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Chris Cox

THE WHITE HOUSE

WASHINGTON

August 24, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: PETER D. KEISLER PDK

SUBJECT: Letter to Washington Jewish Week

I have attached a draft letter to respond to the recent article in Washington Jewish Week on Judge Bork. Ken Bialkin would be the ideal signatory. If you call him and he turns you down, we can shop around for someone else.

In order that he might feel comfortable with the assertions made in the letter, I have also attached:

(1) A copy of the August 6, 1987 Washington Jewish Week article which prompted this draft ("Senate Democrats Woo Jews for Anti-Bork Fight").

(2) A copy of the July 28, 1987 Washington Post article which made the original reference to Judge Bork's remarks on school prayer ("Bork's Appetite is Whetted for Place on Supreme Court").

(3) A copy of the letter from Warren Cikins to the Washington Post, which was never published.

(4) A copy of the letter from Rabbi Joshua Haberman to the Washington Post, which was published.

(5) A copy of the July 26, 1987 Washington Post article which recounted the Howard Krane story ("A Trip Across the Political Spectrum").

(6) The text of the Tel-Oren decision which has been the subject of much of the controversy.

Attachment

cc: Max Green

To the Editor:

I read with some dismay the August 6 article entitled "Senate Democrats Woo Jews For Anti-Bork Fight." The article repeated, inadvertently I am sure, several untrue and misleading allegations about Robert Bork's record which unfortunately have been circulating within our community. As Jews, we have always taken justifiable pride in our sense of fairness to others. As a strong supporter of Judge Bork's nomination, I write to set the record straight.

First, your article noted that the *Washington Post* recently recounted an incident in which Bork, in remarks delivered at the Brookings Institution a few years ago, is reported by one attendee to have endorsed school prayer and made certain insensitive remarks on that subject. When the *Post* account was described to him, Bork said "I can't believe I would have said that," and every available piece of evidence backs him up. His written remarks contain no mention of school prayer, and the Brookings official who organized (and of course attended) that meeting has come forward to say that the reported statements were never made. Moreover, Rabbi Joshua Haberman, another attendee, stated the following in a letter to the editor published in the *Post*: "It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but the *Post*'s account of that evening, I would draw entirely wrong conclusions about Judge Bork's views on church-and-state issues. The *Post*'s reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort." (Apparently, Rabbi Haberman told this to the *Post* reporter before the story ran, but no mention was made of his comments in the published account.) The story is demonstrably false by any standard, and it would be irresponsible to spread it any further.

Second, your article made reference to a case in which Judge Bork participated, *Tel-Oren v. Libyan Arab Republic*, and may have left the impression that Judge Bork's opinion in that case was somehow pro-PLO. That is entirely untrue.

Tel-Oren involved a lawsuit by survivors of a PLO terrorist attack who sought compensation from the PLO and associated entities. The lawsuit was brought under the Alien Tort Statute, a little-known and rarely-used law which was enacted two centuries ago. By its terms, the Alien Tort Statute appears to authorize federal courts to hear at least some cases brought against officials of foreign governments for violations of international law. The precise breadth of this statute has never been clear, and its potentially limitless scope has given many judges and scholars pause.

All four judges who heard this particular case, Judge Bork among them, voted to dismiss the lawsuit. In that narrow sense, the PLO "won." Far more important in the long run, however, were the rationales Judge Bork gave for his decision. For one thing, he noted that as a general rule international law applies only to foreign <u>states</u>, and, under that rule, the PLO could not be made subject to international law in the same way as a genuine government. As Bork explained, its "governmental aspirations" were not sufficient in this regard. This was clearly correct. Plainly, any "victory" in this lawsuit which required enhancing the legitimacy of the PLO would have been thoroughly pyrrhic.

Perhaps more significantly, Bork's holding rested upon his reluctance to read the Alien Tort Statute as authorizing broad and expansive judicial authority to interpret and enforce the often vague and evolving standards of international law against foreign states. Bork expressed the concern that the exercise of such authority would involve the courts in sensitive foreign policy decisions which they are not qualified to make. This is a classic demonstration of judicial restraint, and in an area of law where activism would have been especially ill-advised. Granting broad authority for American judges to enforce international law against foreign states would be at best a double-edged sword which could be used by creative lawyers against Israel as often as against her adversaries. Indeed, more often--since Israel, unlike the PLO, <u>is</u> a state. We are all familiar with the common rhetorical use of international law concepts by opponents of Israel to attack Israeli policies. Had this case gone the other way, critics of Israel would have had a field day in court, and might well have been able to find a judge more willing to assert judicial power, and less disdainful of the legitimacy of the PLO, than Judge Bork.

The case in favor of Bork is a strong one. He is a man of unusual skill and sensitivity, and would become, I am sure, one of the great Justices of this century. One anecdote in particular deserves mention. Soon after Bork began the practice of law as a young associate at a prestigious Chicago law firm, he learned that an applicant for a position in that firm had been passed over because the applicant was Jewish. Bork went with another associate to see several senior partners and said, according to the colleague who accompanied him, "We have a larger stake in the future of this firm than you do. We want this man considered on his merits." The partners agreed to take a second look; the applicant was hired, and he's now one of the managing partners of the firm. This incident reflects the measure of Robert Bork far more accurately than most others that I have heard.

Sincerely,

Senate Democrats Woo Jews for Anti-Bork Fight

BY LARRY COHLER

Three Democratic senators last week urged representatives of the major national Jewish organizations to take a strong stand on the nomination of Judge Robert Bork for the Supreme Court.

At a closed-door meeting last week in the Capitol Hill office of Sen. Alan Cranston (D-Calif.), the senators depicted the Bork nomination as a crucial opportunity for Jewish groups to give the lie to their image as a one-issue lobby.

Sens. Carl Levin (D-Mich.) and Howard Metzenbaum (D-Ohio) joined Cranston in urging the Jewish groups to take a position. Metzenbaum is a member of the Senate Judiciary Committee, which will hold hearings on the nomination in September and then vote on a recommendation to the full Senate.

Michael Pelavin, chairman of the umbrella group encompassing most of the Jewish organizations, said he thought there was a "reasonable chance" the groups would achieve sufficient unity to oppose the nomination.

"We didn't take a position on [Supreme Court Chief Justice William] Rehnquist's nomination," said Pelavin, president of the National Jewish Community Relations Advisory Council (NJCRAC). "But my feeling is that because of the time period involved and the philosophical issues, there is a better chance of us being able to take a position on this than any previous nomination."

Representatives of the American Jewish Committee (AJC) and the Anti-Defamation League of B'nai B'rith (ADL), however, stressed their stand of "no position" on the Bork nomination. Under NJCRAC's governing rules, all of its constituent national organizations must endorse a position before NJCRAC can adopt it on behalf of the Jewish community.

According to several attending the meeting, the senators' appeal represented a major attempt to enlist the Jewish community in the coalition of groups opposing the Bork nomination.

"It was a powerful message to the Jewish community of how important we are in this battle shaping up," said Rabbi David Saperstein, director of the Reform movement's Religious Action Center. The Union of American Hebrew Congregations (UAHC), parent organization of the center, came out against the Bork nomination last week. "If people who represent the mainstream of freedoms and liberties here are not going to make this fight, it can't be won," said Saperstein.

Spokespersons for Cranston and Levin said the senators did not call the meeting to urge the Jewish groups to necessarily oppose the nomination. Rather, they said, they had urged the groups to get involved in the debate, regardless of their position.

But Murray Flander, a Cranston spokesman, conceded that if the Jewish groups were to take any stand, it would certainly be against Bork.

"We're urging Jewish groups to take an active role because there is a mistaken notion that Jewish leaders are outspoken on only the single issue of Israel," said Flander.

Judge Robert Bork

Sen. Alan Cranston

"Here's an issue where other considerations, such as abortion, privacy, church-state separation and civil rights will be at issue.... This is the kind of issue in which so many groups—environmental, civil rights, civil liberties—have taken a stand. So many constituent groups have announced their opposition to Bork; it's bound to affect senators."

Flander suggested that Bork's conservative positions on minority rights and church-state separation offered Jewish and black groups an opportunity to work together, something they were noted for in the past but have often been unable to do more recently.

The three senators themselves have yet to formally announce a position on the nomination. But those attending the meeting said their inclination to oppose Bork was clear.

Among the groups at the meeting were the AJC, ADL, UAHC, the American Jewish Congress (AJCongress), the National Council of Jewish Women, B'nai B'rith, B'nai B'rith Women, the Jewish Labor Committee, the Synagogue Council of America (representing the three major denominations within Judaism) and New Jewish Agenda. In addition to UAHC, the National Council of Jewish Women, B'nai B'rith Women, the AJCongress and New Jewish Agenda have come out against Bork's nomination. New Jewish Agenda and B'nai B'rith Women are not national members of NJCRAC, though B'nai B'rith Women's associate organization, B'nai B'rith, is.

Pelavin recently sent a letter to NJCRAC's constituent groups urging them to consider Bork's judicial philosophy in deciding their positions. In a letter to Sen. Joseph Biden (D-Del.), chairman of the Senate Judiciary Committee, he urged the committee to do so as well.

Conservative groups, including the National Jewish Coalition, have come out against making judicial philosophy a factor in confirming Bork. In a recent statement, NJC called on critics to allow the president a candidate of his own philosophical choosing.

But Jewish critics of Bork have cited several sources of ideological concern on Bork:

• In a recent *Washington Post* article, a Rochester, N.Y. Baptist minister related telling Bork about his experiences as a teacher in a Florida public school, where school prayer was required. The minister told of pressuring a Jewish boy to read from the New Testament. The minister quoted Bork as saying, "So what? I'm sure he got over it." Bork told the *Post*, "I can't believe I would have said that."

• In a 1971 article for the *Indiana Law Journal*, Bork referred to the Bill of Rights as "a hastily drafted document upon which little thought was expended."

• In a 1984 concurring opinion in *Tel-Oren vs. Libyan Arab Republic*, Bork refused damages to American victims of a PLO terrorist attack in Israel. Among the reasons Bork cited was the PLO's exemption from prosecution under the act-of-state doctrine. Though he conceded the PLO's "apparent lack of international law status as a state," he said that the diplomatic recognition the PLO enjoyed in some 100 countries and its observer status at the UN made the case a foreign policy matter beyond the proper purview of the judiciary.

Marc Pearl, Washington representative of the American Jewish Congress, contended that such emerging information had strongly affected many of the meeting participants.

But David Brody, Washington representative of the ADL, denied Pearl's suggestion that such information had fostered a majority sentiment against Bork at the meeting. "I don't see how anyone can say on the basis of [the majority's] silence that they disapprove [Bork's nomination]," he said.

Brody said that ADL was "reviewing all his writings and decisions. We'll listen to the evidence. But as of the moment we have no position."

David Harris, Washington representative of the AJC, said his group has historically remained neutral in Supreme Court confirmation debates. Nothing that has emerged so far, he said, has altered the sentiment of "a strong majority" of the AJC board for staying neutral this time. He added, "We will watch the hearings with close interest and reserve the right to reconsider our position."

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THE WASHINGTON POST
Tuesday, July 28, 1987

Bork's Appetite Is Whetted For Place on Supreme Court

By Dale Russakoff and Al Kamen
Washington Post Staff Writers

Robert H. Bork's return to Yale in January 1977 was not a happy one. Alexander Bickel, his colleague and closest friend had died three years before. His wife, Claire, was waging a valiant, but losing, battle with cancer. Moreover, he missed Washington, a city that had captivated him like none other.

For perhaps the first period of his life, he was detached—almost biding time, putting aside the credo that Bickel had handed down to him, "Wreak yourself upon the world!"

Many of his colleagues said it was clear that his appetite had been whetted by the prize that eluded him in 1975, the chance to sit on the nation's highest court, to put into practice the theories he had struggled with.

Moreover, academic life had lost much of its appeal. "There were all kinds of people in Washington who were interesting," he said in an interview, "government people, lawyers, judges, journalists, a lot more interesting people than there were in New Haven." Bork was known at Yale for his remark: "New Haven is the Athens of America—if you like pizza."

THE SHAPING OF ROBERT H. BORK
Last of three articles

In addition, Bork had not gotten over the scorn of many Yale students, and some fellow faculty members, for his role in the Saturday Night Massacre. Many of them signed petitions and telegrams denouncing his actions, without giving

See BORK, A8, Col. 1

THE SHAPING OF ROBERT H. BORK

Return to Washington Put High Court in View

BORK, From A1

him a chance to explain. "Why didn't they call me first?" one former colleague recalls him asking.

Bork said he spent the rest of his time at Yale distracted by his wife's declining health. His pattern was to go to class, teach and return home immediately. Some of his students felt he was no longer engaged in teaching. He seemed to have stopped exploring ideas, and appeared less eager to invite students to act as his sounding board for developing new theories.

A student in his constitutional law class in 1980 recalled Bork arriving in class and declaring: "Today we're going to talk about *Roe v. Wade* [the landmark abortion rights case that he considered unconstitutional]. Who wants to take me on?"

"His return was not a success," said a longtime friend on the faculty. "Bickel was dead and he was back in an environment which had changed. He had become more pragmatic and less theoretical. He had abandoned grand theories [and the search for them] and in its place was a hostility toward the notion of theory."

Bork also finished his only book thus far, "The Antitrust Paradox: A Policy at War with Itself," published in 1978. It advanced his free-market thesis that bigness was not necessarily bad, and on the contrary, could increase efficiency and reduce prices for consumers.

It concluded in an embattled tone, with a vehement attack upon liberalism. Bork argued that an "intellectual class" of academics, journalists, lawyers, government officials and "others whose jobs center on ideas and words" had developed an apparent affinity "for expansions of the public sector at the expense of the private sector . . . .

"Intellectuals as a class have distinctive interests and tastes, and are disproportionately able to move law in the direction of their interests and tastes. The intellectuals' preference for government economic regulation is attributed to a desire to shift power and prestige from the business class to themselves," he wrote.

The man who claimed as a scholar to be seeking neutral principles suddenly had adopted the rhetoric of the neoconservative movement—those former liberals who spurned the post-New Deal Democratic Party, many of whom employ the old left's language of class struggle in their fight against their old cause.

Also, for the first time in his life, Bork was making big money as a consultant to major corporations, charging as much as $250 an hour. One client, it was learned, raised Bork's pay to $350 an hour to persuade him to give more attention to the case.

Bork Takes a Stand at Yale

Because of his wife's failing health, Bork declined to travel except when necessary for court appearances. His clients agreed to come to New Haven to get his advice, renting suites in a local hotel. His goal, he said, was to buy a house in the country if his wife recovered.

He continued to maintain a high profile off campus, preserving his political credentials by speaking to conservative groups, becoming an adjunct scholar at the conservative American Enterprise Institute and commenting regularly on issues before the Supreme Court.

When the court issued its landmark 1978 ruling in *Bakke* upholding the use of affirmative action, Bork wrote in The Wall Street Journal that affirmative action "offends both ideas of common justice and the 14th Amendment's guarantee of equal protection to persons, not classes."

The sweeping statement was reminiscent of his 1960s writings on civil rights, when he wrongly predicted massive resistance to enforcement of the laws.

Similarly, in an article published before the *Bakke* ruling, Bork predicted that the court's approval of affirmative action quotas would spur other groups, such as Eastern European ethnics, to insist on preferential treatment. The result would be "racial and ethnic politics with a vengeance," he predicted.

Bork had never been particularly active in campus politics, rarely attending faculty meetings during his first tour of duty in the 1960s and early 1970s. He was even less active upon his return. But one issue in the spring of 1978 lured him into battle—whether Yale should forbid on-campus recruiters from law firms that discriminated against homosexuals.

Bork led the opposition to the proposal, according to a 1978 student newspaper article. In a recent interview, he emphasized that there had been no harassment of homosexuals in the law school, and so he regarded the proposal as a symbolic statement aimed at getting the Yale faculty to approve of homosexuality.

"Contrary to the assertions made, homosexuality is obviously not an unchangeable condition like race or gender," Bork wrote in a letter making his case to the faculty. "Individual choice plays a role in homosexuality; it does not in race or gender; and societies can have very small or very great amounts of homosexual behavior, depending upon the degrees of moral disapproval or tolerance shown."

He continued: "That behavior [homosexuality], it is relevant to observe, is criminal in many states."

"The proposed rule does not relate to educational policy and is therefore beyond the legislative powers of the faculty," Bork said, echoing his judicial philosophy of remaining neutral unless laws specifically call for intervention.

"The proposal before us is simply an attempt to have this faculty ratify homosexuality, to have us state publicly that it is immoral for society to have any preference on the matter. I do not believe it is immoral for society or for individuals in it to have such preferences," he said.

