

Fordham International Law Journal

Volume 6, Issue 1

1982

Article 9

Terrorism as a Tort in Violation of the Law of Nations

Eileen Rose Pollock*

*

Copyright ©1982 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Terrorism as a Tort in Violation of the Law of Nations

Eileen Rose Pollock

Abstract

Part I of this Note will attempt a definition of terrorism to determine whether the Tel-Oren attack was a terrorist act. Part II will discuss whether terrorism is a tort in violation of the law of nations for purposes of Alien Tort Statute jurisdiction. Part III will examine United States cases interpreting the term “violation of the law of nations” in the Alien Tort Statute and will then analyze the district court’s opinion in Tel-Oren, particularly its holding that Alien Tort Statute jurisdiction requires that the law of nations or a treaty confer a private right of action upon individuals. Finally, Part IV will consider the implications of a court of appeals reversal in Tel-Oren and a holding that jurisdiction lies under the Alien Tort Statute.

TERRORISM AS A TORT IN VIOLATION OF THE LAW OF NATIONS

INTRODUCTION

A recent case¹ discusses whether the Alien Tort Statute² provides subject matter jurisdiction to federal courts in a case involving an incident which has been described as an international terrorist attack.³ The Alien Tort Statute furnishes a basis for federal subject matter jurisdiction when an alien sues in federal court for a tort committed in violation of the law of nations or a United States treaty.⁴

Before determining whether a terrorist act gives rise to a cause of action under the Alien Tort Statute, two preliminary issues must be addressed. First, it is necessary to examine whether terrorism is a tort⁵ in violation of the law of nations within the meaning of the Alien Tort Statute, and second, whether, as suggested by some cases interpreting the Alien Tort Statute,⁶ international law must provide

1. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), Nos. 81-1870 and 81-1871 (D.C. Cir. argued Mar. 24, 1982).

2. 28 U.S.C. § 1350 (1976).

3. See Brief for Appellants at 29, *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), Nos. 81-1870 and 81-1871 (D.C. Cir. argued Mar. 24, 1982) [hereinafter referred to as Appellants' Brief].

4. The Alien Tort Statute reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1976).

The original predecessor of this statute is found in the Judiciary Act of 1789, enacted by the First Congress. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789). Its text is very similar to that of the present-day statute:

That the districts courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

Id. at 76-77.

There appears to be no legislative history on this statute, although it is in keeping with the constitutional mandate that foreign affairs should be controlled by the federal government. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). There is only sparse early case law on the statute. See *infra* text accompanying notes 69-73.

5. The "tort of terrorism" will, in this Note, mean the torts of wrongful death, battery, assault, false imprisonment and intentional infliction of emotional distress which are committed in the context of a terrorist act, that is, an act of violence with international repercussions directed against non-combatants or diplomats and intended to exert political pressure. See *infra* text accompanying notes 20-37.

6. See, e.g., *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), cert. denied, 429 U.S. 835 (1976).

a right of action before an individual may successfully enter federal court under the statute.

The catalyst for this discussion is the case of *Hanoch Tel-Oren v. Libyan Arab Republic*,⁷ currently pending before the United States Court of Appeals for the District of Columbia. A group of Israeli plaintiffs, victims of a bus attack⁸ in Israel by El Fatah,⁹ are suing the Palestinian Liberation Organization (P.L.O.), the Libyan Arab Republic and the National Association of Arab Americans¹⁰ for multiple tortious acts allegedly committed in the attack.¹¹ Plaintiff-appellants allege the Alien Tort Statute as one of the bases for subject matter jurisdiction,¹² on the theory that terrorism is a tort committed in violation of the law of nations.¹³

7. 517 F. Supp. 542 (D.D.C. 1981), Nos. 81-1870 and 81-1871 (D.C. Cir. argued Mar. 24, 1982).

8. The facts underlying the *Tel-Oren* case, as related in the New York Times, are as follows:

On March 11, 1978, members of El Fatah, a faction of the P.L.O. allegedly came by ship from Lebanon and landed on an Israeli beach near Haifa. There they shot an individual on the beach who apparently had witnessed their landing. The Palestinians then fired through the windshield of a bus carrying civilians to force it to stop. When the passengers sought to leave the bus and seek shelter, the gunmen fired at them. They also fired at passing cars, inflicting additional casualties.

The Palestinians seized a passing Mercedes and filled it with arms and explosives. Then another bus arrived on the scene, and passengers got off to help the wounded from the attack on the first bus. At gun point, the Arabs forced these passengers and survivors from the first attack onto the original bus. They ordered the driver to proceed to Tel Aviv.

Learning of the attack, the police tried to stop the bus with barricades. With a gun pointed at his head, the driver was forced to go through the barriers. On the outskirts of Tel-Aviv, the police managed to halt the bus by firing at its tires. The attackers threw grenades from the windows and fired automatic rifles at police. One Israeli reported seeing a gunman leave the bus and throw grenades at it, setting it ablaze. Most of the passengers managed to escape before the bus blew up, but at least 37 Israelis were killed in the attack. The Palestinians were all killed during the fierce fighting between the raiders and police. N.Y. Times, Mar. 12, 1978, at A1, col. 8; N.Y. Times, Mar. 13, 1978, at A14, col. 1.

9. El Fatah, a major constituent faction of the Palestinian Liberation Organization, claimed credit for the attack. N.Y. Times, Mar. 12, 1978, at A1, col. 8.

10. The Libyan Arab Republic was named as a defendant for allegedly recruiting and training the attackers. Appellants' Brief, *supra* note 3, at 8-9. The National Association of Arab Americans (N.A.A.A.) was named as a defendant for allegedly funding and otherwise assisting the P.L.O. *Id.* at 9. Service was not completed on the P.L.O. and Libya. 517 F. Supp. at 545 n.1. The Palestine Congress of North America and the Palestine Information Office were originally defendants, but the appeal was not pursued against them, for unspecified reasons. Appellants' Brief, *supra* note 3, at vi.

11. *Id.* at 8; 517 F. Supp. at 544.

12. Plaintiffs also allege as a basis for subject matter jurisdiction 28 U.S.C. § 1331 (Supp. IV 1980) (federal question jurisdiction). Appellants' Brief, *supra* note 3, at 19.

13. *Id.* at 29-32.

Part I of this Note will attempt a definition of terrorism to determine whether the *Tel-Oren* attack was a terrorist act. Part II will discuss whether terrorism is a tort in violation of the law of nations for purposes of Alien Tort Statute jurisdiction. Part III will examine United States cases interpreting the term "violation of the law of nations" in the Alien Tort Statute and will then analyze the district court's opinion in *Tel-Oren*, particularly its holding that Alien Tort Statute jurisdiction requires that the law of nations or a treaty confer a private right of action upon individuals.¹⁴ Finally, Part IV will consider the implications of a court of appeals reversal in *Tel-Oren* and a holding that jurisdiction lies under the Alien Tort Statute.

I. TOWARD A DEFINITION OF TERRORISM

No generally accepted definition of terrorism exists¹⁵ because what to one party to a conflict is terrorism will be, to another, the actions of freedom fighters in a national liberation movement.¹⁶

14. The district court did not reach the substantive question of whether terrorism is a violation of the law of nations allowing Alien Tort Statute jurisdiction, because it held that international law did not provide plaintiffs with a private cause of action. 517 F. Supp. at 546. The court held that an action under § 1350 predicated on a treaty or on the law of nations must be based on a private right of action, and that the treaty or the law of nations under which the plaintiffs claim Alien Tort Statute jurisdiction must provide such specific private right of action. *Id.* at 549.