Owen Fiss, the faculty member representing the gay students, countered that it was impossible to be neutral on the issue. "Neutrality is an unattainable ideal in this sphere. What is neutral? To allow people to discriminate is not neutral," Fiss said, according to the student paper.

The proposal, according to Prof. Harry Wellington, then dean of the law school, "won handily" despite opposition from Bork and a number of other professors, liberal and conservative.

Claire Bork died in December 1980, ending an extraordinary partnership that Bork's friends said was essential to his achievements. Soon afterward, Bork decided he needed a change of scene, and began exploring a move to Washington.

"It's tough enough living in New Haven. Imagine doing it as a widower," Bork told his former Marine buddy, Sports Illustrated environmental writer Robert H. Boyle.

Bork talked with Howard Krane, his longtime friend and now the managing partner of the Chicago firm where Bork worked until 1962. Krane persuaded him to return to Kirkland & Ellis, this time in the Washington office. In 1981, Bork purchased a $500,000 house in the Palisades neighborhood on the same street where retired Justice Potter Stewart and George Bush—before he was vice president—had homes. He also bought a new BMW—a trapping of wealth commensurate with the substantial salary, apparently in the upper six figures, he was to make at Kirkland & Ellis.

By 1981, with Reagan in the White House, Bork was a strong candidate for a judicial appointment, either to an appeals court or to the Supreme Court. His writings attacking the Warren Court and liberal judicial activism had made him the patron saint of conservatives interested in changing the courts.

Nonetheless, Bork took several positions in this period that displeased conservatives, using his rigorous, constitutional analysis to critique their crusades as well as those of liberals.

In 1979, he wrote a column in The Wall Street Journal, warning against a balanced-budget amendment—a cornerstone then as now of Ronald Reagan's economic program.

Testifying before the Senate in 1981, Bork opposed a bill to declare a fetus a person, a major agenda item of some conservative groups. "I am convinced, as I think most legal scholars are," he said, "that *Roe v. Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."

But the bill would permit Congress to tell federal judges how to interpret the Constitution. And that, he said, "proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over the past 25 years . . . . The deformation of the Constitution is not properly cured by further deformation."

In July 1981, just after Kirkland & Ellis mailed announcements of Bork's arrival, Krane received a call from then-Attorney General William French Smith. According to Krane, Smith said: "The government appreciated the firm giving up Bob for the service of the United States."

So it was that the friend and colleague of 35 years learned Bork's secret: He was to become a judge on the D.C. Circuit Court of Appeals, often called the second-highest court in the land, located just down the hill from the ultimate prize, the Supreme Court.

A 'Burkean' at the Appeals Court

Bork arrived at the appeals court with a fully formed judicial philosophy worked out over 25 years of writing, teaching and wrestling with the law.

Asked how he would describe the philosophy at which he has arrived, Bork called himself "a Burkean," a reference to 18th century British philosopher Edmund Burke.

"Someone will say that is wrong as soon I say it," he said, "so let me explain what I mean by Burkean: highly suspicious of sweeping, abstract principles as a way of organizing society, because they tend to be highly coercive; respect for community, tradition, constitutional structure; a willingness to look at a law and ask, 'Will it do more good than harm?'"

Told that his critics consider him anything but Burkean, even by his own definition, Bork said: "It's not true. If they look at my opinions they'll see that it is not true."

In five years on the appeals court, voting in several hundred cases and writing more than 100 opinions, Bork has created a clear record that is, with some significant exceptions, one of a conservative in the Reagan tradition: a judge inclined to deny judicial help to plaintiffs unless Congress or the Constitution explicitly gives them a right to it.

His opinions defer to the rulings of the executive branch over the pleas of individuals or Congress. When agencies are accused of failing to act—by not enforcing environmental or health and safety laws or not following due process—Bork rarely intervenes. When business is the plaintiff, however, he has been sympathetic to assertions that government regulators have been unfair, or have violated constitutional rights.

If a situation is morally wrong, but not constitutionally wrong, he believes a judge has no cause to remedy it.

Some former clerks at the appeals court accuse him of being closed-minded, saying that he enjoyed debating amiably with lawyers during oral argument but that his mind was made up before the argument began. Bork, in interviews, said he has often changed his mind during or after oral argument and has even done so publicly on occasion.

Once on the appeals court, Bork soon discovered that the intellectual rough-and-tumble that he so enjoyed was lacking, that much of the work involved processing some of the most humdrum regulatory issues. In interviews he has complained that he has had far too little contact with other judges on the court, that none of them has time, given the workload, to reflect on broader issues.

When Bork did not hire clerks last winter for the appeals court's 1988 term, there was widespread speculation that he was planning to quit. When asked why he did not hire clerks, he declined to answer, saying he wanted to remain an "enigma" on that score.

If the court was not the forum he sought, he found an outlet for his ideas in speaking before conservative groups and writing for conservative journals.

It was on the way to one of those speeches in the summer of 1982 that he met Mary Ellen Pohl, a former nun who was active in conservative groups, and a staff member at the Ethics and Public Policy Center, the conservative think tank established by Ernest W. Lefever, whose appointment to be assistant secretary of state for human rights was rejected by the Senate Foreign Relations Committee early in the Reagan administration.

She was the first woman he had gone out with since his wife died. It was a whirlwind romance—they were married five months after they met. She was 40, he was 55. "It was very fast," Bork recalled. "We would have been married faster but we couldn't arrange the church any faster," he recalled.

They were married in a large wedding in October 1982 at St. Matthew's Cathedral. The ushers included liberal D.C. federal appeals court Judge Abner Mikva, a friend from law school days, Antonin Scalia, another appeals judge who worked in the Justice Department when Bork was solicitor general and who is now on the Supreme Court, and columnist George Will, who had known Bork since Will had worked in the Senate in the early 1970s.

On Church and State

In his outside speaking engagements, Bork has expressed himself on an issue he has written nothing about as a professor or judge—the protection of religious freedoms and the separation of church and state. Justice Lewis F. Powell Jr., the man Bork would replace on the court, often provided the critical vote on such cases when they came before the court.

In a 1982 speech at a New York University Law School banquet, Bork criticized decisions in which he said the Supreme Court did not adhere to what he considered a strict interpretation of the words of the Founding Fathers and instead imposed "upper-middle-class elite values" on the country.

One decision he singled out for criticism, according to the written recollections of one who attended, was the court's landmark 1962 ruling in *Engel v. Vitale*. That decision said public school officials may not require students to recite a state-sanctioned prayer at the start of each school day.

When asked, Bork said he has never taken a position on the constitutionality of school prayer.

In a second speech, given at a Brookings Institution dinner for religious leaders in September 1985, several members of the audience said Bork criticized that case and the court's 1985 ruling in *Aguilar v. Felton*, a 5-to-4 decision which, along with a companion case, struck down the use of state or federal funds to pay teachers in religious schools. Powell was the swing vote in both cases.

Bork, asked about those recollections, said he did not think he referred to specific cases in his speech.

One of those who spoke at Brookings in response to Bork said Bork essentially adopted Chief Justice William H. Rehnquist's dissent in an Alabama school prayer case in 1985. In that case, Rehnquist said the Founding Fathers intended only to ensure that one religious sect should not be favored over another, not that the government should be entirely neutral toward religion.

Another member of the audience, the Rev. Kenneth Dean, pastor of the First Baptist Church of Rochester, N.Y., said he told Bork of his experience as a junior high school teacher in Florida, where Bible reading began every school day.

Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the classroom, he recalled. Dean said he felt he had treated the student badly by singling him out before his peers.

Dean quoted Bork as responding, "So what? I'm sure he got over it."

Bork, asked about Dean's account, said, "I can't believe I would have said that."

His supporters argue that Bork, who has written and trumpeted his bold conservative ideas for a quarter-century, is so complex he can't be categorized—a notion Bork's liberal critics find preposterous.

The Democratic-controlled Senate will decide whether Bork's jurisprudence and character are appropriate for the nation's highest court, whether he is capable, as he contends, of "neutral," value-free reasoning, or whether his claim of neutrality is a way of cloaking a tendency toward conservative activism.

"Bob is a person of total principle, but I think like everybody he sometimes fools himself and sometimes the principle comes to serve his goals," said a longtime Yale professor who expressed admiration for Bork.

Bork apparently does not disagree—at least not entirely.

"To the degree that constitutional intention is somewhat indeterminate or unclear, to some extent the judge participates in making that policy," Bork said in an interview broadcast June 10 by the U.S. Information Agency.

"That doesn't trouble me a great deal," he said. "That's inevitable in any application of written words to modern circumstances. The important question is whether the judge is self-conscious about that and tries to reduce to a minimum the imposition of his own views."

Staff writer Mark Lawrence contributed to this report.

MEMORANDUM FROM YALE LAW SCHOOL

Date: April 27, 1978

To: The Faculty

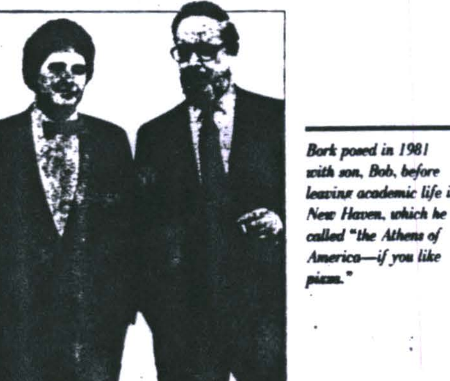
From: Robert H. Bork

I am unable to attend the faculty meeting today, but I want to express my opposition to the proposal that the Yale law school deny employers the privilege of interviewing students on law school premises if the employers display any reluctance to hire and promote homosexuals.

There is no need to rehearse at length the intellectual emptiness of the arguments put forward on behalf of this proposal. Contrary to the assertions made, homosexuality is obviously not an unchangeable condition like race or gender. Individual choice plays a role in homosexuality; it does not in race or gender, and societies can have very small or very great amounts of homosexual behavior, depending upon the degrees of social disapproval or tolerance shown.

THE WASHINGTON POST

Robert Bork made his case in a memo, above, against a proposal at Yale dealing with discrimination against homosexuals. At right, Bork with second wife Mary Ellen, the former nun he married two years after his first wife's death in 1980.



Bork posed in 1981 with son, Bob, before leaving academic life in New Haven, which he called "the Athens of America—if you like pizza."

Reagan's Power to Make Recess Appointment Is Noted

GOP Leader Dole Makes Point in Effort to Speed Senate Action on Nomination

By Edward Walsh
Washington Post Staff Writer

Senate Minority Leader Robert J. Dole (R-Kan.) accused Democratic leaders yesterday of engaging in an almost unprecedented "stall" in acting on the Supreme Court nomination of Appeals Court Judge Robert H. Bork and suggested that President Reagan might be justified in placing Bork on the court while Congress is in recess.

In a speech to the National Conference of State Legislatures in Indianapolis, Dole noted that the Constitution empowers the president to make temporary "recess appointments" without Senate confirmation to fill court vacancies.

However, he added that he does not favor such a course and called instead for the Senate to "move more quickly" toward a vote on the Bork nomination.

Dole's remarks, which were released by his Senate office, were part of a drumbeat of Republican criticism of the Bork confirmation schedule that has been announced by Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.). Dole's suggestion of a "recess appointment" of Bork appeared aimed largely at keeping pressure on Biden to expedite the committee hearings, scheduled to begin Sept. 15, and to discourage Democrats from attempting to kill the nomination with a filibuster at the end of Congress' first session.

The speech was also another sign that Dole, an unannounced candidate for the Republican presidential nomination, intends to play a leading role in the Bork confirmation fight, putting him in a highly visible confrontation with Biden, a Democratic presidential contender.

Under a recess appointment between congressional sessions, Bork would be eligible to serve on the court without Senate confirmation through the end of the 100th Congress next year. There have been 15 recess appointments in the court's history, although only five of these justices took their seats on the court before being confirmed.

Dole stressed that he was not advocating a recess appointment but wanted to provide "some food for thought" for Biden. He said Biden "has been trying mightily to stall the Bork nomination or, failing that, to generate opposition to the nomination on the basis of Judge Bork's so-called ideology."

At a news conference in Iowa, Biden dismissed the timing issue and said a recess appointment would only hurt Bork's chances of gaining Senate confirmation. "Dole is playing politics with this," he said, repeating a pledge to hold "thorough, full and expeditious" hearings.

Biden, who has pledged to lead opposition to Bork, has said he expects the issue to be ready by Oct. 1 for Senate debate, the same target date for floor debate favored by GOP leaders. However, Biden has rejected a Republican demand that hearings begin Aug. 31—during Congress' month-long summer recess—and that his committee vote on the nomination by Sept. 15.

In his speech, Dole said Bork's commitment to "judicial restraint" should be welcomed by elected legislators, "who ought to be allowed to [legislate] without federal judges second-guessing us every time we cast a vote." While the Supreme Court on occasion "has to give the legislative branch a good kick in the pants," over the years legislative bodies have been reformed and improved, Dole argued.

"We are more diverse, better informed and more representative than ever before," he said. "We are, in short, ready—ready to be entrusted with the decisions that affect our constituents most intimately, including decisions on education, criminal justice and social welfare. And that's what Judge Bork is all about."

Bork has publicly criticized the Supreme Court's landmark 1962 "one-man, one-vote" decision, which is widely credited with having forced state legislatures to become more representative.

LETTERS TO THE EDITOR

The Meaning of Murder

Richard Cohen [magazine, July 19] claims that men of the U.S. Army air forces were murderers of civilians from the air. My Webster's New World (1960 edition) defines murder as "the unlawful and malicious or premeditated killing by another." As a pilot of B-24 bombers based in Italy, I flew 30 missions to targets in Austria, Germany, Yugoslavia and northern Italy. Our targets were largely railroad marshaling yards, oil refineries and factories producing war goods. No doubt civilians were killed, but equating these deaths with those in the German death camps, the rape of Nanking, the Bataan death march or other events is absurd. Mr. Cohen has rewritten history and defamed honorable men, living and dead.

SAMUEL F. STREET
Salisbury

'My Cheap Labor'

I am a former farm worker from Florida who has worked in picking citrus fruit and tomatoes. With regard to the article on the Eastern Shore migrant workers [July 25], I basically agree that worker housing in Virginia and other states is a disgrace, but I totally disagree that the taxpayer should have to subsidize agribusinesses with low-interest loans from state funds. Eastern Shore farm workers are the only workers I know of who have had a pay decrease in the last 10 years. We used to get paid 40

The Bork Nomination (Cont'd.)

It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but The Post's account of that evening [front page, July 28], I would draw entirely wrong conclusions about Judge Bork's views on church-and- state issues.

The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

In fact, the judge showed great sensitivity to the ambiguities and dilemmas of the First Amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and open-minded. He threw back at us as many questions as he answered—a Socratic approach I found most stimulating.

I do not recall the judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church-and-state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues, which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices—a policy that is now advocated even by the staunchly liberal People for the American Way.

JOSHUA O. HABERMAN
Washington

■

The Post is to be commended for what appears to be a surprisingly evenhanded series of articles on Judge Bork by Dale Russakoff and Al Kamen [July 26, 27, 28].

I now understand better why there has been such rabid opposition to Judge Bork's nomination to the Supreme Court. The judge has apparently committed at least two cardinal sins: he kept an open mind as he grew older and matured, and he "converted" from liberalism/socialism/leftism to a philosophy reflected by the pragmatic old cliché: if you're not a socialist at 20, you don't have a heart; if you're still a socialist at 30 (or 40), you don't have a brain.

Judge Bork also apparently believes that if a law or the Constitution doesn't allow, or disallow, an action, then a judge should not give or take away. I find that hard to argue with. But then I have tried to keep my mind from closing.

WALTER M. PICKARD
Alexandria

The Brookings Institution

1775 MASSACHUSETTS AVENUE N.W. / WASHINGTON D.C. 20036 / CABLES: BROOKINST / TELEPHONE: (202) 797-6000

Center for Public Policy Education

July 28, 1987

To the Editor
The Washington Post

Dear Madame:

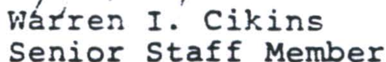
I am quite concerned about the article of Al Kamen on Thursday, July 28 which made reference to a Brookings Seminar for Religious Leaders which Judge Robert H. Bork addressed on Thursday, September 12, 1985. When Mr. Kamen asked me about the Seminar, I replied that it was my understanding as the Chairman of that meeting that the meeting was off-the-record. Since other attendees have elected to report their recollections of the meeting, I thought, in fairness, that I should also respond to their comments.

Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision, but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer, but only the comment that the current turmoil in constitutional law may force some revisions.

One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of Church and State, in an aura of reconciliation not confrontation. While Judge Bork was challenged frequently by members of the Seminar, he responded with grace and an inquiring mind, and willingly extended the discussion period well beyond its adjournment time.

Let the debate on Judge Bork's confirmation go forward on its merits, in this same aura of the tenacious but gracious pursuit of the truth!

Sincerely,



Warren I. Cikins
Senior Staff Member

WASH. POST: 7-26-87

1 of 3

A Trip Across the Political Spectrum

After Flirting With Socialism, Bork Became a Conservative

By Dale Russakoff and Al Kamen
Washington Post Staff Writers

1288

"Wreak yourself upon the world!" Robert H. Bork drew on a cigarette and punched the air for emphasis as he enunciated his life's credo, handed down from a friend and mentor. It calls upon him always to provoke, to be a force in intellectual and political debate—not a cloistered academic, certainly not a faceless judge.

This approach to life has made Bork, President Reagan's choice to fill the Supreme Court vacancy created by the retirement of Justice Lewis F. Powell Jr., the object of a fierce ideological struggle over the role of the nation's highest court. Rarely has one nomination so sharply focused the conflict between forces trying to shape American society.

A liberal Democrat in his college days, Bork was a confirmed conservative by the time he joined the Yale Law School faculty in the early 1960s. His habit of speaking his mind quickly made him the conservative movement's Ivy League voice.

As a young professor, he wrote articles opposing landmark civil-rights legislation, became a Scholar for Goldwater, an Academic for Nixon. In 1973, he puts his ideas into practice, joining the Nixon administration and ending up the "executioner" in the "Saturday Night Massacre"—saying then, as before, that his actions were driven by deeply held convictions about constitutional law.

With the same conviction, Bork said in 1978, he led the opposition to a Yale Law School policy barring from the campus those recruiters whose firms discriminated against homosexuals. "Homosexuality is obviously not an unchangeable condition like race or gender," Bork wrote in a memo at the time. ". . . [Homosexual] behavior, it is relevant to observe, is criminal in many states."

And, in three speeches since 1982, Bork has indicated agreement with the Reagan administration's efforts to promote prayer in public schools and to allow federal aid to religious schools.

As a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Bork, 60, is today an unrelenting voice for "judicial restraint," railing against "imperialistic" liberal judges who have read their values into the Constitution, but saying the same criticism would apply to conservative activists. Bork holds that elected lawmakers, not unelected judges, should control public morality: the death penalty, abortion, affirmative action.

But this most complex person is not the stick figure either side would make him. While his judicial writings are often icy and uncompromising, his friends and foes, in rare agreement, call him a man of uncommon charm, intellect, introspection and emotion, with a wit so sharp that constitutional scholar Alexander Bickel once termed it dangerous, and with a capacity to feel personal loss deeply. Bork has valued mental discipline since his teens, but his professional life recently has been characterized by restlessness; colleagues said he bores easily, is frequently late with his work and is often fighting an addiction to nicotine and a fondness for large meals and martinis.

Between the public and private Bork lie many contradictions. He staked his legal career, when a rising associate in a leading Chicago law firm, on a demand that his partners cease discriminating against Jewish applicants. (They did.) Yet two years ago, at a forum on religion, two participants described him as "callous" to religious minorities who do not share the majority's values.

A 6-foot ex-Marine, a bear of a man who hopes to trim down to 220 pounds by his September confirmation hearings, Bork appears nowadays under enormous pressure. In an interview last week, he chomped for a few minutes on nicotine gum, then spat it out and declared: "I don't care what anybody says, I'm going to have a cigarette." He proceeded to chain-smoke Marlboro Lights for more than an hour.

'There's Never Been Anything Like It'

Bork does not shy away from discussing the pain of the national vilification he experienced after the Saturday Night Massacre, particularly when some of his Yale ex-colleagues joined in. Bork, then solicitor general at the Justice Department, fired the Watergate special prosecutor on orders from President Richard M. Nixon. In that same period, Bork's first wife, Claire, was suffering from terminal cancer.

"There's never been anything like it," he said, as if lost in memories of earlier days. After a pause, he winced, and amended his thought:

"Till now."

With the high court more evenly divided than at any time since the New Deal, Bork's nomination is magnified in importance for those who support and oppose it. Reagan now seeks to institutionalize the conservative social agenda that has eluded him throughout his tenure: authorizing public school prayer, expanding police powers, ending affirmative action and banning abortion.

Liberal leaders fear that Bork will mark the end of 45 years of expanding individual freedoms.

Bork has never dodged an intellectual brawl, and he has not shied from this this fight, either. He has responded not only by making customary courtesy calls to key senators but also—virtually without precedent for a Supreme Court nominee—by granting interviews to numerous news organizations, including this one. The goal, according to one colleague, is to "humanize him, to show he doesn't have horns."

In the interviews, Bork has portrayed himself as flexible and pragmatic, not the ideologue that supporters and opponents are debating. The "humanizing" campaign has caught so many people off guard that it produced a Washington joke that Reagan will withdraw the nomination because he didn't realize Bork was so moderate.

Bork's intellectual strength—and one of his political vulnerabilities—is that he spent his academic life seeking frameworks to explain the society around him. He now concedes that this habit of mind was often misguided, leading him to embrace seamless theories that overlooked human complexities. He has left in his wake a trail of strongly worded speeches and articles that made him a conservative demigod, but have come back to haunt him.

For example, as a libertarian in the 1960s, seeking a society without government intrusion, Bork applied his philosophy to civil rights. He ended up championing the rights of innkeepers to refuse to serve blacks in response to the 1963 Public Accommodations Act, and writing a critique of the constitutionality of the Civil Rights Act for Republican presidential nominee Barry Goldwater in 1964.

In 1971, in his most important academic treatise on constitutional rights, Bork wrote that the First Amendment protected only political speech excluding such forms of expression as science, literature and education. He later conceded that he adopted a far too limited view.

'Original Intent' Should Guide Judges

"I was looking for bright lines," he said. "I've since decided that bright lines aren't available and to impose [them] is to reach a ridiculous result. Reality doesn't work that neatly."

While Bork has often expressed disdain for court precedents with which he disagrees, he portrays himself today as reverent toward tradition, institutions and continuity even if he privately disapproves of some of the underlying reasoning. But he returns often to the idea that only the "original intent" of the Constitution's framers should guide today's judges.

"When a court becomes that active or that imperialistic," he said in 1982 of rulings going beyond rights specifically mentioned in the Constitution, "then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of government that we have."

Opponents said Bork's current tones of moderation are window-dressing designed to help his Senate confirmation chances. In their view, he has shed one intellectual straitjacket for another, trading rigorous allegiance to libertarian economics for equally rigorous allegiance to the "original intent" of the Constitution's framers as he reads it.

These opponents ask: Does his narrow view of rights for blacks in the early 1960s differ from his view of homosexual rights at Yale in 1978? His expanded definition of First Amendment protections, encompassing other forms of expression than political speech, remains in the view of critics a narrow reading of those rights. With Bork on the high court, no longer under the institutional constraints he felt on the appeals court, they perceive largely unchecked majority rule.

While at Yale, Bork wrote only one book, putting much of his energy into articles for popular organs that promised a broader audience—The New Republic, Fortune, The Wall Street Journal. Bork reached for that audience largely at the urging of Alexander Bickel, his Yale Law School colleague who became Bork's mentor and closest friend. The dictum to "wreak yourself upon the world" also came from Bickel, who had learned it from Felix Frankfurter, a celebrated scholar and advocate of restraint named to the high court by Franklin D. Roosevelt.

"Try to be a force, an intellectual force," Bork recalls Bickel telling him.

Robert Heron Bork was groomed to argue. Born March 1, 1927, in Pittsburgh, he was the only child of Harry and Elizabeth Bork, a steel-firm purchasing agent and schoolteacher. His mother passed on to him a love of books, raising him as an avid reader of the Saturday Review and other journals of ideas.

"My mother and I used to argue far into the night about all kinds of things," Bork recalled. "My father would yell down at us from the bedroom: 'This is not a debating society. Go to sleep!' "

Asked how she influenced her son, Elizabeth Bork said: "I wouldn't bite that for anything. I could only say good things. But I prefer not to be involved at all because [pause] well, my son can explain everything."

Bork spent most of his youth in the suburb of Ben Avon. The community's social standing was measured by its distance up the hill from the Ohio River: Ben Avon was about two-thirds of the way up.

"There was a handful of Catholic families. I don't remember any Jewish people. And it was very Republican. Maybe three or four registered Democrats," said Virginia Jeffries Sturm, Bork's high school girlfriend. It was also virtually all white.

Perhaps it was clear even then that Bork would not blend in gently with the world around him. As a boy he had an affinity for pet snakes, which rattled his next-door neighbor and childhood friend, William Karns.

To make matters more difficult in Republican Ben Avon, Bork defined himself as a socialist. "Socialism sounded to me like a swell idea, and rebellion sounded like a swell idea, too," he said. Bork said his sentiments came in part from his father, Harry, a successful businessman who was a union sympathizer and who had taken repeated pay cuts during the Depression.

Karns recalled that Bork once talked him into attending a Communist Party meeting downtown. "The nation had just gone through a severe depression, and these ideas were considered appropriate by some people," Karns said. "We weren't concerned about women's rights and abortion, but we wanted to put food on tables and find jobs for people."

Bork also read in earnest as a youth: Aldous Huxley, George Bernard Shaw and Thomas Paine, among others, according to Virginia Sturm. By his second year of high school, he was reading essays by John Strachey, a British Marxist, and discussing those ideas with all who would listen.

"Bob liked to provoke, especially the people who were so self-satisfied, like the people of this borough," Karns said.

Despite his rebelliousness, Bork was very much one of the boys. He was president of his class and editor of the high school paper in his junior year, and like most boys during that time of world war, highly patriotic and determined to fight for his country.

Even in writing about the school chess team, Bork's

enthusiasm for the military and mental rigor come out: "Many people think the game of chess develops mental powers. It is encouraged at West Point because it lays stress on logic, clear thinking and foresight," he wrote in the school paper.

With U.S. participation in World War II at full strength, most of Ben Avon's best teachers joined up in 1943, and Bork transferred to the Hotchkiss School in Lakewood, Conn., for his senior high school year. Most of the Hotchkiss students came from wealthy families, although Bork recalled a number of scholarship students.

It marked a major change for a popular boy from Ben Avon, made more difficult because Hotchkiss had a rule barring first-year students from most activities. Bork managed nonetheless to become a champion boxer.

Beside a pensive, unsmiling Bork in the Hotchkiss yearbook is this "favorite" quotation: "Do you want a contusious [bruised] scab, maybe?"

"You wouldn't expect Bob Bork to give someone an ordinary, nonerudite scab," explained Hotchkiss and Avonworth classmate Richard Gordon.

After graduating from high school in 1944, Bork joined the Marine Corps and studied to be a translator for front-line troops interrogating Japanese prisoners. But the United States dropped two atomic bombs on Japan before he went, and Bork spent the rest of his time in China guarding supply lines for Chiang Kai-shek. Then he entered the University of Chicago.

Bork's Ben Avon high school history teacher, Raymond Kuhl, recalled that Elizabeth Bork had visited him to discuss "a liberal leaning of Bob's that she thought maybe was going extreme." It was Kuhl who sold Bork on going to the University of Chicago, portraying it as one of the world's most intellectual environments, led by Chancellor Robert Maynard Hutchins, a youthful visionary.

Chicago, under Hutchins, was an intensely intellectual world, where professors put a premium on free—even rebellious—thinking. Conformity was for cowards. Bork blossomed there, graduating Phi Beta Kappa and then marrying Claire Davidson, a Chicago undergraduate. (Davidson was raised a Jew and Bork a Protestant, but he said neither dwelled on the religious difference; throughout their marriage the couple did not practice an organized religion.)

Called Back to Duty in the Korean War

Bork then entered the University of Chicago Law School because, he said, a poet-teacher persuaded him that law would allow him to "take philosophy into the marketplace." Ever an admirer of insulting humor, Bork was dazzled by his first professor, Edward H. Levi (later U.S. attorney general and Bork's boss). Bork recalled in an adulatory speech upon Levi's retirement that the professor opened his first lecture on antitrust this way:

"I won't keep you long today. I won't keep you long because you are too ignorant to talk to." Bork said he was won over by the combination of insult and dare.

Although comfortable on a campus, Bork grew homesick for the physical rigor of the Marines and enlisted in the reserves. After his first year of law school, during the Korean war, he was called back to duty.

He returned to Chicago two years later and embarked on what he fervently calls his "conversion" from liberalism to free-market conservatism. Its agent was a Polish-born economist named Aaron Director, who then was developing a powerful critique of government-controlled enterprises.

Director also argued, persuasively to Bork and other then-liberals, that aggressive antitrust enforcement had hampered market forces during the New Deal, often hurting consumers rather than helping them.

Director's ideal was a totally free market, and he held it up as a standard for judging the efficiency of regulation, of antitrust policy and more. "At first, everything he said seemed to me counterintuitive," Bork said. At least through 1952, Bork remained a New Deal liberal; he and Claire campaigned for Democratic presidential nominee Adlai E. Stevenson that year.

But free-market theory began to win him over, and Bork stayed at Chicago for a year after law school to work on a research project led by Director. Bork describes the effect upon him in the language of a religious convert.

"It was a new way of looking at the world, and an enormously rigorous and logical way—a method that seemed to promise further explanations of things if one pursued it," Bork said at a 1981 program on the Chicago school.

Bork and the other researchers occupied dark cubicles in the law school library from morning till night, emerging only when they thought they had a breakthrough idea, which they would share with Director. Bork and the others had frequent lunches, tea-time discussions and beers with Director, and all were captivated by his elegant undressing of conventional economic wisdom. But Director said in an interview that "conversion" was not the word for what was afoot.

"Bob never said he was being converted," said Director, now at Stanford University's Hoover Institution. "If he had, I would have told him he was being emotional about an intellectual issue. If you considered it a conversion every time you learned something, you'd be converted all the time."

Under Director, Bork wrote a 1954 paper arguing that when businesses bought up smaller companies "downstream" in the production process—a practice known as vertical integration—they often were acting not as monopolies, as then believed, but were simply becoming more efficient.

"The dominant opinion at the time was that this was monopolistic behavior," Director said, "but it became clear as we worked on it that it was not that case at all in some industries." The paper won the 27-year-old Bork wide acclaim among antitrust experts.

That year, Bork entered private law practice as an antitrust specialist. He worked first for a New York firm and for the next six years for the Chicago firm now known as Kirkland & Ellis, the city's largest.

Another Director protege, Howard Krane, came to interview at the firm a couple of years later, but was given short shrift. One associate overheard a partner mentioning in the corridor that Krane was passed over because he was Jewish, and reported this to Bork, who had an affinity for Director's students.

Then a star lawyer on his way to becoming a partner, Bork went with this associate to see several senior partners and said, according to his colleague, "We have a larger stake in the future of this firm than you do. We want this man considered on his merits." The partners agreed to take a second look. (Krane is today the managing partner of Kirkland & Ellis.)

Bork confirmed the story, but played down its significance. "You couldn't very well be running a quota system with a Jewish wife," he cracked.

Krane became a close friend of Bork's, possessing the same "dangerous" wit and lightning-fast mind. The two worked antitrust cases together, staying up all night at least three times a month. They also fantasized about writing mysteries—a lifelong passion of Bork's—featuring a detective named Dirk Dork. The first book, never written, was to be about a murder in a law firm.

Bork also became friends at Kirkland with Dallin Oaks, another Chicago-trained lawyer, now a member of the Mormon Church's governing Council of Twelve. The two were instantly compatible, both enamored of law, but both sensing what Oaks called "the lack of fulfillment [in law practice] in the intellectual area."

They talked for three years about their intellectual frustrations. During that time Bork became a partner and moved to Chicago's comfortable northern suburbs with his wife and three children. In 1961, Oaks announced to Bork that he was leaving to join the University of Chicago Law School faculty.

"I know that was a blow to Bob," Oaks recalled. "I was acting on what we'd been discussing."

A year later, in 1962, Bork left his $40,000 a year law partnership and joined the Yale University law faculty for a salary of less than $15,000.

NEXT: A conservative's progress

this court responds favorably to the present request.

These circumstances clearly necessitate a reopening of the matter. Just as clearly, they could not have been foreseen by Gallup during the normal time period for presentation of a petition for rehearing.[18] We thus will allow Gallup to file its petition for rehearing, and will reinstate Gallup's Group III petition for review. We will, however, transfer that petition to the Tenth Circuit, wherein the remainder of the litigation is now pending,[19] the administrative record has been ordered filed,[20] and exclusive jurisdiction to review will reside.[21]

Order accordingly.

Hanoch TEL-OREN, in his capacity as father, on behalf of the deceased, Imry Tel-Oren, et al., Appellants,

v.