Although the scope of this Note is limited to the Alien Tort Statute, the Alien Tort Statute was only one of the bases of jurisdiction claimed by plaintiffs, *see supra* note 12, and it was only one of the grounds on which subject matter jurisdiction was denied. *See* 517 F. Supp. at 549-50. Federal question jurisdiction was denied because of lack of a private right of action under a United States treaty, as explained above. *See infra* text accompanying notes 96-101. Jurisdiction under the diversity statute, 28 U.S.C. § 1332 (1976), was not operative because aliens were parties on both side of the suit. 517 F. Supp. at 549 n.3. Jurisdiction under 28 U.S.C. § 1330 (1976) (Actions Against Foreign States) and 28 U.S.C. §§ 1602-1611 (1976) (Jurisdictional Immunities of Foreign States) was held improper because sovereign immunity was in effect for tort claims arising in Israel. 517 F. Supp. at 549-50 n.3. Finally, the court held that the torts of assault, battery and false imprisonment arising out of the attack were barred by the District of Columbia's one-year statute of limitations, and that the torts of intentional infliction of emotional distress and intentional infliction of cruel, inhuman and degrading treatment were not different enough from the torts from which they arose to justify applying the three-year limitation period. *Id.* at 550.

15. B. JENKINS, INTERNATIONAL TERRORISM: A NEW MODE OF CONFLICT 9 (1975); STAFF OF HOUSE OF REPRESENTATIVES COMM. ON INTERNAL SECURITY, 93D Cong., 2D Sess., TERRORISM 5 (Comm. Print 1974).

16. *See* B. JENKINS, *supra* note 15, at 10. In addition, Jenkins notes:

The problem of defining terrorism is compounded by the fact that terrorism has recently become a fad word used promiscuously and often applied to a variety of

One reason there is no universally accepted definition of terrorism is that by defining it, one either condones or condemns its adherents, and in so doing, takes a tacit position on the issue of whether terrorism is a violation of international law.¹⁷

"Terrorism" has been defined as "the systematic use of terror [especially] as a means of coercion."¹⁸ "Terror" is "violence . . . committed by groups in order to intimidate a population or government into granting their demands . . ."¹⁹ Terrorism is distinguishable from revolution. "Revolution" is defined as a "complete overthrow of the established government in any country or state by those who were previously subject to it."²⁰ Terrorism and revolution both attempt to effect political outcomes. Revolution, however, is an overthrow of the established government by its previous subjects without necessarily pejorative connotations, whereas terrorism embodies the use of coercion through terror to achieve political goals.²¹

International terrorism has been called "a strategy of terror-inspiring violence containing an international element and commit-

acts of violence which are not strictly terrorism by definition. It is generally pejorative. Some governments are prone to label as terrorism all violent acts committed by their political opponents, while antigovernment extremists frequently claim to be the victims of government terror. What is called terrorism thus seems to depend on point of view. Use of the term implies a moral judgement; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint. Terrorism is what the bad guys do.

Id. at 2.

It is interesting, and not altogether surprising, to note that the *Tel-Oren* Appellants' Brief uses the words "terrorism" and "terrorist" throughout to describe the attack of March 11, 1978. Appellants' Brief, *supra* note 3, at 8, 9, 10-18, 24, 29. Whereas in appellees' brief, the words "terrorism" and "terrorist" virtually never appear. The events in question are discreetly referred to as "the incident." Brief for Appellee at 3 nn.3-4, 4, 7, 8 n.8, 10, 12, *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), Nos. 81-1870 and 81-1871 (D.C. Cir. argued Mar. 24, 1982).

17. See B. JENKINS, *supra* note 15, at 10.

18. WEBSTER'S NEW COLLEGIATE DICTIONARY 1195 (1981).

19. *Id.*

20. BLACK'S LAW DICTIONARY 1188 (rev. 5th ed. 1979). A revolt is distinguished from an insurrection:

A revolt goes beyond insurrection in aim, being an attempt actually to overthrow the government itself, whereas insurrection has as its objective some forcible change within the government. A large-scale revolt is called a rebellion and if it is successful it becomes a revolution.

Id.

21. See *supra* text accompanying notes 18-20.

ted by individuals to produce power outcomes."²² It has also been more broadly defined as acts of terrorism with international repercussions, and as violence outside the accepted norms of diplomacy and war.²³

National governments do not agree on a definition of terrorism.²⁴ Each government tends to define it so as to proscribe those acts which are most likely to be directed against itself.²⁵ Many nations exclude from their definition "national wars of liberation" which they support or may wish to employ.²⁶ Most Western nations, however, describe national liberation movements which engage in "violence with an international element designed to produce power outcomes," as simply, terrorist.²⁷

The United States Department of State, in the context of a discussion of terrorist attacks on diplomats, has written:

All terrorist attacks involve the use of violence for purposes of political extortion, coercion, and publicity for a political cause. . . .

22. Bassiouni, *An International Control Scheme for the Prosecution of International Terrorism: An Introduction*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 485 (A.E. Evans & J.F. Murphy eds. 1978).

23. B. JENKINS, *supra* note 15, at 10.

24. A group of Third World nations, including Algeria, Congo, Guinea, India, Mauritania, Nigeria, Southern Yemen, Syria, Tanzania, Tunisia, Yemen, Yugoslavia, Zaire and Zambia, proposed the following definition of "terrorism":

(1) Acts of violence and other repressive acts by colonial, racist and alien régimes against peoples struggling for their liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms;

(2) Tolerating or assisting by a State the organizations of the remnants of fascists or mercenary groups whose terrorist activity is directed against other sovereign countries;

(3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardize fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist régimes and other forms of alien domination and the legitimacy of their struggle, in particular of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant of the organs of the United Nations;

(4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one State.

Report of the *Ad Hoc* Committee on International Terrorism, 28 U.N. GAOR Supp. (No. 28) at 21, U.N. Doc. A/9028 (1973).

25. B. JENKINS, *supra* note 15, at 10.

26. *Id.*

27. See generally *CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS ix-xiv* (Y. Alexander, M.A. Browne & A.S. Nanes eds. 1979).

[A]ll attacks . . . have one element in common: All terrorist attacks are acts of political violence. The terrorist is seeking to redress a political grievance, overthrow a political system, or publicize a political point of view.²⁸

The relevant State Department criterion for evaluating whether an act is terrorist is the use of violence for political ends; to coerce or overthrow a government, or to gain publicity for a political cause.²⁹

A working definition of international terrorism, which encompasses elements of the definitions already discussed, may be phrased as terror-inspiring violence³⁰ having international repercussions³¹ engaged in by individuals³² against non-combatants, civilians, internationally protected persons³³ or states to achieve a political end.³⁴

If this definition is applied to the attack in *Tel-Oren*, then the attack may justifiably be called terrorist. The attack was terror-inspiring in that it was of a random nature, rather than aimed at a military target.³⁵ The attack was launched from Lebanon by indi-

28. Perez, *Terrorist Target: The Diplomat*, DEP'T ST. BULL., Aug. 1982, at 24-25. See *infra* note 33.

29. Telephone interview with Norman Antokol, Public Affairs Officer, Office for Combatting Terrorism, U.S. Department of State (Oct. 1, 1982).