LIBYAN ARAB REPUBLIC, et al.

Hanoch TEL-OREN, et al., Appellants,

v.

LIBYAN ARAB REPUBLIC, et al.

Nos. 81-1870, 81-1871.

United States Court of Appeals, District of Columbia Circuit.

Argued March 24, 1982.

Decided Feb. 3, 1984.

Survivors and representatives of persons murdered in armed attack on civilian bus in Israel brought suit against defendants for compensatory and punitive damages for alleged multiple tortious acts in violation of law of nations, treaties of the United States, and criminal laws of United States as well as common law. The United States District Court for the District of Columbia, 517 F.Supp. 542, Joyce Hens Green, J., dismissed action for lack of subject-matter jurisdiction and as barred by applicable statute of limitations, and plaintiffs appealed. The Court of Appeals held that action was properly dismissed.

Harry T. Edwards and Bork, District Judges, and Robb, Senior Circuit Judge, filed separate concurring statements.

Federal Courts ⚷161, 162, 192

District Court properly dismissed, for lack of subject-matter jurisdiction, action brought by Israeli citizens who were survivors and representatives of persons murdered in armed attack on civilian bus in Israel seeking compensatory and punitive damages from Libyan Arab Republic and various Arab organizations for multiple tortious acts in violation of law of nations, treaties of the United States, and criminal laws of United States, as well as common law. 28 U.S.C.A. §§ 1330, 1331, 1332, 1350, 1602-1611.

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action Nos. 81-0563 & 81-0564).

Michael S. Marcus, Arlington, Va., with whom Oren R. Lewis, Jr., and Richard H. Jones, Arlington, Va., were on brief, for appellants.

Karla J. Letsche, Washington, D.C., for appellee, National Association of Arab Americans. Cherif Sedky and Lawrence Coe Lanpher, Washington, D.C., were on brief, for appellee, National Association of Arab Americans.

Michael Kennedy, New York City, was on brief, for appellee, Palestine Information Office.

18. See Fed.R.App.P. 40(a).

19. See 28 U.S.C. § 2112(a) (1976).

20. See text *supra* at note 15.

21. See 16 U.S.C. § 825*l*(b) (1982).

Michael E. Tigar, Washington, D.C., entered an appearance for appellee, Palestine Congress of North America.

Before EDWARDS and BORK, Circuit Judges, and ROBB, Senior Circuit Judge.

Concurring opinions filed by Circuit Judge HARRY T. EDWARDS, Circuit Judge BORK, and Senior Circuit Judge ROBB.

PER CURIAM:

Plaintiffs in this action, mostly Israeli citizens, are survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel in March 1978. They filed suit for compensatory and punitive damages in the District Court, naming as defendants the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[1]

In their complaint, plaintiffs alleged that defendants were responsible for multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law. Jurisdiction was claimed under four separate statutes: 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1350 (providing jurisdiction over actions by an alien alleging a tort committed in violation of the law of nations or a treaty of the United States); and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611. For purposes of our jurisdictional analysis, we assume plaintiffs' allegations to be true.

The District Court dismissed the action both for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. *Hanoch Tel-Oren v. Libyan Arab Republic,* 517 F.Supp. 542 (D.D.C. 1981). Plaintiffs appeal the District Court's rulings on two of their claimed jurisdictional bases, 28 U.S.C. §§ 1331, 1350, and on the statute of limitations issue.

We affirm the dismissal of this action. Set out below are separate concurring statements of Judge Edwards, Judge Bork, and Senior Judge Robb, indicating different reasons for affirming the result reached by the District Court.

1. Plaintiffs do not pursue their claim against the Palestine Congress of North America on appeal.

HARRY T. EDWARDS, Circuit Judge, concurring:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations." As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

At issue in this case is an aged but little-noticed provision of the First Judiciary Act of 1789, which gives federal courts jurisdiction over a minute class of cases implicating the law of nations. Thus, it is not startling that the central controversy of this action has now produced divided opinions between and within the circuits. The opinions of Judge Bork and Judge Robb are fundamentally at odds with the decision of the Second Circuit in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir.1980), which, to my mind, is more faithful to the pertinent statutory language and to existing precedent. Although I cannot concur in the opinions of my colleagues, I do agree with them that the decision of the District Court should be affirmed. I write separately to underscore the rationale for my decision; I do this because, as will be apparent, there are sharp differences of viewpoint among the judges who have grappled with these cases over the meaning and application of 28 U.S.C. § 1350 (1976).[1]

1. That I confine my remarks to issues directly related to the construction of § 1350 should in no respect be read as an endorsement of other aspects of my colleagues' opinions. Indeed, I disagree with much of the peripheral discussion they contain.

My analysis also is limited to the allegations against the Palestine Liberation Organization. I agree with the District Court that the com-

I. BACKGROUND

On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (hereinafter "the PLO") turned a day trip into a nightmare for 121 civilian men, women and children. The PLO terrorists landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded. Most of the victims were Israeli citizens; a few were American and Dutch citizens. They turned to our courts for legal redress and brought this action for damages asserting jurisdiction under 28 U.S.C. §§ 1331 and 1350 (1976). The District Court dismissed the action for lack of subject matter jurisdiction. The critical issue on appeal is whether plaintiffs alleged sufficient facts to meet the jurisdictional elements of those sections.

II. THE FILARTIGA DECISION

My inquiry into the sufficiency of plaintiffs' allegations is guided by the Second Circuit's decision in *Filartiga*. For reasons set out below, I adhere to the legal principles established in *Filartiga* but find that factual distinctions preclude reliance on that case to find subject matter jurisdiction in the matter now before us. Specifically, I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law. Absent direction from the Supreme Court on the proper scope of the obscure section 1350, I am therefore not prepared to extend *Filartiga*'s construction of section 1350 to encompass this case.

The pertinent allegations in *Filartiga* are as follows. Dr. Joel Filartiga, a Paraguayan known to oppose the Paraguayan Stroessner regime, and his daughter, Dolly, alleged that, in 1976, the defendant Pena-Irala, a Paraguayan police official, had kidnapped and tortured to death Dr. Filartiga's 17-year-old son, Joelito. They claimed he was killed in retaliation for his father's political activities. On the day of the murder, Dolly Filartiga was taken to Pena's home and confronted with her brother's body, which bore marks of severe torture. Thereafter, Filartiga commenced a murder action against Pena in a Paraguayan court. The action was still pending at the time of the Second Circuit opinion.

Pena entered the United States in 1978 on a visitor's visa and remained beyond the term of the visa, living in Brooklyn, New York. Dolly Filartiga, living in Washington, D.C., learned of his presence and notified the Immigration and Naturalization Service. She also filed a civil complaint against him, alleging that he had wrongfully caused her brother's death by torture and seeking compensatory and punitive damages of ten million dollars. Jurisdiction was claimed under the general federal question provision, 28 U.S.C. § 1331 (1976), and under the Alien Tort Statute, 28 U.S.C. § 1350 (1976). The District Court dismissed the complaint on jurisdictional grounds. In so doing, the trial court relied on prior cases in which the Second Circuit had defined the "law of nations" to encompass only relationships between states, or an individual and a foreign state, and not a state's treatment of its own citizens. *E.g., Dreyfus v. von Finck*, 534 F.2d 24, 30–31 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). It concluded that a Paraguayan plaintiff's suit against a Paraguayan defendant did not implicate the law of nations and, therefore,

plainants' allegations against the Palestine Information Office and the National Association of Arab Americans are too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 549 (D.D.C.1981). Jurisdiction over Libya is barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1976), which preserves immunity for tort claims unless injury or death occurs in the United States. 28 U.S.C. §§ 1604, 1605(a)(5) (1976).

did not fit within the jurisdictional limits of section 1350. The Second Circuit reversed the district court and remanded for further proceedings.

Section 1350 provides that a district court shall have original jurisdiction over civil actions "*by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*" In the absence of an allegation of a treaty violation, the critical issue in *Filartiga* was whether torture constitutes a violation of the law of nations. In determining that it does, Judge Kaufman reviewed the accepted sources of international law—the usage of nations, judicial opinions and the works of jurists—and concluded that *official torture* of both aliens and citizens is prohibited by the law of nations. 630 F.2d at 884. That section 1350 was enacted in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77, when world perceptions both of the role of international law and its substantive provisions differed considerably from perceptions of today, did not preclude this result. Judge Kaufman took guidance from *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (holding that the traditional prohibition against seizure of an enemy's coastal fishing vessels had ripened from a standard of comity into a settled rule of international law), and observed that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881.

The opinion thus established several propositions. First, the "law of nations" is not stagnant and should be construed as it exists today among the nations of the world. *Id.* Second, one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators. *Id.* at 884. Third, international law today places limits on a state's power to torture persons held in custody, and confers "fundamental rights upon all people" to be free from torture. *Id.* at 885. Fourth, section 1350 opens the federal courts for adjudication of the rights already recognized by international law. *Id.* at 887.

Because I am substantially in accord with these four propositions, and Judge Bork and Judge Robb apparently are not, I am unable to join in their opinions.

III. SECTION 1350 AS THE SOURCE OF THE "RIGHT TO SUE"

First, and most fundamentally, I diverge from the views of my colleague Judge Bork regarding the necessary elements of this court's jurisdiction. The Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations. In contrast, Judge Bork would deny jurisdiction to any plaintiff—presumably including those in *Filartiga*—who could not allege a specific right to sue apart from the language of section 1350 itself. In Part A, below, I outline the Second Circuit's formulation of section 1350 and summarize my reasons for endorsing it. In Part B, I offer an alternative formulation of section 1350 under which domestic tort law, not the law of nations, provides plaintiffs with the substantive right needed to trigger application of section 1350. I am less comfortable with the alternative formulation; however, in the face of the obscure history of section 1350, I would be remiss were I to ignore a tenable construction of this difficult statutory provision.

A. *Section 1350 Provides a Right of Action and a Forum: The* Filartiga *Formulation*

Judge Bork's suggestion that section 1350 requires plaintiffs to allege a right to sue granted by the law of nations is seriously flawed. Initially, it assumes that the "law of nations" could provide a specific, articulated right to sue in a form other than a treaty or executive agreement. Yet no evidence is offered to indicate that jurists or commentators have ever looked to the law of nations to determine when a wrongful deed is *actionable.* This absence of evidence is not surprising, because it is clear that "[i]nternational law itself, finally, does

not require any particular reaction to violations of law.... Whether and how the United States wished to react to such violations are domestic questions...." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972) (footnote omitted).

The law of nations thus permits countries to meet their international duties as they will, *see* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); *cf.* 1 C. HYDE, INTERNATIONAL LAW 729 n. 5 (2d rev. ed. 1945). In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in a United Nations Genocide Convention, which commits states to make genocide a crime, L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra,* or in bilateral or multilateral treaties. Otherwise, states may make available their municipal laws in the manner they consider appropriate. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3 comment h & illustration 5 (1965) (domestic law of a state may provide a remedy to a person injured by a violation of a rule of international law). As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard even to imagine that harmony ever would characterize this issue.

In consequence, to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the "law of nations" portion of section 1350. There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it "inoperative or superfluous, void or insignificant," 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973), and there exists a presumption against a construction yielding that result. *See Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office,* 515 F.2d 988, 994 (D.C. Cir.1975). Yet, the construction offered by Judge Bork would have the effect of voiding a significant segment of section 1350.[2]

Judge Bork argues that the statute retains meaning under his interpretation because he recognizes that the drafters of section 1350 perceived of certain offenses against the law of nations. He enumerates three offenses recognized by Blackstone—violation of safe-conducts, infringement of the rights of ambassadors, and piracy—and insists that these were the offenses that the drafters of section 1350 had in mind. This

2. In obvious contrast is a treaty, which may create judicially enforceable obligations when that is the will of the parties to it. *See People of Saipan v. Department of Interior,* 502 F.2d 90, 97 (9th Cir.1974) (elaborating criteria to be used to determine whether international agreement establishes affirmative and judicially enforceable obligations without implementing legislation), *cert. denied,* 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975). Unlike the law of nations, which enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms, treaties establish both obligations and the extent to which they shall be enforceable.

We therefore must interpret section 1350 in keeping with the fact, well-known to the framers of section 1350, that a treaty and the law of nations are entirely different animals. As Judge Bork states, for two hundred years it has been established that treaties by their terms and context may create enforceable obligations. Similarly, for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations. Section 1350 opened federal courts to aliens to challenge violations of treaties insofar as treaty terms expressly or impliedly established affirmative and judicially enforceable obligations. Congress also opened courts to aliens to challenge violations of the law of nations, to the extent that the law of nations established a binding obligation. Section 1350 thus provides a forum for actions brought to enforce obligations binding on parties, whether as a result of treaties or the law of nations. To argue that § 1350, under any formulation, could create a right to sue or somehow make all treaties self-executing, when parties to the treaties intend otherwise, is to throughly misconstrue the nature of treaty law.

explanation is specious, not responsive. Judge Bork does nothing more than concede that, in 1789, the law of nations clause covered three substantive offenses. However, under his construction of section 1350, this concession is meaningless unless it is also shown that the law of nations created a private right of action to avenge the three law of nations violations to which Blackstone averted—a showing that would require considerable skill since the law of nations simply does not create rights to sue. Indeed, in the very passage quoted by Judge Bork, Blackstone makes clear that it was the municipal laws of England, not the law of nations, that made the cited crimes offenses: "The principal offenses against the law of nations, *animadverted on as such by the municipal laws of England,* are of three kinds: 1. Violation of safeconducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 BLACKSTONE'S COMMENTARIES 67 (Welsby ed. 1854) (emphasis added). In short, under Judge Bork's construction of the statute, section 1350 would lose virtually all meaning.

Equally basic, to require an express right to sue is directly at odds with the language of the statute, which grants jurisdiction over civil actions for a tort "committed in violation of the law of nations." Unlike section 1331, which requires that an action "arise under" the laws of the United States, section 1350 does not require that the action "arise under" the law of nations, but only mandates a "violation of the law of nations" in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350. Judge Bork nevertheless would propose to write into section 1350 an additional restriction that is not even suggested by the statutory language. Congress, of course, knew full well that it could draft section 1350 with "arising under" language, or the equivalent, to require a "cause of action" or "right to sue," but it chose not to do so.[3] There simply is no basis in the language of the statute, its legislative history or relevant precedent to read section 1350 as though Congress had required that a right to sue must be found in the law of nations.[4]

3. It might be argued that in 1789 Congress had not enacted general federal question jurisdiction, with its "arising under" provision, and could not have used that phraseology as a reference point. Not until 1875 did Congress give federal courts general original jurisdiction over federal question cases. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. However, in its original form, the predecessor to § 1350 did not contain the word "committed." The pertinent part of the clause granted jurisdiction "where an alien sues for a tort only in violation of the law of nations." The word "committed" appears in a 1948 recodification of the Judicial Code, Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934, but was absent in earlier recodifications. *See, e.g.,* Act of Mar. 3, 1911, ch. 231, § 24, par. 17, 36 Stat. 1087, 1093. By 1948 the term "arising under" was a well-established element of federal question jurisdiction, *see American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (a suit "arises under" the law that creates the action), and would have been the obvious choice of wording had Congress wished to make explicit that, in order to invoke § 1350, a right to sue must be found in the law of nations.

4. I disagree both with Judge Bork and with plaintiffs in this action that for purposes of the issues raised in this case, the jurisdictional requirements of § 1331 and § 1350 are the same.

However, for several reasons I believe plaintiffs' claim under § 1331 fails as well. My analysis on that issue proceeds on two paths, depending on whether the plaintiff is a citizen or an alien.

As to aliens, most of the plaintiffs here, jurisdiction under § 1331 is available at least to the extent that § 1350 applies. If it does, their action "arises under" § 1350 and, therefore, under a law of the United States, as required by § 1331.

Citizens of the United States, in this action the Tel-Oren plaintiffs, do not meet the alienage requirement of § 1350 and must seek other law under which their action might arise. The only plausible candidate is the law of nations itself.

Assuming, without deciding, that the law of nations constitutes a law of the United States for § 1331 jurisdictional purposes, *see* Moore, *Federalism and Foreign Relations,* 1965 DUKE L.J. 248, 291–97 (arguing that § 1331 includes cases arising under a federal decisional law of foreign relations); *cf.* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 222–23 (1972) (federal courts determine international law and apply it as though it were federal law), the language of § 1331, unlike § 1350, suggests that plaintiffs must identify a remedy granted by the law of

Indeed, a 1907 opinion of the United States Attorney General suggests just the opposite. It asserts that section 1350 provides both a right to sue and a forum. Responding to an inquiry about the remedies available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River, the Attorney General wrote,

> As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes *provide a right of action and a forum.* Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction "of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." ... *I repeat that the statutes thus provide a forum and a right of action.* I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.