30. The phrase "terror-inspiring violence" is borrowed from Bassiouni, *see supra* note 22 and accompanying text, and is used to denote violence which is of a more random nature than violence by, for example, participants in a civil war or armed conflict. As recognized by the United States Department of State, *see supra* note 28, worldwide publicity is frequently of greater value to those engaging in violent acts than the outcome of those acts as military ventures. *See id.*

31. *See supra* text accompanying notes 22-23. Terrorist acts engaged in by individuals entirely within their own country may be the exclusive concern of the nation involved.

32. Individuals or groups, rather than states, are the perpetrators of terrorist acts. *See* Bassiouni, *supra* note 22.

33. Although the State Department article, *see supra* note 28, was directed to terrorist violence directed against diplomats, the definition of terrorism contained therein is equally applicable to terrorist violence directed against civilians. Telephone interview with Norman Antokol, *supra* note 29. The State Department article is also not limited to violence in the form of hostage-taking. *Id.* Where, as in *Tel-Oren*, the hostage-taking situation disintegrated into a kind of "mass murder" as the attackers proceeded to kill off their hostages when they were cornered by police, *supra* note 8, the incident was considered terrorist by a United States State Department spokesman. *Id.* The operative question in such incidents, according to the State Department criteria, is whether there is a use of terror for the achievement of political purposes. *Id.*

34. A political purpose motivates terrorism in the definitions of both Bassiouni, *see supra* text accompanying note 22, and of the State Department, *see supra* text accompanying note 28.

35. *See supra* notes 8, 30.

viduals as members of El Fatah³⁶ against civilians.³⁷ Its political aim was to disrupt the Camp David peace process.³⁸ If the *Tel-Oren* attack is considered an act of terrorism, the next level of analysis is to examine whether it was in violation of the law of nations.

II. *TERRORISM AS A VIOLATION OF THE LAW OF NATIONS*

A. *The Law of Nations*

International law has been defined as a "body of principles, customs, and rules which are recognized as effectively binding obligations by sovereign states and other international persons in their mutual relations."³⁹ It is generally agreed that the sources of the law of nations are embodied in article 38 of the Statute of the International Court of Justice.⁴⁰ These sources are international conventions, international custom, general principles of law recognized by "civilized nations," and, as subsidiary means, judicial decisions and teachings of the most highly qualified jurists.⁴¹

The Statute of the International Court of Justice states that the law of nations must be generally recognized and accepted by nations.⁴² International law is created through the openly or tacitly expressed will of states, which agree to recognize its obligatory character.⁴³ It is therefore formulated by mutual consensus.

The traditional view is that states are the subjects of international law.⁴⁴ As evidenced by treaty and international custom, however, individuals have increasingly been said to be the subjects of interna-

36. *See supra* note 8.

37. *Id.*

38. Appellants' Brief, *supra* note 3, at 15. The purpose of the attack was allegedly to prompt an Israeli counterattack into Lebanon, creating a climate that would make it impossible for any Arab government to negotiate with Israel. *Id.* The raiders were believed to have strongly opposed Egyptian President Sadat's peace initiative. *N.Y. Times*, Mar. 13, 1978, at A10, col. 3.

39. G. VON GLAHN, *LAW AMONG NATIONS* 3 (4th ed. 1981).

40. I.C.J. STAT., art. 38.

41. *Id.*

42. *Id.*

43. *See* I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3-12 (3d ed. 1979); H. LAUTERPACHT, *The Sources of International Law*, in 1 *INTERNATIONAL LAW* 51 (1970).

44. H. LAUTERPACHT, *supra* note 43, at 136.

tional law.⁴⁵ This development recognizes that the dignity of the individual is the ultimate object of international, as well as national, law.⁴⁶ Therefore, international law is created by international consensus,⁴⁷ which arises from a general recognition of moral principles concerning the rights of man.⁴⁸

B. Conventions as Reflecting the Law of Nations

Although one nation's terrorism is another nation's liberation movement, this lack of international consensus does not necessarily constitute a barrier to a conclusion that terrorism is a tort in violation of international law. Nations generally view terrorism as a violation of the law of nations,⁴⁹ and have collectively consented to measures designed to discourage terrorist activity in the form of international resolutions and conventions.

1. International Human Rights Conventions

The major human rights conventions include language which may be interpreted as an interdiction of terrorism. The United Nations Charter states generally that nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all."⁵⁰ The Universal Declaration of Human Rights states that "[e]veryone has the right to life, liberty and security of person" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁵¹ This language implies that international terrorism would constitute a violation of human rights under international law, because the torts subsumed under terrorism by definition involve loss of liberty, subjection to torture, and cruel, inhuman and degrading treatment. Comparable language appears in the Covenant on Civil and Political Rights,⁵²

45. *Id.* at 141-42.

46. *Id.* at 148-49.

47. See *supra* text accompanying notes 39-43.

48. See H. LAUTERPACHT, *supra* note 43, at 143.

49. See B. JENKINS, *supra* note 15, at 10.

50. U.N. CHARTER art. 55.

51. Universal Declaration of Human Rights, G.A. Res. 217A, arts. 3, 5, U.N. Doc. A/810, at 72-73 (1948).

52. International Covenant on Civil and Political Rights, G.A. Res. 2200A, arts. 6(1), 7, 21 U.N. GAOR Supp. (No. 16) at 52, 53, U.N. Doc. A/6316 (1966).

the European Convention on Human Rights,⁵³ and the Geneva Convention of 1949.⁵⁴

These international agreements have explicitly recognized human rights, rights which terrorist acts by definition abrogate. If a state cannot violate these rights in the pursuit of its ends, it stands to reason that neither may a group of individuals infringe upon human rights in the pursuit of political or revolutionary goals.

2. International Anti-Terrorism Conventions

There is substantial consensus among Western nations that international terrorism, by its nature, violates international law. This consensus is illustrated by several conventions intended to combat international terrorism. The principal remedy espoused by these conventions is to extradite terrorists to the country in which the wrong occurred in order to face criminal charges. The Council of Europe, for example, adopted a convention to insure that alleged terrorists would be subject to extradition, rather than escaping extradition on the grounds that their offenses were political.⁵⁵ In

53. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 2-3, 213 U.N.T.S. 221, 224.

54. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Article 3 of the Convention proscribes taking as hostages persons having no part in the hostilities during armed conflicts of an international character. Such persons are to be respected, protected, and treated humanely. *Id.* art. 3. The other three Geneva conventions have the same provision with respect to armed conflict not of an international character. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 135.

55. The European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977 (to be reported in U.N.T.S.), *reprinted in* CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS, *supra* note 27, at 87. The signatories are Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey and the United Kingdom. *Id.* at 92. France, Italy, Norway, Portugal and Sweden signed with stated reservations. *Id.* at 93-96.

In May, 1973 the Consultative Assembly of the Council of Europe adopted a recommendation "condemning international terrorist acts which, regardless of their cause, should be punished as serious criminal offences involving the killing or endangering of the lives of innocent people" and calling on the Committee of Ministers of the Council to establish a definition of "political offence" in order to disallow any political justification when an act of terrorism endangered the lives of innocent people. *Id.* at 96. The Assembly was acknowledg-

1978, seven Western nations⁵⁶ issued a statement that they would cease all flights to any nation that refused extradition or prosecution of aircraft hijackers or which failed to return a hijacked aircraft.⁵⁷ The Organization of American States adopted a convention stating that anyone charged with kidnapping, murder or assault against those whom the state has a special duty to protect under international law, such as diplomatic personnel, or extortion in connection with those crimes, would be subject to extradition and prosecution.⁵⁸ The convention explicitly equated kidnapping, murder and assault which have international import with terrorism.⁵⁹

The General Assembly of the United Nations has also addressed the issue of international terrorism. The United Nations, however, found it more practical to divide the problem of terrorism into its component parts and to condemn those parts rather than to define

ing that some crimes are so "odious" that they cannot be executed as "political offences" precluding extradition. *Id.* It was recommended that States receiving extradition requests take into account the seriousness of the crime charged. *Id.*

The Convention itself was intended to fill the legal loophole existing in international extradition agreements, by removing the "political offence" exception to extradition for terrorists. *Id.* at 98. There was no generally accepted definition of political offense; it was left to the discretion of each nation. *Id.* The Convention specified offenses that would never be regarded as political, and offenses that might or might not be regarded as political. *Id.* Offenses that would never fall within the "political offence" exception included aircraft hijacking, attacks upon diplomats, kidnapping or taking hostages, and attacks using dangerous weapons such as bombs or grenades. *Id.* at 87-88. The contracting nations were free to decide whether or not to treat as political offenses those acts of violence not listed above. *Id.* at 88.

56. Participating countries included Canada, France, Germany, Italy, Japan, United Kingdom and United States. Bonn Economic Summit Declaration, Joint Statement, July 17, 1978, DEP'T. ST. BULL., Sept. 1978, at 2, 5.

57. The statement expressed concern on the subject of terrorism and the taking of hostages, and declared that the participating governments would "intensify their joint efforts to combat international terrorism." *Id.* at 5.

58. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 37 O.A.S. arts 2-3, T.S. 6, 7, reprinted in 10 I.L.M. 255, 256 (1971).

59. *Id.* The convention states in pertinent part:

The contracting states undertake to [take measures] . . . to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

Id. art. 1.

"[K]idnapping, murder, and other assaults [as stated above] . . . shall be considered common crimes of international significance, regardless of motive."

Id. art. 2.

terrorism for the purpose of condemning it as a whole.⁶⁰ Within those limits, the United Nations has attempted to address the issue in the International Convention Against the Taking of Hostages.⁶¹ After much bargaining and compromise,⁶² the convention was diluted by an article which stated that the convention would not apply to hostage-taking when it is a part of a fight against colonial domination, alien occupation or racist regimes in exercising the right of self-determination.⁶³ The convention nonetheless states that hostage-taking is a crime that shall be prosecuted and punished.⁶⁴

The United States position, as enunciated by the State Department, is that the international community must develop a consensus to outlaw terrorism and bring terrorists to justice.⁶⁵ The State Department has lauded measures taken by the United Nations to outlaw crimes against diplomats and the taking of hostages⁶⁶ as "steps in the right direction of *establishing an international consensus and body of law* outlawing crimes against diplomats."⁶⁷

60. An example of a working paper submitted to the United Nations by the United States which concerns terrorism as a whole is the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, submitted to the General Assembly in 1972. It was never acted upon. 27 U.N. GAOR Annex (Agenda Item 92) at 3, U.N. Doc. A/C.6/L.851 (1973), reprinted in 67 DEP'T ST. BULL. 431 (1972).

One extravagantly titled United Nations resolution exemplifies the problems that organization has had in making sweeping pronouncements on the subject of terrorism: Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, G.A. Res. 31/102, 31 U.N. GAOR Supp. (No. 39) at 185-86, U.N. Doc. A/RES/31/102 (1977), reprinted in R.A. FRIEDLANDER, 1 TERRORISM 115 (1979).

61. Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A/34/39 (1979) [hereinafter cited as International Convention Against the Taking of Hostages].

62. Note, *The United Nations Effort to Draft a Convention on the Taking of Hostages*, 27 AM. U.L. REV. 433 (1978).

63. International Convention Against the Taking of Hostages, *supra* note 61, at 6. As of this writing, the convention is three ratifications or accessions short of the 22 needed for entry into force. The United States is a signatory, but has not ratified or acceded. Telephone interview with Julio A. Baez, Associate Legal Officer, Treaty Section, Office of Legal Affairs, United Nations (Sept. 20, 1982).

64. International Convention Against the Taking of Hostages, *supra* note 61, Preamble.

65. Perez, *supra* note 28, at 27.

66. *See id.* at 28.

67. *Id.* at 28 (emphasis added). Although the article refers specifically to crimes against diplomats, it applies equally to terrorism committed against civilians, as in the *Tel-Oren* case. Telephone interview with Norman Antokol, *supra* note 29.

Consequently, although there is lack of consensus on the definition of terrorism, there is a uniformity of purpose in seeking to prevent and punish acts of terrorism. This is an implicit recognition that terrorism is a violation of law, because there must be illegality for punishment to be imposed. In addition, the general statements of human rights conventions demonstrate international consensus that torture and cruel and inhuman treatment, components of terrorist acts, are violations of international law.⁶⁸ Thus, sufficient international consensus has been demonstrated for terrorism to be deemed a violation of the law of nations.

III. THE LAW OF NATIONS IN THE ALIEN TORT STATUTE AS CONSTRUED IN UNITED STATES CASE LAW

A. *The Law of Nations in the Alien Tort Statute Prior to Tel-Oren*

The earliest cases under the Alien Tort Statute show only isolated instances of what constitutes a violation of the law of nations.⁶⁹ For example, early cases have held that the following acts violated the law of nations: seizing the vessel of a peaceful nation and holding it as a prize within United States territorial limits during peacetime;⁷⁰ unjustified seizure of an alien's property by a United States officer in a foreign country;⁷¹ a mother's unlawfully spiriting a child from country to country on a falsified passport.⁷²

Recent cases denying Alien Tort Statute jurisdiction are illustrative of what is not considered a violation of the law of nations in United States courts. In *Khedivial Line, S.A.E. v. Seafarers' International Union*,⁷³ the court denied Alien Tort Statute jurisdiction,

68. See *supra* text accompanying notes 50-54.

69. See *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 296 (E.D. Pa. 1963).

70. See *Moxon v. Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895). In *Moxon*, a French captain captured a British ship within the territorial waters of the United States and brought it to Philadelphia at a time when France and Great Britain were at war, but Great Britain and the United States were at peace. The court held that within the territorial limits of the United States no state of war existed with Great Britain, so France could not capture the ship of Great Britain, with which it was at war, within American waters. The law of nations forbade the fitting out of privateers in a neutral country or capturing within its limits the friends of a neutral. *Id.* at 943. The court noted that it "is particularly by law vested with authority where an alien sues for a tort only in violation of the law of nations . . . and this is a case falling under that description." *Id.*

71. See *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908).

72. See *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

73. 278 F.2d 49 (2d Cir. 1960). An Egyptian vessel owner sought an injunction against a union that was picketing the Egyptian vessel because of Egypt's alleged blacklisting of

holding that the law of nations did not confer upon vessels of all nations an unrestricted right of access to United States harbors.⁷⁴ Unseaworthiness, negligence⁷⁵ and theft⁷⁶ have also been held not to rise to the level of a violation of the law of nations and thus not to confer subject matter jurisdiction under the Alien Tort Statute.