26 Op. Att'y Gen. 250, 252–53 (1907) (emphasis added). The opinion bolsters the view of the Second Circuit,[5] which I endorse, that section 1350 itself provides a right to sue for alleged violations of the law of nations.[6]

Judge Bork, in his rejection of *Filartiga*, reasons as follows: (a) international law grants plaintiffs no express right to sue in a municipal court; (b) for numerous reasons, primarily related to separation of powers, it would be inappropriate to imply one; (c) since section 1350 requires that international law give plaintiffs a cause of action, and it does not, we cannot find jurisdiction. In my view, the first two steps in the analysis are irrelevant and the third step is erroneous. The decision in *Filartiga* did not hold that, under section 1350, the law of nations must provide a cause of action—that is, a right to sue—in order to find jurisdiction. The existence of an express or implied cause of action was immaterial to the jurisdictional analysis of the Second Circuit. By

nations or argue successfully for one to be implied. Plaintiffs here are not able to point to a right to sue in international law and I decline to imply one, given my belief, set out *supra*, that the law of nations consciously leaves the provision of rights of action up to the states.

As an alternative basis for declining § 1331 jurisdiction, I note that the law of nations quite tenably does not provide these plaintiffs with any substantive right that has been violated. As I discuss at length in Section VI of this opinion, I do not believe that the law of nations, as currently developed and construed, holds individuals responsible for most private acts; it follows logically that the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal court. Thus, even if the law of nations constitutes a law of the United States, and even if § 1331 did not require that a right to sue be granted by the relevant law of the United States, plaintiffs still would have no § 1331 jurisdiction because no legal right has been violated.

5. The Second Circuit read § 1350 "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga*, 630 F.2d at 887. I construe this phrase to mean that aliens granted substantive rights under international law may assert them under § 1350. This conclusion as to the meaning of this crucial yet obscure phrase results in part from the noticeable absence of any discussion in *Filartiga* on the question whether international law granted a right of action.

6. While opinions of the Attorney General of course are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking. *See, e.g., Oloteo v. INS*, 643 F.2d 679, 683 (9th Cir.1981) (opinion deserves some deference); *Montana Wilderness Ass'n v. United States Forest Serv.*, 496 F.Supp. 880, 884 (D.Mont. 1980) (opinions are given great weight although not binding), *aff'd, in part*, 655 F.2d 951 (9th Cir.1981), *cert. denied*, 455 U.S. 989 (1982); *Pueblo of Taos v. Andrus*, 475 F.Supp. 359, 365 n. 4 (D.D.C.1979); *cf. Blake v. Kline*, 612 F.2d 718, 724 n. 13 (3d Cir.1979) (state attorney general opinions are entitled to great respect and should be followed where judicial decisions construing statute are lacking) (citing *In re Jackson*, 268 F.Supp. 434, 443 (E.D.Mo.), *aff'd, Zuke v. Mercantile Trust Co.*, 385 F.2d 775 (8th Cir.1967)) *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112 (1980).

focusing on this issue, Judge Bork has skirted the threshold question whether the statute even requires that the law of nations grant a cause of action. I do not believe that the statute requires such a finding, or that the decision in *Filartiga* may be lightly ignored.

At this point, it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the *Filartiga* formulation. Judge Kaufman characterized the torturer in *Filartiga* as follows: "Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890. The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them. As one writer has explained,

> Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis*.' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character.... Piracy is a so-called 'international crime'; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

1 L. OPPENHEIM, INTERNATIONAL LAW § 272, at 609 (H. Lauterpacht 8th ed. 1955) (footnote omitted); *see also id.* § 151, at 339 (every state can punish crimes like piracy or slave trade on capture of the criminal, whatever his nationality); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV.L.REV. 334, 335 (1925). Judge Kaufman did not argue that the torturer is like a pirate for criminal prosecution purposes, but only for civil actions. The inference is that persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law. To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent.Draft No. 3, 1982), which enumerates as violations of international law state-practiced, -encouraged or -condoned (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights. *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV.INT'L L.J. 53, 90 (1981) (focusing on genocide, summary execution, torture and slavery as core human rights violations). I, of course, need not determine whether each of these offenses in fact amounts to a law of nations violation for section 1350 purposes. The point is simply that commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms, *see* Blum & Steinhardt, *supra*, at 87–90—and in the process are defining the limits of section 1350's reach.[7]

The *Filartiga* formulation is not flawless, however. While its approach is consistent with the language of section 1350, it places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the "law of nations"—standards of liability applicable in concrete situations. The difficult law of nations questions animating this particular case suggest the burden that

7. Indeed, international law itself imposes limits on the extraterritorial jurisdiction that a domestic court may exercise. It generally recognizes five theories of jurisdiction, the objective territorial, national, passive, protective and universal. *See* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 402 (Tent.Draft No. 2, 1981); *see also United States v. James-Robinson*, 515 F.Supp. 1340, 1344 n. 6 (S.D.Fla.1981). The premise of universal jurisdiction is that a state "may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern." RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED), *supra*, § 404, even where no other recognized basis of jurisdiction is present.

would attach to each case of this kind. In the 18th century this pursuit was no doubt facilitated both by a more clearly defined and limited body of "international crimes" than exists today, and by the working familiarity of jurists with that body of law. Although I am convinced that it is possible to discover governing standards of liability, the formidable research task involved gives pause, and suggests consideration of a quite plausible alternative construction of section 1350.

B. *An Alternative Approach: Municipal Law as the Standard of Liability*

Under an alternative formulation, section 1350 may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged. Unlike the first approach, set out above, the substantive right on which this action is based must be found in the domestic tort law of the United States. The text of the 1789 Judiciary Act, coupled with the concerns of 18th century legal scholars for a single judicial voice on foreign affairs, as expressed in the Federalist Papers and elsewhere, provide some support for this interpretation of the statute.[8] However, the formulation also raises a host of complex problems of its own.

1. *Historical Underpinnings*

I begin by tracing the historical setting in which the original section 1350 was drafted. The First Judiciary Act granted to circuit courts

> original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. This early grant of diversity jurisdiction opened federal courts to civil suits by aliens, provided they were able to meet the requisite jurisdictional amount.[9] Not content to treat aliens like citizens of a non-forum state, the drafters also gave district courts concurrent original jurisdiction with both state courts and 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." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. There is evidence, set out *infra*, that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis. If left with diversity jurisdiction alone, aliens would have to turn to state courts to bring actions below the jurisdictional amount. Concern that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin, might have led the drafters to conclude that aliens should have the option of bringing suit in federal court, whatever the amount in controversy.[10]

8. One § 1350 case, discussed at length, *infra*, has adopted this framework, *see Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), and one law review note has endorsed the approach. *See* Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L.Rev. 105, 123 (1979).

9. Despite confusion in an early case, *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264, 2 L.Ed. 266 (1804), by 1809 it was clear that the Constitution bars extending diversity jurisdiction to suits between aliens. *See Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 3 L.Ed. 108 (1809).

10. It might also be argued that § 1350 addressed actions for tortious violations only of the law of nations, not domestic law, and that the 1789 Act's grant of diversity jurisdiction covered domestic torts only. However, when the 1789 Judiciary Act was drafted, lawyers had no doubt that the law of nations was a part of the common law encompassed by the diversity jurisdiction statute. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States (pt. 1)*, 101 U.Pa.L.Rev. 26, 27 (1952); 4 Blackstone's Commentaries 66–67 (Welsby ed. 1854); *see also Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116–17, 1 L.Ed. 59 (1784) (common law criminal prosecu-

The Federalist Papers demonstrate unequivocally the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field...." *Hines v. Davidowitz*, 312 U.S. 52, 62 n. 9, 61 S.Ct. 399, 401 n. 9, 85 L.Ed. 581 (1941) (citing THE FEDERALIST Nos. 3, 4, 5, 42 & 80). The Constitution reflects this concern with an array of techniques for centralizing foreign relations, including Article III, § 2, which extends judicial power, *inter alia*, to controversies between a state or its citizens and foreign states, citizens or subjects.

This interest in the rights of aliens is hardly surprising when considered in the context of early American history and traditional precepts of the law of nations. Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory. 1 L. OPPENHEIM, INTERNATIONAL LAW § 165a, at 366 (H. Lauterpacht 8th ed. 1955). If the court's decision constitutes a denial of justice,[11] or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation. *See* J. BRIERLY, THE LAW OF NATIONS 284–91 (6th ed. 1963). The focus of attention, then, was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien. For these acts, the United States was responsible.

Alexander Hamilton outlined precisely this fear as justification for the Constitution's grant of federal jurisdiction for all cases involving aliens:

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

THE FEDERALIST No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961).[12] Having raised the specter of war to convince his readers that "the peace of the *whole* ought not to be left at the disposal of a *part*," *id.* at 535 (emphasis in original), Hamilton considered whether he should distinguish between "cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law." *Id.* at 536. He wrote,

tion for violation of law of nations); *cf.* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV.L.REV. 49, 73 (1923) (arguing that federal courts were intended to assert both statutory and common law criminal jurisdiction, including over law of nations offenses). Section 1350 therefore offered to aliens who could meet the diversity jurisdiction criteria, and therefore bring an action in the circuit court, an alternative forum, under some circumstances. For aliens unable to meet those criteria, § 1350 opened the district courts for assertion of their claims.

11. Brierly enumerates "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it" as instances of a denial of justice. J. BRIERLY, THE LAW OF NATIONS 287 (6th ed. 1963).

12. Similarly, at the Virginia Convention James Madison said, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 ELLIOT'S DEBATES 583 (1888). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & M. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17 (2d ed. 1973) (concluding that "the need for a grant [of federal judicial power] going beyond cases involving treaties and foreign representatives seems to have been undisputed"). *But see* Warren, *supra* note 10, at 56 & n. 19 (1923) (among the proposed amendments to the Constitution was "the elimination of all jurisdiction based on diverse citizenship and status as a foreigner").

The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci,* would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

Id. See also Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789,* 14 U.S.F.L.Rev. 105, 113–15 & nn. 62–65 (1979). *Cf.* The Federalist No. 3 (J. Jay), No. 42 (J. Madison).[13]

The First Judiciary Act clearly did not go as far as Hamilton might have hoped. It withheld much of the judicial power that constitutionally might have been granted—for example, federal courts did not have complete federal question jurisdiction until 1875[14]—and enumerated relatively narrow criteria for subject matter jurisdiction. In particular, diversity jurisdiction under the Act kept out of federal court aliens who could not plead the jurisdictional amount or complete diversity. Given the fears articulated by Hamilton and others, it is easy to speculate that the drafters were worried about possible repercussions from a state's denial of justice to an alien in any action, no matter how slight in monetary value. Recall, in this regard, Hamilton's concerns about any incident, even one "wholly relative to the *lex loci.*" The Federalist No. 80 (A. Hamilton). As Hamilton noted, whatever the fears attaching to "merely" local actions, civil suits also implicating the law of nations were surely fit for federal adjudication. Since the five hundred dollar limit created the potential for mischief by state courts, it would have been logical to place under federal jurisdiction at least the local actions most likely to create international tension. Recalling that each additional statutory grant of federal jurisdiction to lower courts was the product of struggle and compromise, *cf.* Warren, *supra* note 10, at 53–54, it would hardly be surprising that the section 1350 grant, too, reflects a compromise between, on the one hand, placing all actions involving aliens in federal courts and, on the other hand, reserving to state courts exclusive jurisdiction over all civil actions at common law and in equity.

Curiously, the language of the original section 1350, as well as its location in the Judiciary Act, can be construed to support either the *Filartiga* or the alternative formulation for the application of section 1350. As it appeared in section 9 of the 1789 Judiciary Act, the predecessor to section 1350 granted district courts jurisdiction, "concurrent with the courts of the several States, or the circuit courts, as the case may be."[15] A logical inference is that some

13. This formulation of § 1350's underlying intent casts doubt on the appropriateness of federal jurisdiction over suits between two aliens. The United States might be less concerned about the appearance of condoning a wrongful act if its own citizen were not the perpetrator, because the state of the wrong-doer should provide the forum for relief, or suffer the consequences. However, let us assume a tort is committed by an alien against an alien of different nationality, and the injured alien sues the offender under a state's tort law. No diversity jurisdiction exists. *See Hodgson & Thompson v. Bowerbank,* 9 U.S. (5 Cranch) 303, 3 L.Ed. 108 (1809). A denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other. While the potential for retribution is not direct, it would seem to be present, particularly when the tort occurs on United States soil.

14. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

15. In the First Judiciary Act, district courts were granted original jurisdiction over a mixture of actions. The complete authorization was as follows:

> Sec. 9. *And be it further enacted,* That the district courts shall have, exclusively of

actions cognizable in the circuit courts also were cognizable under section 1350. The carefully delimited diversity jurisdiction of the circuit courts was set out in section 11; that section included the grant of jurisdiction, "of all suits of a civil nature at common law or in equity," in which an alien is a party, and no other grant of civil jurisdiction in actions involving aliens.[16] The section 9 reference to concurrent jurisdiction with the circuit courts therefore might reasonably have referred to actions by an alien "at common law or in equity," for a tort, involving more than five hundred dollars—in other words, to domestic torts cognizable under diversity jurisdiction. However, the reference to concurrent circuit court jurisdiction might also refer to actions implicating the law of nations; both courts would have had jurisdiction over such actions, circuit courts as an element of their common law jurisdiction, and district courts directly. In that case, the mention of concurrent jurisdiction would support the *Filartiga* formulation for the application of section 1350.

The structure of the Act also provides support for both the *Filartiga* and the alternative formulations. A comparison of district and circuit court jurisdiction discloses that while each had its own classes of cases, the circuit courts were the more significant

the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United states, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance for all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And 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.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

1 Stat. 73, 76–77 (footnotes omitted) (emphasis added).

16. The circuit courts received much broader original jurisdiction than the district courts. The authorization was as follows:

> Sec. 11. *And be it further enacted*, That the circuit courts shall have *original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars*, and the United States are plaintiffs, or petitioners; *or an alien is a party*, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.

1 Stat. 73, 78–79 (footnotes omitted) (emphasis added).

courts of general original jurisdiction. *See* notes 15 and 16, *supra*. The district court was viewed "primarily as [a] court[] of special jurisdiction," 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 475 (1971), and "as a very inferior court indeed." *Id.* at 473. The district court judge was to be "the resident expert" on his state's jurisprudence, *id.*, and actions placed in district courts were in essence local. Moreover, district court actions were in some respects minor versions of actions eligible to be brought in the circuit courts. Thus while the circuit courts—staffed by a district court judge and two Supreme Court Justices, pursuant to section 4 of the Act—had exclusive jurisdiction of "all crimes and offenses cognizable under the authority of the United States," with some exceptions, the district courts also had jurisdiction over less serious crimes. Similarly, the district courts could hear actions that did not meet the amount in controversy necessary for circuit court diversity jurisdiction.[17]

While the parallel between greater and lesser punishments and greater and lesser amounts in controversy might be persuasive, the district courts also had admiralty and maritime jurisdiction. That power suggests these courts were not merely local petty action tribunals but important forces in the enforcement of maritime law. The drafters' decision to grant district courts admiralty jurisdiction suggests perhaps that the district courts were perceived as appropriate tribunals to handle matters affecting foreign states. It is perhaps anomalous that drafters concerned that decentralized courts might spark international conflict would place in a local court complete control over actions implicating the laws of nations, rather than using that court solely as a diversity jurisdiction catch-all. However, because district courts were located in each state, while circuit courts were scattered more sparsely, Judiciary Act of 1789, ch. 20, §§ 2–5, 1 Stat. 73, 73–75, district court jurisdiction also made federal courts more accessible to aliens, and thereby facilitated their actions.

2. *A Paradigm of the Alternative Formulation:* Adra v. Clift

To probe the mechanics of the alternative formulation for the application of section 1350, I turn to the single case in which it has been adopted. In *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), a Lebanese plaintiff, then Ambassador to Iran, sued his former wife, a Turkish-born Iraqi national resident in the United States, and her American husband under section 1350. The plaintiff contended that he was legally entitled to custody of his daughter by his former wife, that the daughter was wrongfully being withheld from him, and that defendants had concealed the child's name and nationality by falsifying her passport, in violation of the law of nations. The court found jurisdiction to exist by identifying a purely municipal tort—"[t]he unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody." 195 F.Supp. at 862. The court then determined that the defendant had misused her Iraqi passport by including her Lebanese child on it, in order to conceal the child's name and nationality. The misuse of a passport was found to constitute a violation of the law of nations, and jurisdiction was established.