American ships. *Id.* at 50. The court held that there was no ground for an injunction under the Alien Tort Statute because no treaty existed between the United States and Egypt granting Egyptian ships free access to American ports, and plaintiff had not shown that the law of nations accords an unrestricted right of access to harbors by vessels of all nations. *Id.* at 52.

74. *Id.*

75. See *Lopes*, 225 F. Supp. at 294-97. This was an action by an alien against a vessel owner for unseaworthiness and negligence. The court analyzed unseaworthiness and observed it has many characteristics usually associated with contracts. However, since historically the action was brought in tort, the court would assume that unseaworthiness was a "tort only." *Id.* at 294. The next question was whether the tort was committed in violation of the law of nations or a treaty of the United States. *Id.* By an historical analysis of the development of the doctrine of unseaworthiness, the court concluded that the awarding of damages for injuries caused by unseaworthiness originated in the courts as a uniquely American doctrine. The doctrine of unseaworthiness was based in neither the law of nations nor any United States treaty. *Id.* at 295.

The court then analyzed negligence as a tort in violation of the law of nations. The court examined the writings of jurists for instruction as to the content of the law of nations and as to what constitutes a violation of the law of nations. *Id.* at 295-97. One jurist had listed passport violations, coercion of ambassadors, piracy and slave trade as offenses against the law of nations. *Id.* at 297. The court also considered cases that construed the phrase "law of nations" as it appears in the United States Constitution. U.S. CONST. art. I, § 8, cl. 10. Cases have considered the following to be violations of the law of nations: violations of the laws of war, suppression of the slave trade, harassment of foreign diplomatic representatives, and counterfeiting the notes of foreign countries. *Id.* at 296,

Therefore, and examination of both the writings of jurists and United States case law as to what constitutes a violation of the law of nations resulted in nothing to indicate that negligence was treated as such a violation. *Id.* at 297. The court used the following definition of the law of nations: "The Law of Nations . . . may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another." *Id.* at 297 n.29 (citation omitted).

76. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). With reference to the tort of theft, the court observed:

Here there is no allegation of anyone's violating a treaty. *The reference to the law of nations must be narrowly read if the section is to be kept within the confines of Article III.* We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."

Id. (quoting *Lopes*, 225 F. Supp. at 297) (emphasis added).

Recent Alien Tort Statute cases have several common elements. *Dreyfus v. von Finck*⁷⁷ illustrates two important issues: treaties underlying an Alien Tort Statute claim must specifically confer private rights enforceable by individuals,⁷⁸ and the law of nations is concerned with relationships among states, not individuals.⁷⁹ The court held that a finding of violation of the law of nations was barred where the parties to a dispute were individuals.⁸⁰ The court in *IIT v. Vencap, Ltd.*⁸¹ stated that a violation of the law of nations occurs only when it affects the relationship between states or between an individual and a foreign state.⁸² The court in *Cohen v. Hartman*⁸³ defined international law as "the rules of conduct which govern the affairs of this nation, acting in its national capacity, in its relationships with any other nation."⁸⁴ These cases illustrate that, for purposes of the Alien Tort Statute, the law of nations must be construed narrowly, and violations of the law of nations must be flagrant.⁸⁵

77. 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). A German expatriate, now a Swiss citizen, sued a German citizen under § 1350 for alleged wrongful confiscation of his property during Nazi rule. Section 1350 jurisdiction was based on defendant's alleged violation of four treaties to which the United States was a signatory. *Id.* at 26. The district court dismissed the complaint because it held that none of the treaties gave plaintiff a private right of recovery. *Id.* at 27. The district court then held it had jurisdiction to consider plaintiff's treaty-based claims under § 1350. *Id.* at 28.

The court stated that a United States treaty is a contract with another nation which under the United States Constitution is accorded the same treatment as a United States law. *Id.* at 29. A treaty may contain provisions conferring private rights on individuals who are citizens of the contracting parties. *Id.* However, this is not generally true. "It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights." *Id.* at 30 (citation omitted). The court of appeals affirmed the lower court, ruling that none of the treaties relied upon applied to expropriation of the property of an individual by a citizen of the same country (as in the case) and none conferred private rights enforceable in American courts. *Id.* at 30.

With respect to § 1350, the court of appeals stated that the law of nations deals with the relationship between nations, not individuals, although individuals may be greatly affected by the law of nations. *Id.* at 30-31. "Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights." *Id.* at 31 (citation omitted).

78. *See id.* at 30-31.

79. *See id.*

80. *See id.*

81. 519 F.2d 1001 (2d Cir. 1975).

82. *Id.* at 1015.

83. 490 F. Supp. 517 (S.D. Fla. 1980), *aff'd*, 634 F.2d 318 (5th Cir. 1981).

84. *Id.* at 519 (citation omitted).

85. *Vencap*, 519 F.2d at 1015. These themes are illustrated in recent cases holding theft, *id.*, unseaworthiness, *Lopes*, 225 F. Supp. at 295, negligence, *id.* at 297, and embezzlement,

The seminal case of *Filartiga v. Pena-Irala*⁸⁶ represented a sharp break with previous interpretations of the Alien Tort Statute. The Second Circuit Court of Appeals held in *Filartiga* that torture is a tort in violation of the law of nations because it contravenes universally accepted norms of international human rights law.⁸⁷ The court

Cohen v. Hartman, 490 F. Supp. at 519, did not constitute violations of the law of nations so as to confer Alien Tort Statute jurisdiction.

In *Cohen*, where a Canadian plaintiff alleged embezzlement by his former employee, the court held that the acts alleged were not so flagrant as to rise to the level of a violation of international law. *Id.*

86. 630 F.2d 876 (2d Cir. 1980).

87. *Id.* at 878. Plaintiffs in *Filartiga* were from Paraguay. They were the father and sister of a seventeen-year-old boy who had been allegedly tortured to death in Paraguay by a police official, Pena. Plaintiffs alleged that the boy was killed in retaliation for his father's political activities. *Id.* When Pena came to the United States on a visitor's visa he was served with a summons and complaint for wrongful death by torture by the Filartigas. *Id.* at 879. The complaint stated a cause of action arising under the wrongful death statutes, the United Nations Charter, the Universal Declaration of Human Rights, as well as other human rights documents. *Id.* Jurisdiction was claimed under 28 U.S.C. § 1331 (Supp. IV 1980) (federal question statute) and 28 U.S.C. § 1350 (1976) (Alien Tort Statute). *Id.*

The district court dismissed the complaint on jurisdictional grounds. *Id.* at 880. The court felt constrained by the dicta of *IIT v. Vencap, Ltd.* and *Dreyfus v. von Finck*, to construe narrowly the term "law of nations" in the Alien Tort Statute to exclude law governing a state's treatment of its own citizens. *Id.*

The Filartigas based their appeal primarily on the argument that torture was a violation of the law of nations and, therefore, subject matter jurisdiction was proper under the Alien Tort Statute. *See id.* The court of appeals, considering the universal condemnation of torture in numerous international agreements and its renunciation by all nations, held that torture committed by a state official violated the law of nations. *Id.* Therefore the court upheld jurisdiction under the Alien Tort Statute. *See id.*

The court first inquired into the sources of international law, including the works of jurists, the customs and usages of nations, and judicial decisions. *Id.* Recognizing that international law is not immutable, but changes over time by "the general assent of civilized nations," *id.* at 881, the court interpreted international law in its modern form, not as it was when the Alien Tort Statute was enacted in 1789. *Id.*

In determining the content of international law in its present form, the court of appeals looked to a number of conventions. *Id.* at 881-84. These included the United Nations Charter, the Universal Declaration of Human Rights, and the Declaration on the Protection of All Persons from Being Subjected to Torture. *Id.* at 881-83. Though it could be argued that these declarations are not legally binding, the court found that United Nations treaties and resolutions established the human rights obligations of member nations. The court reasoned that by making these declarations, the declarant nations created an expectation that they would be adhered to, and the declarations would thereby become binding on nations as part of customary international law. *Id.* at 883.