If we change the facts slightly in *Adra v. Clift*, and assume both defendants are American citizens, the case becomes a paradigm of the alternative formulation for the application of section 1350.[18] Diversity jurisdiction is unavailable if the amount in controversy is not met. The action is grounded directly on a domestic tort but implicates an international law violation. If plaintiff were denied justice, that denial might be perceived in Lebanon, plaintiff's

17. To be sure, the parallel is not perfect, since district courts could hear actions for any amount in controversy if they met the former § 1350's requirements.

18. As noted earlier, I have some misgivings about the propriety of § 1350 actions between two aliens under this formulation. *See* note 13, *supra*.

home state, as an affront by the United States itself.

At this juncture it is worthwhile to observe that the second formulation is not susceptible of the same criticism as the first—that the district court would have difficulty parsing the law of nations for an applicable legal standard. It is apparent that because domestic law provides the standard, the burden of discovering that standard is removed. However, the *Adra* case suggests that this formulation raises some thorny questions of its own.

Under the alternative approach suggested by *Adra*, the law of nations violation is only one aspect of a multifaceted jurisdictional test and apparently need not be so rigidly defined as under the first approach adopted by *Filartiga*. The *Filartiga* formulation posits a violation of the law of nations as the trigger for section 1350 jurisdiction. The *Adra* formulation adopts a two-step jurisdictional test, requiring what would appear to be a looser allegation of a law of nations offense, coupled with a municipal tort.[19] That *Adra* eschewed the analysis that would have been required under the *Filartiga* approach, and instead spoke only in general terms about the law of nations, suggests a less rigorous showing under the law of nations would be mandated under the *Adra* approach.

The court in *Adra* might convincingly have argued that passport abuse amounts to a serious law of nations violation. The argument would be that countries are entitled, under the law of nations, to rely on passports as evidence of fact, *see Kent v. Dulles*, 357 U.S. 116, 120–21, 78 S.Ct. 1113, 1115–16, 2 L.Ed.2d 1204 (1958) (quoting *Urtetiqui v. D'Arbel*, 34 U.S. (9 Pet.) 692, 9 L.Ed. 276 (1835)), and that nations that do rely are responsible, also under that law, for the safe passage of the passport holder. *See* 4 BLACKSTONE'S COMMENTARIES 68–69 (Welsby ed. 1854). Fraudulent use by an individual might therefore disrupt states' recognized duties, which are grounded in reliance on a passport's authenticity. Misuse by a person entrusted to abide by international norms would amount to a law of nations violation.

The *Adra* court made no effort to tease out of international law an explicit duty, placed on individuals, that had been violated. Instead, it merely identified the important role that passports play in the international arena, implicitly concluded that the defendants were obliged by the law of nations to adhere to international norms regarding passports, and determined that their failure to do so constituted the requisite violation.

That section 1350 jurisdiction might be triggered by offenses less severe than are required under the *Filartiga* formulation gives rise to a new question: how much less severe? No doubt the law of nations condemns passport violations; whether they reach the level of international crimes is another matter entirely. Perhaps the two approaches focus on different segments of the spectrum of international offenses. In the range from the petty to the heinous, the first formulation might look to the upper range only—to those acts that are recognized as international crimes—while the second might encompass a wider scope. It might, for example, refer to a violation of any of the many duties imposed on nations by international law, as set out in detail in the Restatement (Second) of Foreign Rela-

19. Because even under this approach the *Hanoch* plaintiffs do not allege a law of nations violation, it is unnecessary to consider Article III implications of the formulation. It would appear, however, that there are no serious Article III problems associated with the *Adra*-type application of § 1350.

If § 1350 is limited to actions by aliens against citizens, *see* note 13, *supra*, then constitutional diversity jurisdiction exists.

If § 1350 is read more broadly to cover alien versus alien suits, it might still be possible to find that the action arises under the laws of the United States. This is so because the law of nations is "an ingredient" of this action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), and is also an integral part of the laws of this country, *see The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). Therefore, since any action under the *Adra* formulation would involve as a threshold issue the law of nations, it would "arise under" the laws of the United States for Article III purposes.

tions Law. That is an issue with which any future court accepting the *Adra*-type formulation must grapple, however. I need not test the limits of each standard, for while I have no doubt that the official torture cited in *Filartiga* violated the law of nations by any definition, I am not convinced that the unofficial acts at issue in this case in any way implicated the law of nations.

I note, however, that it is thoroughly inconsistent with the impetus behind section 1350 under the *Adra* formulation—to keep the United States *out* of international confrontations—to construe the statute to enable courts to burrow into disputes wholly involving foreign states. I therefore believe the *Adra* formulation makes sense only if construed to cover actions by aliens for domestic torts that occur in the territory of the United States and injure "substantial rights" under international law, *see* 26 Op. Att'y Gen. 250, 252–53 (1907), or for universal crimes, as under the first formulation, or for torts committed by American citizens abroad, where redress in American courts might preclude international repercussions.

Not surprisingly, these limits are consistent with the basic parameters that international law establishes for a domestic court's exercise of jurisdiction over extraterritorial activities. *See* Restatement of the Law of Foreign Relations (Revised) §§ 402–404 (Tent.Draft No. 2, 1981) (enumerating permissible bases of "jurisdiction to prescribe," applicable both to criminal and civil law). They are not, contrary to Judge Bork's assertion, my own "unguided policy judgments," but rather the well-established, prudential judgments of the law of nations. Of course, other municipal law doctrines pertaining to a court's exercise of jurisdiction, such as *forum non conveniens* and attainment of personal jurisdiction, must be met as well.

A second difficult question raised by the facts in *Adra* involves the requisite nexus between the domestic and the international tort. The *Adra* court applied, at best, a "but for" causation test to determine whether the international and domestic torts were sufficiently related to establish jurisdiction. "But for" the passport abuse, defendants could not have concealed the daughter's entry into the United States, and therefore could not have retained custody. This framework opens the courts to a potential deluge of actions. In this case, for example, plaintiffs might have alleged that the PLO violated Israeli immigration laws by landing in Israel without passports, perhaps skirting the problem, addressed *infra*, of individual liability for torture. The formulation poses the difficult question of the necessary degree of convergence between the domestic and international tort. Had I to address the issue, I would recall my basic premise—that the intent of the statute was to avoid or mitigate international conflict—and determine what degree of overlap would be required to achieve that goal. However, since the *Hanoch* plaintiffs focus on one event alone, the issue is not directly presented.

C. *A Summary Comparison of the* Filartiga *and* Adra *Formulations*

From the foregoing analysis it is clear that the *Filartiga* and *Adra* formulations might produce radically different results. *Adra v. Clift* itself is an example. Under its facts, jurisdiction would fail under the *Filartiga* formulation, because the law of nations violation, even if sufficiently severe, caused plaintiff no harm, and plaintiff could not sue under section 1350 for the domestic tort. In contrast, the facts of *Filartiga* would likely produce a finding of jurisdiction under either the *Filartiga* or *Adra* formulation. Whatever the difference in the formulations, however, they do have in common one crucial characteristic: under neither one must plaintiffs identify and plead a right to sue granted by the law of nations. On that point, I espy no reason in the statutory language, history, or case law to conclude otherwise.

IV. Meaning of the "Law of Nations"

In addition to our disagreement over the "right to sue" issue, I also have great diffi-

culty in understanding Judge Bork's effort to restrict the scope of section 1350 to the principal offenses against the law of nations recognized centuries ago by Blackstone, *see* text at notes 2–3, *supra,* instead of construing it in accord with the current definition of the law of nations. While conceding that the legislative history offers no hint of congressional intent in passing the statute, my colleague infers Congress' intent from the law of nations at the time of the passage of section 1350. The result of this analytical approach is to avoid the dictates of *The Paquete Habana* and to limit the "law of nations" language to its 18th century definition. In *The Paquete Habana,* the Supreme Court noted that, in construing the "law of nations,"

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700, 20 S.Ct. at 299. As was pointed out in *Filartiga,*

> *Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." *Id.* at 694, 20 S.Ct. at 297; *accord, id.* at 686, 20 S.Ct. at 297. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *See Ware v. Hylton,* 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

630 F.2d at 881.

In light of the evidence at hand, it seems clear beyond cavil that violations of the "law of nations" under section 1350 are not limited to Blackstone's enumerated offenses. Indeed, the Supreme Court stated as much almost a century ago, when it announced that counterfeiting of foreign securities constitutes an offense against the law of nations. *See United States v. Arjona,* 120 U.S. 479, 7 S.Ct. 628, 30 L.Ed. 728 (1887).

V. The Duty to Exercise Jurisdiction

To the extent that Judge Bork rejects the *Filartiga* construction of section 1350 because it is contrary to his perception of the appropriate role of courts, I believe he is making a determination better left to Congress. It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute. If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions "exacerbate tensions" and should not be heard.

To be sure, certain judge-made abstention rules, such as the Act of State Doctrine, require courts to decline to reach certain issues in certain instances, notwithstanding a statutory grant of jurisdiction. Where the Act of State Doctrine applies, the Supreme Court has directed the courts not to inquire into the validity of the public acts of a *recognized* foreign sovereign 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). The doctrine does *not* require courts to decline jurisdiction, as does the Foreign Sovereign Immunities Act, but only not to reach the merits of certain issues. As Judge Bork admits, the doctrine is not controlling here. Indeed, to apply it at this stage of the case would be to grossly distort the doctrine, first by considering it as a jurisdictional issue, and second, by extend-

ing it beyond its carefully limited confines. Unless and until the Supreme Court reconsiders the Act of State Doctrine and applies it as a jurisdictional matter to acts by nonrecognized entities committed in the territory of a recognized state, it simply is not relevant to this case.

While not claiming that the Act of State Doctrine controls, Judge Bork looks for guidance toward the concerns that he believes animate it. To ignore the Supreme Court's cautious delineation of the doctrine in *Banco Nacional de Cuba v. Sabbatino* and its progeny, and to cite the doctrine's rationale as broad justification for effectively nullifying a statutory grant of jurisdiction, is, to my view, an inappropriate exercise of lower federal court power. It is particularly so in this case, given the considerable disagreement among the Justices regarding the rationale, scope, and flexibility of the doctrine, *see First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773–76, 92 S.Ct. 1808, 1816–17, 32 L.Ed.2d 466 (1972) (Powell, J., concurring in judgment), and congressional efforts to override judicial abdication of the kind directed by the Act of State Doctrine. *See* 22 U.S.C. § 2370(e) (1976) (barring judicial invocation of Act of State Doctrine in certain expropriation actions).

My troubles with Judge Bork's efforts to limit the reach of section 1350 go even deeper. Contrary to my colleague's intimations, I do recognize that there are separate branches of Government. In fact, that is precisely my point. I am the first to admit that section 1350 presents difficulties in implementation, but to construe it out of existence on that ground is to usurp Congress' role and contravene its will.

Judge Bork virtually concedes that he is interposing a requirement that the law of nations provide a right to sue simply to void a statute of which he does not approve—and to avoid having to extend and distort existing doctrine on nonjusticiability to reach the same result. As a first step, he sets forth an interpretation of the statute that completely writes out of the statute the clause at issue. The law of nations provides no private right to sue for the only offenses against the law of nations that he recognizes. Under his view, therefore, the clause in the statute had no meaning when passed by Congress and none today. To enforce a construction that yields that result is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature.

Logically, of course, under Judge Bork's formulation, were the law of nations ever to provide a right to sue, federal courts would have to hear the cases. To avoid this contingency, Judge Bork adds yet another obstacle, stating that "considerations of justiciability" would, necessarily, come into play in that event. With this remark, Judge Bork virtually concedes that he would keep these cases out of court under any circumstance, and he places himself squarely beside Judge Robb, who advocates dismissal of this action on political question grounds. Vigorously waving in one hand a separation of powers banner, ironically, with the other he rewrites Congress' words and renounces the task that Congress has placed before him.

Most surprisingly, Judge Bork's analysis—and his critique of my own—*completely* overlooks the existence of state courts. Subject to the same constraints that face federal courts, such as personal jurisdiction, and perhaps in some instances to other limitations, such as preemption, state courts could hear many of the common law civil cases, brought by aliens, that Judge Bork believes should not be heard at all. As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist—as Judge Bork assumes—but to provide an *alternative* forum to state courts. Indeed, the Supreme Court has at least twice cited section 1350 as a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 & n. 25, 84 S.Ct. 923, 939 & n. 25, 11 L.Ed.2d 804 (1964); *Ex Parte Quirin*,

317 U.S. 1, 27–30 & n. 6, 63 S.Ct. 1, 10–12 & n. 6, 87 L.Ed. 3 (1942). Not only is it patently indefensible to ignore this mandate. It is also erroneous to assume that the troublesome cases will disappear altogether from state courts, as well as federal, if section 1350 becomes mere historical trivia. In that event, no doubt, my colleagues would either assert nonjusticiability generally or turn the issue on its head and argue, precisely as the section 1350 drafters recognized, that state courts are inappropriate fora for resolution of issues implicating foreign affairs.

VI. Liability of the Non-State Actor Under the Law of Nations

While I endorse the legal principles set forth in *Filartiga,* I also believe the factual distinctions between this case and the one faced by the Second Circuit mitigate its precedential value in this case. To be sure, the parallels between the two cases are compelling. Here, as in *Filartiga,* plaintiffs and defendants are both aliens. Plaintiffs here allege torture in their complaint, as did plaintiffs in *Filartiga.*[20] Here, as in *Filartiga,* the action at issue undoubtedly violated the law of the nation in which it occurred (in this case, the law of Israel). *See Filartiga,* 630 F.2d at 889.

The two fact patterns diverge, however, on the issue of *official torture.* The Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law. In contrast, the Paraguayan official in *Filartiga* acted under color of state law, although in violation of it. The Second Circuit surveyed the law of nations and concluded that *official torture* constituted a violation. Plaintiffs in the case before us do not allege facts to show that official or state-initiated torture is implicated in this action. Nor do I think they could, so long as the PLO is not a recognized member of the community of nations.[21]

20. On the basis of international covenants, agreements and declarations, commentators have identified at least four acts that are now subject to unequivocal international condemnation: torture, summary execution, genocide and slavery. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv.Int'l L.J. 53, 90 (1981); *see also* P. Sieghart, The International Law of Human Rights 48 (1983) (cataloguing as recognized international crimes certain war crimes, crimes against humanity, genocide, apartheid and, increasingly, torture). Plaintiffs in this action allege both torture and murder that amounts to summary execution. *Filartiga* accepted the view that official torture in fact amounts to a law of nations violation. Analysis along the same lines would likely yield the conclusion that state-sponsored summary executions are violations as well. However, by definition, summary execution is "murder conducted in uniform," as opposed to lawful, state-imposed violence, Blum & Steinhardt, *supra,* at 95, and would be inapplicable here. *See id.* at 95–96. Therefore, for purposes of this concurrence, I focus on torture and assume, *arguendo,* that torture amounts to a violation of the law of nations when perpetrated by a state officer. I consider only whether non-state actors may be held to the same behavioral norms as states.

21. Our courts have in the past looked to the foreign policy of this nation, in particular to the recognition or non-recognition of a foreign government, to determine the applicability of a given legal doctrine. For example, in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Supreme Court explicitly tied the application of the Act of State Doctrine to whether the foreign state was recognized by the United States. *See* 376 U.S. at 401, 428, 84 S.Ct. at 926, 940. *See also Oetjen v. Central Leather Co.,* 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (Supreme Court takes judicial notice of Washington's recognition of Mexican government, applies Act of State Doctrine retroactively to pre-recognition incidents). Indeed, the Court has made clear that the judiciary is not to second guess the determination of the other branches as to "[w]ho is the sovereign, *de jure* or *de facto,* of a territory." *Oetjen,* 246 U.S. at 302, 38 S.Ct. at 311. We therefore are bound by the decision of the Executive not to recognize the PLO, and we must apply international law principles accordingly.

I note, however, that it is conceivable that a state not recognized by the United States is a state as defined by international law and therefore bound by international law responsibilities. To qualify as a state under international law, there must be a people, a territory, a government and a capacity to enter into relations with other states. *See* 3 U.N. SCOR (383d Mtg.) at 9–12, U.N. Doc. S/P.V. 383, pp. 21–35 (1948) (remarks of Professor Philip C. Jessup advocating Israeli membership in the

A. *The Lack of Consensus on Individual Responsibility*

The question therefore arises whether to stretch *Filartiga*'s reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law. The extension would require this court to venture out of the comfortable realm of established international law—within which *Filartiga* firmly sat—in which states are the actors.[22] It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. Would terrorists be liable, because numerous international documents recognize their existence and proscribe their acts? *See generally* R. LILLICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (1982) (reprinting numerous international anti-terrorism accords); *see also* Lauterpacht, *The Subjects of the Law of Nations (pt. 1),* 63 L.Q. REV. 438, 444–45 (discussing international obligations of insurgents). Would all organized political entities be obliged to abide by the law of nations? Would *everybody* be liable? As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point. Therefore, heeding the warning of the Supreme Court in *Sabbatino,* to wit, "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it," 376 U.S. at 428, 84 S.Ct. at 940. I am not prepared to extend the definition of the "law of nations" absent direction from the Supreme Court. The degree of "codification or consensus" is simply too slight.

While I do not believe that international harmony exists on the liability of private individuals, it is worth noting that a number of jurists and commentators either have assumed or urged that the individual is a subject of international law. *See Lopes v. Reederei Richard Schroder,* 225 F.Supp. 292, 297 (E.D.Pa.1963) (violation of law of nations, in section 1350, means, "at least a violation by one or more individuals"); *Adra v. Clift,* 195 F.Supp. 857 (D.Md.1961) (individual violation of law of nations); Judgment of the International Military Tribunal, 22 Trial of the Major War Criminals Before the International Military Tribunal, Proceedings, 411, 465–66 (1948), 41 AM.J. INT'L L. 172, 220–21 (1947) (international law "imposes duties and liabilities upon individuals as well as upon States"), *reprinted in* The Nuremberg Trial 1946, 6 F.R.D. 69, 110–11 (1947); G.A.Res. 95, UN.Doc. A/64/Add. 1, at 188 (1947) (affirming Nuremberg principles); *see also* Sohn, *supra* note 22, at 9–11 (summarizing shift since 1945 in individual rights and duties under international law); Note, *The Law of Na-*

United Nations), *quoted in* Liang, *Notes on Legal Questions Concerning the United Nations,* 43 AM.J.INT'L L. 288, 300 (1949). Jurisdiction over the territory must be exclusive. G. VON GLAHN, LAW AMONG NATIONS 62 (4th ed. 1981). Even assuming, *arguendo,* that the law of nations obligates unrecognized states that meet this standard, and that § 1350's intent was to hold liable even those states the U.S. does not recognize, there is no allegation here that the PLO does or could meet this standard.

22. Classical international law was predominantly statist. The law of nations traditionally was defined as "the body of rules and principles of action which are binding *upon civilized states* in their relations with one another." J. BRIERLY, *supra* note 11, at 1 (emphasis added); *see also* G. VON GLAHN, *supra* note 21, at 61–62; 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 2A, at 4 (2d ed. rev. 1945). Non-state actors could assert their rights against another state only to the extent that their own state adopted their claims, and as a rule they had no recourse against their own government for failure to assist or to turn over any proceeds. 1 C. HYDE, *supra,* § 11B, at 36. *See also* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States,* 32 AM.U.L.REV. 1, 9 (1982). That the International Court of Justice permits only party-states to appear in cases before the court highlights this outlook. Article 34(1), Statute of the International Court of Justice, *done* June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153 (entered into force for United States October 24, 1945).

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tions in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350, 1 B.C.INT'L & COMP. L.J. 71, 82 (1977). Confusion arises because the term "individual liability" denotes two distinct forms of liability. The first, now well-implanted in the law of nations, refers to individuals acting under color of state law. Commentators routinely place the origin of this development at the Nuremberg Trials, *see, e.g.,* Sohn, *supra* note 22, at 9–11, and it was in this context that the International Military Tribunal wrote of individual responsibility for war crimes.[23] The second, currently less-established meaning addresses the responsibility of individuals acting separate from any state's authority or direction. That the defendant in *Filartiga* was an official, not the state itself, placed him squarely within the first meaning. In contrast, in the case before us, the second formulation of individual liability is at issue.

Even in the truly private arena there is support for the concept of individual responsibility. Inferences from case law suggest that courts over the years have toyed with the notion of truly individual liability both under section 1350 and more generally. Section 1350 case law, unfortunately, is sparse. Other than *Filartiga,* only two cases brought under section 1350 have established jurisdiction. Both involved private-party defendants. In one, *Bolchos v. Darrell,* 3 Fed.Cas. 810 (D.S.C.1795) (No. 1607), a predecessor to section 1350 provided jurisdiction for an action, grounded on a treaty violation, involving a title dispute concerning neutral property on a captured enemy vessel. It is worthwhile to note that, although *Bolchos* involved a treaty obligation, at the time of the *Bolchos* case individual defendants were in fact found to violate the law of nations, although not necessarily in actions based on section 1350. *See, e.g., United States v. Smith,* 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820) (indictment for crime of piracy, as defined by the law of nations). In a more recent case, *Adra v. Clift,* 195 F.Supp. 857 (D.Md.1961), an individual was in fact found to have violated the law of nations, and section 1350 jurisdiction was thereby established. The action, discussed extensively, *supra,* involved a child custody suit between two aliens; the court found that defendant's wrongful withholding of custody was a tort and that her misuse of passports to bring the child into the United States violated international law. To reach this conclusion on individual responsibility, the court relied primarily on one commentator, who asserted that some acts violate the law of nations and may be prosecuted when committed by a private offender, *Adra,* 195 F.Supp. at 863–64 (citing 1 C. HYDE, *supra* note 22, § 11A, at 33–34); it then leapt to a conclusion that passport violations are among such acts. *Id.* at 864–65. As I shall demonstrate, *infra,* Hyde's position, while certainly compelling, is not so widely accepted doctrinally or practically as to represent the consensus among nations.[24]

23. For example, responding to a "following orders" defense, the court cited Article 8 of the Charter annexed to the agreement establishing the Nuremberg Tribunal, which declared, "The fact that the defendant acts pursuant to orders of his Government or a superior shall not free him from responsibility, but may be considered in mitigation of punishment." 6 F.R.D. at 110–11.

24. Three other cases have suggested jurisdiction might be available under § 1350. Of these, two implicated private defendants. In *Nguyen Da Yen v. Kissinger,* 528 F.2d 1194 (9th Cir.1975), an action against the Immigration and Naturalization Service and others alleging the illegal seizure and removal of Vietnamese babies from Vietnam in the final hours of U.S. involvement there, the court noted in dicta that jurisdiction might be available under § 1350, and that, if it were, private adoption agencies that participated in the "babylift" might be joined as joint tortfeasors. *Id.* at 1201 n. 13. In a 1907 Opinion, 26 Op. Att'y Gen. 250 (1907), the Attorney General indicated that a predecessor to § 1350 might provide a forum to Mexican citizens seeking redress for damages suffered when an American irrigation company altered the channel of the Rio Grande River. The third case, *O'Reilly de Camara v. Brooke,* 209 U.S. 45, 28 S.Ct. 439, 52 L.Ed. 676 (1908), suggests that a United States officer's seizure of an alien's property in a foreign country might fall within § 1350.

Numerous other § 1350 actions have been dismissed on jurisdictional grounds for failure to allege a violation of the law of nations, *see*

B. *Historical Evolution of the Role of the Individual in International Law*

That the individual's status in international law has been in flux since section 1350 was drafted explains in part the current mix of views about private party liability. Through the 18th century and into the 19th, writers and jurists believed that rules of international law bound individuals as well as states. *See, e.g., United States v. Smith,* 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820) (piracy violates law of nations; individual liable); *Respublica v. DeLongchamps,* 1 U.S. (1 Dall.) 111, 1 L.Ed. 59 (1784) (assault on French consul-general violates law of nations; individual liable); 4 BLACKSTONE'S COMMENTARIES 66–73 (Welsby ed. 1854) (recounting various offenses against law of nations, committed by private persons, punishable under English statutory law); *see generally* Dickinson, *supra* note 10, at 26–27, 29–30; Dickinson, *The Law of Nations as Part of the National Law of the United States (pt. 2),* 101 U.PA.L.REV. 792, 792–95 (1953); Korowicz, *The Problem of the International Personality of Individuals,* 50 AM.J.INT'L L. 533, 534 (1956). In the 19th century, the view emerged that states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations. Under that view—which became firmly entrenched both in doctrine and in practice, *see* Korowicz, *supra,* 50 AM.J.INT'L L. at 535, 541—individual rights existed only as rights of the state, *see* Lauterpacht, *The Subjects of the Law of Nations (pt. 1),* 63 L.Q.REV. 438, 439–40 (1947), and could be asserted, defended or withdrawn by the state. *See* P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 38 (1960); *see also* note 22, *supra.*

In this century, once again writers have argued that both the rights and duties of international law should be applied to private parties. *See* P. REMEC, *supra,* at 8–18; Hill, *International Affairs: The Individual in International Organization,* 28 AM.POL.SCI.REV. 276, 282 & nn. 20–23 (1934) (describing shift from statism and emergence of view that individual is subject of international law); Korowicz, *supra,* 50 AM.J.INT'L L. at 537–39 (observing trend toward recognition of international personality of individuals, especially in their assertion of rights). However, their discussions are more prescriptive than descriptive; they recognize shifts in firmly entrenched doctrine but are unable to define a clear new consensus. And for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go. *See, e.g.,* Brownlie, *The Place of the Individual in International Law,* 50 VA.L.REV. 435 (1964).

C. *Whether Torture, Like Piracy, Is an Exception to the Rule*

One strand of individual liability apparently survived the 19th century swing toward statism—private responsibility for piracy. It remained, with only a handful of other private acts, such as slave trading, as a confutation of the general principle of statism. *See* Korowicz, *supra,* 50 AM.J.INT'L L. at 545, 558; *cf.* Lauterpacht, *The Subjects of the Law of Nations (pt. 2),* 63 L.Q.REV. 438, 441–42. Explanations of the basis for this continued recognition of individual responsibility vary. In one view, these acts are private violations of the law of nations, *e.g., United States v. Smith,* 18 U.S. (5 Wheat.) 153, 161–62, 5 L.Ed. 57 (1820). In another view, international law merely authorizes states to apply sanctions of their municipal law, whatever the nationality of the offender. "The state of the offender is not authorized to apply normal consular or diplomatic protection. International provisions against [acts such as piracy] . . . allow the state which captures the offenders to

generally Annot., 34 A.L.R. FED. 388 (1977) (reviewing cases). The most common shortcoming of these actions is in the allegation of a municipally recognized tort, such as fraud, *Trans-Continental Inv. Corp., S.A. v. Bank of Commonwealth,* 500 F.Supp. 565 (C.D.Cal. 1980), or libel, *Akbar v. New York Magazine Co.,* 490 F.Supp. 60 (D.D.C.1980), that does not have the stature of a law of nations violation.

proceed according to its own internal law." Korowicz, *supra*, 50 AM.J.INT'L L. at 545. *See also Harvard Research in International Law, Piracy,* 26 AM.J.INT'L L.SUPP. 739, 754, 759–60 (1932) (piracy a special ground of state jurisdiction); *see generally* Dickinson, *Is the Crime of Piracy Obsolete?,* 38 HARV. L.REV. 334 (1925) (discussing doctrinal confusion about piracy as an international or municipal crime).

It is worthwhile to consider, therefore, whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility. Definitions of torture set out in international documents suggest it is not. For example, torture is defined in the Draft Convention on the Elimination of Torture in part as any act "by which severe pain or suffering" is inflicted, "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/L 1576) of 6 March 1981, *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. Similarly, the United Nations General Assembly definition requires that the actor be "a public official." *See* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N.GAOR Supp. (No. 34) at 91–92, U.N.Doc. A/10034 (1975), *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. *See also* Blum & Steinhardt, *supra* note 20, at 93, 95–96. Against this background, I do not believe the consensus on non-official torture warrants an extension of *Filartiga.* While I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term "law of nations."

VII. TERRORISM AS A LAW OF NATIONS VIOLATION

I turn next to consider whether terrorism is itself a law of nations violation.[25] While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.

To witness the split one need only look at documents of the United Nations. They demonstrate that to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation. For example, a resolution entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes," G.A.Res. 3103, 28 U.N. GAOR at 512, U.N.Doc. A/9102 (1973), declared:

> The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.

It continued that armed conflicts involving such struggles have the full legal status of international armed conflicts, and that violation of that status "entails full responsibility in accordance with norms of international law." *Id.* at 513. *See also* Definition of Aggression, G.A.Res. 3314, 29 GAOR Supp. (No. 31) at 142–44, U.N.Doc. A/9631 (1974) (nothing in definition of term "aggression" should prejudice right of self-de-

25. At least one law review note has suggested that we decide this case in favor of plaintiffs by identifying terrorism as a law of nations violation. *See* Note, *Terrorism as a Tort in Violation of the Law of Nations,* 6 FORDHAM INT'L L.J. 236 (1982).

termination or struggle, particularly of peoples under "colonial and racist regimes or other forms of alien domination"). In contrast, there is of course authority in various documents and international conventions for the view that terrorism is an international crime. Many Western nations condemn terrorist acts, either generally, as in the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance,[26] or with reference to particular terrorist acts, as in the International Convention Against the Taking of Hostages,[27] or the Hague Convention on the Suppression of Unlawful Seizure of Aircraft.[28] *See also* R. FRIEDLANDER, TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL 38 (1983) (describing the international division on the legitimacy of terrorist acts); *see generally* R. LILLICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (1982).

The divergence as to basic norms of course reflects a basic disagreement as to legitimate political goals and the proper method of attainment. Given such disharmony, I cannot conclude that the law of nations—which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe[29]—outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.

VIII. MY COLLEAGUES' OPINIONS

My colleague Judge Robb argues that this case is a nonjusticiable "political question" and that it therefore was properly dismissed. With all due respect, I disagree with this approach to appellate adjudication. A judge should not retreat under facile labels of abstention or nonjusticiability, such as the "political question doctrine," merely because a statute is ambiguous. In the words of one eminent jurist, "[o]*bscurity of statute* or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and *cast a duty upon the courts to declare it* retrospectively in the exercise of a power frankly legislative in function." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921) (emphasis added). Or, as another jurist framed the issue, "The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527, 529 (1947).

Nonjusticiability based upon "political question" is *at best* a *limited* doctrine, and it is wholly inapposite to this case. In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court held that the question whether a state legislative district apportionment plan violates the Constitution is not a political question and therefore not nonjusticiable. In so doing, the Court rejected the notion that the doctrine rendered nonjusticiable all "political cases"—a doctrine advanced by Justice Frankfurter writing for a plurality of the Court in *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Instead, it observed, the nonjusticiability of a question is "essentially a function of the separation of powers." 369 U.S. at 217, 82 S.Ct. at 710. The Court then identified several categories of political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy

26. Signed Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (entered into force for United States Oct. 20, 1976).

27. Adopted Dec. 17, 1979, G.A.Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/819 (1979).

28. Signed Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force for United States Oct. 18, 1971).

29. 1 C. HYDE, *supra* note 22, at 1.

determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The opinion also observed that the doctrine in no respect requires that all questions implicating foreign affairs be ruled political questions. *Id.* at 211, 82 S.Ct. at 706.

Subsequently Justice Brennan, the author of *Baker v. Carr,* emphasized the narrowness of the political question doctrine as it applies to matters of foreign relations. Dissenting in *Goldwater v. Carter,* 444 U.S. 996, 1006, 100 S.Ct. 533, 538, 62 L.Ed.2d 428 (1979)—in which only four Justices agreed that a Congressman's challenge to the President's Taiwan treaty termination presented a nonjusticiable political question—Justice Brennan explained, "Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].' " *Id.* at 1006, 100 S.Ct. at 538 (quoting *Baker v. Carr,* 369 U.S. 186, 211–13, 82 S.Ct. 691, 706–08, 7 L.Ed.2d 663 (1962)) (brackets in original). I simply do not believe that the doctrine in either of these narrow formulations counsels a finding of nonjusticiability in this case.

Initially, the action before us does not implicate separation of powers principles, and therefore is not even related to the central concern of the political question doctrine. *See Baker v. Carr,* 369 U.S. at 210, 217, 82 S.Ct. at 706, 710. We have here no clash between two branches of government that requires us to resolve the apportionment of power between them. Nor do we potentially transgress by reviewing any exercise of authority by another branch of government, much less one committed to another branch by the Constitution. Far from it, in fact; in implementing section 1350, courts merely carry out the existing view of the legislature that federal courts should entertain certain actions that implicate the law of nations.[30] Moreover, none of the categories identified in *Baker* is applicable here. We do not lack judicially discoverable and manageable standards. The parties do not invoke constitutional or statutory provisions that resist judicial application. The Supreme Court, in *The Paquete Habana,* explicitly acceded to the task of applying the law of nations and instructed lower courts on how to approach the task of discovering it. I therefore can hardly conclude that courts *lack* the means of determining what standards to apply. That the task might be difficult should in no way lead to the conclusion that it should not be accomplished. Nor do I believe either that

30. To the extent that Judge Robb's reliance on political question principles arises from his concern about court intervention in foreign affairs, the Act of State Doctrine delineates the bounds of proper judicial restraint. The doctrine arises in cases which, under Judge Robb's formula, would be deemed political question cases. Yet, we cannot ignore the fact that they are not treated as political question cases and ruled nonjusticiable.