To demonstrate international consensus against the use of torture, the court cited many treaties and accords which renounce torture. *Id.* at 883-84. Although torture may have been commonly utilized by nations when the Alien Tort Statute was enacted in 1789, by the evolution of international custom, it had been renounced by all nations and was therefore forbidden by international law. *Id.* at 884.

reached this conclusion by finding that international conventions and accords reflected universal agreement among nations that the use of torture was forbidden and a violation of the law of nations.⁸⁸

Filartiga differed with previous case law on the Alien Tort Statute in several key areas. It held that international law may address a relationship among individuals, if one party represents a state, even when both parties are nationals of the same state.⁸⁹ This was a departure from *Dreyfus v. von Finck*,⁹⁰ which stated the traditional rule that the proper subject matter of the law of nations is the relationship among nations, not individuals.⁹¹ *Filartiga* held that Alien Tort Statute jurisdiction may be found if the law of nations is violated.⁹² Contrary to *Dreyfus's* conclusion that a plaintiff must have individual legal rights under either treaties or the law of nations for a private right of action to exist,⁹³ *Filartiga* implied that the law of nations need not provide a private cause of action.⁹⁴ However, prior case law and *Filartiga* were consistent in holding that a violation of the law of nations had to be flagrant and that jurisdiction under the Alien Tort Statute could only be found if the

The court rejected the dictum in *Dreyfus v. von Finck* that there is no violation of international law when both parties are nationals of the acting state. International law, stated the court, confers fundamental rights upon all people vis-à-vis their own governments, including the right to be free from torture. *Id.* at 884-85.

The court also rejected the claim that jurisdiction of the case was inconsistent with Article III of the Constitution. *Id.* at 885. The law of nations, which is part of federal common law, is the constitutional basis for the Alien Tort Statute. *Id.* Since international law is embodied in American common law, the Alien Tort Statute was consistent with Article III. *Id.* at 886.

The court also rejected the claim that the law of nations forms a part of United States law only to the extent Congress has acted to define it. It noted Chief Justice Marshall's statement in *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), that, in the absence of statutory law, United States courts are "bound by the law of nations, which is a part of the law of the land." 630 F.2d at 887.

The court then addressed Pena's argument that international law, as reflected in treaties and declarations, is not self-executing. *Id.* at 889. The court stated that this is a choice of law question.

Thus, the court concluded that, through the evolution of customary international law, the right of all persons to be free of torture has been recognized by all nations. *Id.* at 890. "[T]he torturer has become . . . *hostis humani generis*, an enemy of all mankind." *Id.*

88. 630 F.2d at 880.

89. *Id.* at 884-85.

90. 534 F.2d 24; *see supra* text and accompanying notes 77-80.

91. 534 F.2d at 30-31.

92. 630 F.2d at 887, 889.

93. 534 F.2d at 31.

94. *Filartiga* did not require plaintiffs to demonstrate that a specific provision of international law gave them a private cause of action. They only had to show that the sources of international law prohibited official torture. 630 F.2d at 884.

violation was of a well established and universally recognized norm of international law.⁹⁵

The split between *IIT v. Vencap, Ltd.* and *Dreyfus v. von Finck*, on the one hand, and *Filartiga*, on the other, appears to be based upon the importance that each attaches to two different sources of international law. One view, represented by *Vencap* and *Dreyfus*, places great weight on treaties containing specific provisions that expressly or impliedly provide a private cause of action.⁹⁶ The other view, represented by *Filartiga*, sees international law as a constantly evolving process reflected in a growing body of international agreements which define norms of international behavior.⁹⁷ The *Filartiga* view would allow principles which have been universally accepted by nations to be admitted into the corpus of international law. As the law of nations, these principles would become part of the common law, enforceable in United States courts without provision for a private cause of action. Pursuant to this view, human rights which have been accepted in principle by virtually all nations are the proper subject of international law. Therefore a nation's treatment of its own citizens, a human rights question, is a proper subject of international law. By acknowledging international declarations on human rights as part of binding, customary international law,⁹⁸ the *Filartiga* court implicitly recognized that international law must safeguard individual rights.

B. *The Tel-Oren Case: Private Cause of Action Under
the Law of Nations as a Requisite to Alien
Tort Statute Jurisdiction*

1. The District Court Opinion in *Tel-Oren*

The district court addressed only one of the two major issues presented in *Tel-Oren*. The issue of whether *Tel-Oren* was a case of terrorism and whether terrorism is a violation of international law for purposes of the Alien Tort Statute was never reached. The court rejected jurisdiction on the ground that the law of nations must contain a private right of action enforceable by individuals before

95. *Cohen v. Hartman*, 490 F.Supp. at 519; *Filartiga v. Pena-Irala*, 630 F.2d at 887-88.

96. See H. LAUTERPACHT, *supra* note 43, at 58-61.

97. See I. BROWNIE, *supra* note 43, at 2.

98. 630 F.2d at 883.

Alien Tort Statute jurisdiction could be found.⁹⁹ The court said that the law of nations cited by plaintiffs did not confer such rights upon individuals.¹⁰⁰ There was no jurisdiction as to any of the defendants because:

[The Alien Tort Statute] . . . serves merely as an entrance into the federal courts and in no way provides a cause of action to any plaintiff. Somewhere in the law of nations or in the treaties of the United States, the plaintiffs must discern and plead a cause of action that, if proved, would permit the Court to grant relief.¹⁰¹

Citing dictum in *IIT v. Vencap, Ltd.*,¹⁰² the *Tel-Oren* court stated that the term "law of nations" in the Alien Tort Statute must be construed narrowly if the statute is to remain within the bounds of Article III of the United States Constitution.¹⁰³ If section 1350 jurisdiction were allowed without provision for private rights of action under treaty or law of nations, warned the court, "federal

99. In arguing for jurisdiction under the federal question statute, 28 U.S.C. § 1331 (Supp. IV 1980), plaintiffs had cited the Geneva Convention for the Protection of Civilian Persons in Time of War, *supra* note 54, the Universal Declaration of Human Rights, *supra* note 51, the United Nations Charter, *supra* note 50, and numerous other treaties and conventions. 517 F.Supp. at 545-46. The court stated that treaties must provide expressly or impliedly for a private right of action before an individual can assert a claim under the treaty. *Id.* at 546.

The court discussed several cases in support of this proposition. In *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470 (1941), plaintiffs presented a petition for an injunction prohibiting the government from paying awards made by an international commission created after World War I. 114 F.2d at 467. The court held that the plaintiffs could not raise the claim because an individual has no legal right to participate in an award. *Id.* at 472. In *Canadian Transp. Co. v. United States*, 430 F.Supp. 1168 (D.D.C. 1977), *aff'd in part and rev'd and remanded in part on other grounds*, 663 F.2d 1081 (D.C. Cir. 1980), the court declared that without provision giving private parties the right of enforcement, an individual injured by a government's failure to enforce a treaty had no legal redress. It was a political question and he must look to his government for relief. 430 F. Supp. at 1172.

In *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976), plaintiff asked the courts to compel enforcement of a United Nations resolution calling upon member states to boycott South Africa. *Id.* at 849. The court of appeals held that no private right of enforcement existed. "[T]he U.N. resolution underlying that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation." *Id.* at 850.

Since the treaties cited by plaintiffs in *Tel-Oren* provided neither expressly nor impliedly for private rights of action, 517 F. Supp. at 547-48, there was no federal question presented. *Id.* at 548. The court also rejected plaintiffs' claim that federal common law included the law of nations. *Id.*

100. 517 F. Supp. at 548.

101. *Id.* at 549.

102. 519 F.2d at 1015.

103. 517 F. Supp. at 550.

courts would clutch power over cases, under the guise of the law of nations, undoubtedly casting effect on international relations and foreign policy when no country, friend or foe, has consented to an American court opening its door to one alleging violations of international legal principles."¹⁰⁴

2. Judicial Interference in Foreign Affairs: *Filartiga v. Tel-Oren*

The *Tel-Oren* court's refusal to grant federal subject matter jurisdiction under the Alien Tort Statute thus appears to have been influenced by its reluctance to intervene judicially in the area of foreign affairs.¹⁰⁵ The court was unwilling to impose United States law upon foreign parties who had not consented to be bound by it, and was equally unwilling to decree judicial solutions in the area of foreign policy, traditionally the realm of the executive and legislative branch of government.¹⁰⁶

Filartiga, on the other hand, found it unnecessary to require that treaties and the law of nations expressly or impliedly provide for a cause of action.¹⁰⁷ It recognized the existence of universally accepted standards of conduct to which nations have consented to be held through the weight of international custom.¹⁰⁸ In *Filartiga*, this idea was so compelling to the court, that enforcement of international conduct by United States courts was less influential than the fact that international law binds one and all to a certain level of respect for those norms.¹⁰⁹ Once these universally accepted norms were found to exist, the *Filartiga* court felt obliged to enforce them. Therefore, the importance of human rights, specifically the right to be free of torture, outweighed the possible dangers of judicial activism.¹¹⁰ In fact, the court held that the Alien Tort Statute was consistent with article III and the exercise of judicial scrutiny.¹¹¹

104. *Id.*

105. *See supra* text accompanying note 104.

106. *See id.*

107. *See supra* note 94 and accompanying text.

108. *See Filartiga v. Pena-Irala*, 630 F.2d at 878, 890.

109. *See id.*

110. *See id.* The Second Circuit in *Filartiga* stated that the Alien Tort Statute demonstrated the wisdom of the First Congress in vesting jurisdiction over alien tort claims in the federal district courts. "Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states." *Id.* at 890.

111. *Id.* at 885-86. The constitutional basis for the Alien Tort Statute is the law of nations, which is part of federal common law. *Id.* at 886. Further, courts often adjudicate tort claims arising outside their territorial jurisdiction, applying the laws of the jurisdiction or state

3. Should a Private Right of Action Be Required in *Tel-Oren*?

The district court in *Tel-Oren* refused to grant Alien Tort Statute jurisdiction. As rationale, it extended to the Alien Tort Statute the doctrine that treaties must provide a private right of action in order for individuals to sue upon them.¹¹² This extension is highly questionable.

There is ample precedent for the proposition that before an individual may state a federal question claim under a treaty, the treaty must allow a private right of action.¹¹³ Thus, if federal question jurisdiction in *Tel-Oren* rested on treaties which did not expressly or impliedly provide a private right of action, the federal question claim was properly denied.¹¹⁴ However, the meaning that

where the tort occurred. *Id.* at 885. Since international law is embodied in American common law, and became part of the common law of the United States at the time of the adoption of the Constitution, the Alien Tort Statute was authorized by article III. *Id.* at 885-86.

112. 517 F. Supp. at 546.

113. *See supra* note 99.

114. Through interpretation, courts may find intent that a treaty be self-executing from its language, or, if its language is uncertain, by examining the circumstances surrounding its execution. *Diggs v. Richardson*, 555 F.2d at 851. Thus, in *Tel-Oren* the court of appeals may look to the intent of the treaties cited by plaintiffs to determine if they imply a right to a private cause of action.

In *Guerrero ex rel. Saipan v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), plaintiffs claimed a private right of action based on a Trusteeship Agreement pursuant to which the United States was authorized to administer the territory of Micronesia. The court interpreted the language of the Trusteeship Agreement to indicate intent that plaintiffs be afforded a private right of action without any further enabling legislation. *Id.* at 97-98. The court relied on language providing that the United States was required to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end . . . regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources." *Id.* at 97. This phraseology is similar to that found in the treaties and covenants cited by the *Tel-Oren* plaintiffs. The Ninth Circuit stated that whether an international agreement established private rights of action without implementing legislation depended on contextual factors: "[T]he purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution." *Id.*

The court also looked at features in the Trusteeship Agreement which suggested an intention to establish judicially enforceable rights.

The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic fora; and the

the federal question issue has for Alien Tort Statute jurisdiction is difficult to discern. It appears that the court was analogizing and perhaps confusing private rights under a treaty for federal question purposes with private rights under the law of nations for purposes of the Alien Tort Statute. Contrary to the requirement of private rights of action for federal question jurisdiction under a treaty, there appears to be no requirement of private right of action for the law of nations according to the Alien Tort Statute's plain language.

The court in *Dreyfus v. von Finck* stated: "It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."¹¹⁵ In making their claim under the Alien Tort Statute, however, the plaintiff-appellants in *Tel-Oren* are not relying upon treaties for the enforcement of their rights, nor are they relying upon international law for the direct enforcement of rights. They are relying simply upon the language of the Alien Tort Statute. The statute makes reference to the law of nations or to treaty, but it does not require that they provide for private right of enforcement; the Alien Tort Statute itself provides for private rights of enforcement via the federal courts. Plaintiffs rely on treaties to demonstrate the content of international law, in order to show that the tort is in violation of the law of nations.

The *Tel-Oren* plaintiffs argue that the torts involved in terrorism violate the law of nations as evidenced by treaties and international conventions.¹¹⁶ They use these documents to demonstrate that terrorism has been universally condemned by nations, in the same way

alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable.

Id. at 97-98.

So, too, the court of appeals might find that the human rights claims asserted by plaintiffs in *Tel-Oren* are equally appropriate matters for judicial enforcement as issues involving the local economy and environment. Appellants' Brief, *supra* note 3, at 39.

Another case, *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), is instructive in this regard. There the court noted that the Micronesian Trusteeship Agreement contained a pledge by Congress "to encourage respect for human rights and fundamental freedoms for all." *Id.* at 626. It stated that although the agreement may not have amounted to a legally enforceable guarantee of substantive rights to Micronesians, it is an expression of moral principle not lightly to be disregarded. *Id.* Similarly, the court of appeals, in deciding *Tel-Oren*, may hold that the language of United Nations treaties and resolutions calling for respect for human rights and condemning terrorism also reflect moral principles not to be lightly disregarded.

115. 534 F. Supp. at 30.

116. 517 F. Supp. at 545-46.

that *Filartiga* demonstrated, through the universal renunciation of torture by nations, that torture is a violation of the law of nations.¹¹⁷

The *Tel-Oren* plaintiffs refute the requirement of a private cause of action on the ground that a cause of action for violation of international law arises automatically under the domestic law of the United States which includes the law of nations.¹¹⁸ The cause of action does not arise under international law; international law merely provides the normative right.¹¹⁹

If a private right of action had to be specifically provided in the law of nations in order for jurisdiction to lie under the Alien Tort Statute, there would be no need for such a statute. A plaintiff could sue directly under the law of nations, citing international law as embodied in the federal common law.

It is reasonable to assume that the First Congress would not have passed the Alien Tort Statute unless it were meant to fill a gap left unremedied by other means, that is, if there were no private right of action under the law of nations directly. Therefore, the requirement of a private right of action in international law erects a barrier to use of the statute that is logically at odds with both its plain language and the probable intention of its framers.

IV. POSSIBLE OUTCOMES IF ALIEN TORT STATUTE JURISDICTION IS UPHeld IN TEL-OREN

The plaintiffs in *Tel-Oren* and the court of appeals in *Filartiga* relied on United Nations resolutions and international covenants to demonstrate the content of the law of nations for purposes of providing Alien Tort Statute jurisdiction.¹²⁰ If the law of nations is said to be evidenced by such resolutions and covenants, it is possible that

117. *Filartiga v. Pena-Irala*, 630 F.2d at 880-85.

118. Appellants' Brief, *supra* note 3, at 25-26. See also *supra* note 111.

119. One commentator has noted:

It is . . . unrealistic to contend that the significance of . . . [U.N.] resolutions completely disappears by virtue of their designation as not legally binding. Therefore, the crucial point is not the legal status of the resolutions themselves, but the degree to which they influence the conduct and attitude of States towards acceptance or rejection of a particular rule of international law crystallized through the process of multilateral diplomacy.

Adede, *International Law from a Common Law Perspective: A Second Look*, 60 B.U.L. REV. 46, 76 (1980).

120. Appellants' Brief, *supra* note 3, at 25. See also *supra*, note 111. See Appellants' Brief, *supra* note 3, at 27; *Filartiga v. Pena-Irala*, 630 F.2d at 880-85.

aliens may use this precedent to gain access to federal court on far less substantial grounds than those presented by *Tel-Oren* and *Filartiga*. United Nations declarations are often aspirational in nature, rather than strictly prescriptive. There have been treaties condemning racism and undertaking to eliminate it,¹²¹ undertaking to ensure economic, social and cultural rights, including the right to work, to an adequate standard of living, to physical and mental health, and to take part in cultural life.¹²² The Universal Declaration of Human Rights states in article 25 that everyone has a right to an adequate standard of living.¹²³

Consequently, it is possible that an alien from a Third World country could sue an American multinational corporation for depriving him of the adequate standard of living guaranteed him by the Universal Declaration of Human Rights. Or, a South African black might seek redress against a South African official in federal court for systematic, official racism, which has been proscribed by a United Nations convention, and which could therefore plausibly be called a violation of the law of nations. In these cases the Alien Tort Statute would still have to be construed narrowly as requiring flagrant violations of the law of nations.¹²⁴ A federal court would doubtlessly weigh the severity of the violation claimed. The court would also measure the universality of international opinion as to whether the tort was in violation of international law. This type of conservative approach would limit jurisdiction to the most flagrant cases of human rights violations.

In a suit against a United States multinational corporation by a citizen of a Third World nation, the court might find that since there is no universal measure of an adequate standard of living, the law of nations does not guarantee a specific standard. Indeed, it would be difficult to prove proximate cause between actions of

121. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 20/2106, 20 U.N. GAOR Supp. (No. 14) at 47-52, U.N. Doc. A/RES/2106 (1966), reprinted in 5 I.L.M. 350 (1966).

122. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No.16) at 4950-51, U.N. Doc. A/6316, arts. 7,11(1),12(1),15(1)(a), (1966).

123. Universal Declaration of Human Rights, *supra* note 51. An adequate standard of living includes food, clothing, housing, medical care, social services and security in case of unemployment, sickness, disability, widowhood, old age, or lack of livelihood due to circumstances beyond one's control. *Id.* art. 25, para. 1.

124. See *supra* notes 76 & 99 and accompanying text.

United States corporations and the situation of Third World nationals.

As to a claim by a South African black on the cause of action of racism, there exists a strong body of international conventions condemning racism, particularly official *apartheid*.¹²⁵ A claim of racism may fail, however, because it is not recognized as a tort in American courts.¹²⁶ It would also fail on the basis of the act of state doctrine,¹²⁷ under which United States courts will not examine the legality of actions of foreign officials taken under the laws of foreign states. Since a South African official is acting in accordance with the laws and the constitution of his country, the act of state doctrine would bar an American court from examining the legality of his actions.¹²⁸

Thus, if terrorism were upheld by the court of appeals as a violation of the law of nations, it would hardly "open the flood-gates." Courts would still be compelled to strictly interpret the law of nations for purposes of the Alien Tort Statute.

CONCLUSION

This Note demonstrates that the torts which comprise terrorism may be sued upon by an alien because terrorism is a violation of the law of nations for purposes of the Alien Tort Statute.¹²⁹ The lack of a universal definition of terrorism does not bar a conclusion that terrorism is a violation of the law of nations¹³⁰ because there exists a consensus among nations that terrorism is an offense that must be

125. See, e.g., *supra* note 121.

126. However, several cases have held that racial slurs may be the basis for a cause of action for intentional infliction of emotional distress. See *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); *Browning v. Slenderella Systems*, 54 Wash.2d 440, 341 P.2d 859 (1959).

127. See I. BROWNIE, *supra* note 43, at 507-08.

128. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Under the act of state doctrine, judicial inquiry into Cuban confiscation of private property was precluded because the nationalization was the public act of a recognized foreign sovereign power committed in its own territory. *Id.* at 413-15. This applied even though the foreign expropriation violated customary international law. *Id.* at 427-37.

In cases claiming terrorism as a tort in violation of the law of nations, as in *Tel-Oren*, the act of state doctrine would probably not be raised by a defendant state (such as Libya) because it is highly unlikely that any state, however renegade, would care to identify itself with the legal sanctioning of terrorism. Therefore, states participating in and aiding terrorist activities would in all likelihood not afford themselves the shield of the act of state doctrine.

129. See *supra* notes 49-68 and accompanying text.

130. See *supra* notes 15-38 and accompanying text.

prevented and punished.¹³¹ In addition, there is no need for the law of nations to provide a specific right to a private cause of action for Alien Tort Statute jurisdiction,¹³² as a treaty must for federal question jurisdiction. Conferral of Alien Tort Statute jurisdiction in a case alleging terrorism in violation of international law does not constitute undue interference in the executive foreign policy-making prerogative.¹³³ Terrorism so clearly violates the norms of international behavior that judicial sanctions for terrorist activities are in keeping with national policy. The decision of the district court in *Tel-Oren* should therefore be reversed and jurisdiction upheld under the Alien Tort Statute.

Eileen Rosé Pollock

131. See *supra* notes 49, 68 and accompanying text.

132. See *supra* notes 112-19 and accompanying text.

133. See *supra* notes 105-11 and accompanying text.