The doctrine applies only to judicial review of the acts of *recognized* foreign governments committed *within their own territory. See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). It is, in effect, a doctrine of deference, requiring that courts not second-guess the judgments of such sovereigns in a category of contexts. When a § 1350 action implicates such action by a recognized sovereign, the Act of State Doctrine might bar further inquiry. Such is not the case here. Similarly, the Foreign Sovereign Immunities Act restrains courts from asserting jurisdiction, but, again, only to the extent Congress has deemed appropriate. Considering that the Supreme Court—in the Act of State Doctrine—and the Congress—in the Foreign Sovereign Immunities Act—have each delimited the scope of necessary judicial restraint in cases involving foreign affairs, I am not inclined to fashion yet another doctrine of nonjusticiability simply because this case, and the intricacies of the law of nations, are not of easy resolution or implicate foreign affairs generally.

any of the other concerns in *Baker* arise here.[31]

I note, in addition, that to expand the doctrine at this juncture would be to counter the movement of courts and scholars in the opposite direction. Indeed, commentators have noted the "judicial indifference and scathing scholarly attack" recently directed at the political question doctrine, *see* McGowan, *Congressmen in Court,* 15 GA.L. REV. 241, 256 (1981). As Judge McGowan has noted, other than the Taiwan treaty case, *Goldwater v. Carter,* 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), the last Supreme Court case to cite the doctrine in any meaningful way was *Gilligan v. Morgan,* 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), and the last Supreme Court case to rely squarely on it was *Colegrove v. Green,* 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). *See* McGowan, *supra,* at 256–57.

It is therefore clear that the political question doctrine is a very limited basis for nonjusticiability. It certainly does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases. And the doctrine surely may not be employed here to vitiate section 1350.

I decline to address further Judge Bork's critique of my opinion. He has completely misread my opinion to say that the primary purpose of section 1350 was to authorize courts to "regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States." I only wish the issues posed were so simple. Judge Bork seriously distorts my basic premises and ignores my expressed reservations. Accordingly, I prefer to let this opinion speak for itself, in the belief that it belies my colleague's mischaracterizations, and that any further exposition would be redundant.

IX. CONCLUSION

In light of the foregoing, I conclude that the appellants have not, and could not, allege facts sufficient to remain in court under existing precedent. I therefore vote to affirm the District Court's dismissal for lack of subject matter jurisdiction.

BORK, Circuit Judge, concurring:

This case grows out of an armed attack on a civilian bus in Israel on March 11, 1978. Appellants (plaintiffs below) are sixty-five of the persons seriously injured in the attack and the survivors of twenty-nine of the persons killed. Appellees (defendants below) are the Libyan Arab Republic ("Libya"), the Palestine Liberation Organization ("PLO"), the Palestine Information Office ("PIO"), and the National Association of Arab Americans ("NAAA").[1] Appellants alleged in their complaint that appellees were responsible for the 1978 attack, and they sought compensatory and punitive damages. Specifically, appellants charged appellees with torts committed in violation of international law and of some treaties and statutes of the United States as well as with commission of and conspiracy to commit various intentional common law torts. Jurisdiction over the common law tort

31. This case therefore is distinguishable from *Crockett v. Reagan,* 720 F.2d 1355 (D.C.Cir. 1983), in which a panel of this court recently affirmed the dismissal of an action on political question grounds. In *Crockett,* we held that the inquiry into whether United States advisers stationed in El Salvador were in a situation of imminent hostilities was beyond the fact-finding power of this court and hence constituted a political question. That case, unlike this one, involved the apportionment of power between the executive and legislative branches. The case was brought by a group of Congressmen challenging the President's failure to report to Congress under the War Powers Resolution. Our opinion adopted that of the District Court, which had articulated an extremely narrow view of the political question doctrine. Even within that narrow view, it was apparent that *Baker v. Carr's* category of "judicially discoverable and manageable standards" would bar judicial interference in the dispute between the two branches. Here we have no such dispute and no such fact-finding problems and, therefore, no legitimate grounds for a finding of nonjusticiability.

1. Appellants have not pursued the appeal against a fifth defendant named in the complaint, the Palestine Congress of North America ("PCNA").

counts is pendent and will fail if the other counts fail.

The district court dismissed the action for lack of subject matter jurisdiction.[2] *Hanoch Tel-Oren v. Libyan Arab Republic,* 517 F.Supp. 542 (D.D.C.1981). We agree that the complaint must be dismissed, although our reasons for agreement differ. I believe, as did the district court, that, in the circumstances presented here, appellants have failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981).[3] Neither the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States. Furthermore, we should not, in an area such as this, infer a cause of action not explicitly given. In reaching this latter conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations.

I.

According to the complaint, on March 8, 1978, thirteen heavily armed members of the PLO left Lebanon for Israel. They were under instructions from the PLO to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel jails. If their plans broke down, the terrorists were to kill their hostages.

The complaint's allegations of what happened upon the terrorists' arrival in Israel constitute a tale of horror. Since my analysis does not turn upon the particulars of those events, they need not be described in detail. The thirteen terrorists landed by boat and, after killing an American photographer they encountered on the beach, made their way to the main highway between Haifa and Tel Aviv. There they stopped and seized a civilian bus, a taxi, a passing car, and, later, a second civilian bus, taking the passengers hostage. While proceeding toward Tel Aviv with their many hostages gathered in the first bus, the terrorists fired on and killed numerous occupants of passing cars as well as some of their own passengers. They also tortured some of their hostages.

The police finally brought the terrorist-controlled bus to a halt by shooting at the tires and engine of the bus as it passed through a police barricade. The terrorists reacted by shooting a number of their hostages and, eventually, by blowing up the bus with grenades. As a result of the terrorists' actions, twenty-two adults and twelve children were killed, and sixty-three adults and fourteen children were seriously wounded.

Appellants in this case are most of those wounded and the survivors of most of those killed, as well as the guardians and next friends of those wounded minors who may not sue in their own capacity. Appellants alleged their complaint that appellees are responsible for the deaths and injuries. According to the complaint's allegations, the PLO not only recruited and trained the thirteen terrorists but also planned, financed, supplied, and "claimed responsibility" for the operation. Libya, plaintiffs alleged, trained the PLO instructors who trained the thirteen terrorists, planned, supplied, financed, and "claimed responsibility" for the operation, and gave an official "hero's welcome" to the ship that carried the terrorists to Israel. As for the PIO and

2. The district court dismissed the action against all defendants on the alternative ground that it was barred by the local one-year statute of limitations for certain torts. D.C.Code Ann. § 12-301(4) (1981). *Hanoch Tel-Oren v. Libyan Arab Republic,* 517 F.Supp. 542, 550-51 (D.D.C.1981). Because we agree that the complaint was properly dismissed on other grounds, we need not reach this ground. Nor need we reach the district court's dismissal of the action against the NAAA and PIO (as well as the PCNA) on the ground that the allegations of the complaint were insufficiently specific. *See* note 4 *infra.*

3. In the district court, appellants also argued that jurisdiction rested on 28 U.S.C. § 1330 (1976) (Foreign Sovereign Immunities Act) and on 28 U.S.C. § 1332 (1976) (diversity). The district court rejected both grounds of jurisdiction, 517 F.Supp. at 549 n. 3, and appellants have abandoned them on appeal.

the NAAA, the complaint contains only the general allegations that the PIO is an agent and instrumentality of the PLO and that both the PIO and the NAAA helped plan, finance, outfit, and direct the terrorist operation.[4]

Though the complaint sought recovery under five theories of liability, only two need be considered to decide this appeal. Count II charges defendants with tortious actions in violation of the law of nations. Count III charges defendants with tortious actions in violation of various treaties of the United States.[5] The district court granted the NAAA's motion to dismiss for lack of jurisdiction. The portion of the district court's inquiry that is relevant here is whether the allegations of Counts II and III sufficed to support jurisdiction under sections 1331 or 1350.

Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1350 provides: "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." With respect to Count III's allegation of treaty violations, the district court found jurisdiction lacking on the ground that none of the treaties alleged to be violated either expressly or impliedly gave rise to a private right of action. 517 F.Supp. at 545–48. With respect to Count II's allegation that appellees violated the law of nations, the district court held that neither section 1331 nor section 1350 provided jurisdiction. Section 1331 jurisdiction is lacking, the court held, because federal common law, which incorporates the law of nations, cannot be constituted to grant a cause of action without "judicial interference with foreign and international relations." 517 F.Supp. at 548. Section 1350 jurisdiction is lacking, the district court held, for the same reason: International human rights law grants no private right of action, and section 1350, like section 1331, must be interpreted narrowly to require such a right in suits for violation of international law. 517 F.Supp. at 549–50.

In this appeal, appellants agree with the district court that, for purposes of the issues raised in this case, the jurisdictional requirements of sections 1331 and 1350 are the same. *See* Brief for Appellants at 35–36; 517 F.Supp. at 549 n. 2 ("[P]laintiffs themselves recognize that the jurisdictional bases of § 1331 and § 1350 are identical as to the role of the law of nations."). Contrary to the holding of the district court, however, they contend that at least some of the treaties they cite in their complaint impliedly provide private rights of action for the claims in Count III and that federal common law provides private rights of action for the claims in Count II. Thus, appellants argue, section 1350 gives jurisdiction over the claims of the alien plaintiffs and section 1331 gives jurisdiction over the claims of all the plaintiffs, including those who are United States citizens.[6]

4. The district court found the complaint's allegations against the PIO and the NAAA (and against the PCNA) insubstantial, vague, and devoid of any factual detail. It therefore held those allegations insufficient to support a tort action for damages. 517 F.Supp. at 549.

5. Count I charges defendants with the torts of assault, battery, false imprisonment, and intentional infliction of mental distress; it also charges defendants with a tort it describes as the intentional infliction of cruel, inhuman, and degrading treatment. Count IV charges defendants with tortious actions in violation of various criminal laws of the United States. Count V charges defendants with conspiracy to commit the torts specified in Counts I through IV.

The district court dismissed Count IV on the ground that none of the federal statutes relied on by plaintiffs, 18 U.S.C. §§ 371, 956–957, 960, 1651–1652, 1654, 1661 (1976), provides a private right of action for damages. 517 F.Supp. at 545. Appellants have not appealed this ruling. Counts I and V provide no independent basis for federal jurisdiction under the two statutes alleged to vest the district court with jurisdiction. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981).

6. The Tel-Oren plaintiffs are citizens of the United States, and the Drory plaintiffs are citizens of the Netherlands. The other plaintiffs are citizens of Israel. All the plaintiffs reside in Israel.

For the reasons given below, appellants' contentions must be rejected. I first consider separation of powers principles that counsel courts, in a case like this, not to infer any cause of action not expressly granted. I then show that the treaties on which appellants rely create no private causes of action. Turning next to appellants' claim under general principles of international law, I conclude that federal common law does not automatically accord appellants a cause of action and that appellants have not been granted a cause of action by federal statute or by international law itself. Finally, in order to clarify what I believe we should and should not have decided, I discuss the recent decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), a case having some similarities to this one.

II.

The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.

The Supreme Court explained in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), that to ask whether a particular plaintiff has a cause of action is to ask whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240 n. 18, 99 S.Ct. at 2274 n. 18. The Court said that the "question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241, 99 S.Ct. at 2275 (emphasis in original). In addressing the question, as the *Davis* opinion itself makes clear, the focus may be at least as much on the character of the issues presented for decision as on the character of the class of litigants seeking an adjudication, and the result of the inquiry might well be that certain claims cannot be litigated at all in certain forums.

This case presents a question not covered by the analyses described by the *Davis* Court for statutory and constitutional causes of action. An analysis of the appropriateness of providing appellants with a cause of action must take into account the concerns that are inherent in and peculiar to the field of international relations. My assessment of those concerns leads me to a conclusion different from that reached in *Davis*, for here there appear to be "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971). The factors counselling hesitation are constitutional; they derive from principles of separation of powers.

The crucial element of the doctrine of separation of powers in this case is the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918). That principle has been translated into a limitation on judicial power in the international law area principally through the act of state and political question doctrines. Whether or not this case falls within one of these categories, the concerns that underlie

them are present and demand recognition here.

"The act of state doctrine in its traditional formulation precludes the courts 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). Originally, the doctrine rested primarily on notions of sovereignty and comity. *See Underhill v. Hernandez,* 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897). In more recent formulations, there has been "a shift in focus from the notions of sovereignty and the dignity of independent nations ... to concerns for preserving the 'basic relationships between branches of government in a system of separation of powers,' and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts." *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1292 (3d Cir.1979) (quoting *Sabbatino,* 376 U.S. at 423, 84 S.Ct. at 937).

The *Sabbatino* Court explained that, although the Constitution does not compel the act of state doctrine, the doctrine has "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." 376 U.S. at 423, 84 S.Ct. at 937. The Court emphasized the separation of powers basis for the doctrine when it observed that the doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 427–28, 84 S.Ct. at 939–40. In its principal post-*Sabbatino* act of state case, the Supreme Court again stressed the centrality of separation of powers concerns: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 697, 96 S.Ct. 1854, 1863, 48 L.Ed.2d 301 (1976).[7] The courts of appeals have likewise emphasized the decisive role played, in applying the doctrine, by the two relevant aspects of separation of powers: the potential for interference with the political branches' functions and the

7. The Supreme Court also discussed the act of state doctrine in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), but the case produced no majority opinion. Nonetheless, all of the Justices except Justice Douglas, who scarcely addressed the act of state doctrine, stated that judicial abstention from pronouncing judgment on the validity of a foreign act of state turns on separation of powers concerns.

Four Justices said that application of the act of state doctrine depends chiefly on the potential for interference with, or usurpation of, the political branches' primary role in foreign affairs. Justice Rehnquist, joined by Chief Justice Burger and Justice White, stated: "The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." 406 U.S. at 765, 92 S.Ct. at 1812 (Opinion of Rehnquist, J.). He also stated: "The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *Id.* at 767–68, 92 S.Ct. at 1813. Justice Powell, writing separately, echoed these views. The act of state doctrine, he said, bars adjudication when and only when "it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." *Id.* at 775–76, 92 S.Ct. at 1813 (Powell, J., concurring in the judgment).

Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun, disagreed with the view that the act of state doctrine was exclusively concerned with interference with other branches' conduct of foreign relations. Rather, he wrote, the act of state doctrine is one part of the political question doctrine and therefore depends for its application on a variety of considerations, no one of which—not even the Executive's declaration that adjudication will not interfere with foreign relations—can be conclusive on the ultimate determination whether an issue is fit for judicial resolution. 406 U.S. at 785–93, 92 S.Ct. at 1822–25 (Brennan, J., dissenting).

fitness of an issue for judicial resolution. *See, e.g., International Association of Machinists & Aerospace Workers v. OPEC,* 649 F.2d 1354, 1358–61 (9th Cir.1981), *cert. denied,* 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982); *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d at 1292–93; *Hunt v. Mobil Oil Corp.,* 550 F.2d 68, 77–79 (2d Cir.), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597, 605–08 (9th Cir.1976).

The same separation of powers principles are reflected in the political question doctrine. The Supreme Court gave that doctrine its modern formulation in *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied. *See id.* at 211–14, 82 S.Ct. at 706–08. If it were necessary, I might well hold that the political question doctrine bars this lawsuit, since it is arguable, as much of the remainder of this opinion will show, that this case fits several of the categories listed in *Baker v. Carr.* Such a determination is not necessary, however, because many of the same considerations that govern application of the political question doctrine also govern the question of the appropriateness of providing appellants with a cause of action.[8]

Neither is there a need to consider whether the act of state doctrine applies to bar this case from going forward. Although the act of state doctrine might well apply to Libya's alleged role in the 1978 bus attack, it would seem not to apply, in its current formulation, to the alleged acts of the PLO, the PIO, and the NAAA, none of which would seem to be a state under internation-

8. A plaintiff who has no cause of action is, according to *Davis v. Passman,* 442 U.S. at 240 n. 18, 99 S.Ct. at 2274 n. 18, not entitled to "invoke the power of the court." He is not entitled to a pronouncement on the legal merits of his claim. In that respect he is more like a plaintiff who lacks standing than he is like a plaintiff facing a motion to dismiss for failure to state a claim. That is especially true in a case like this, where judicial consideration of the legal merits is of constitutional concern, so that parties should not be able to waive the claim that no cause of action exists. In these circumstances, whether a cause of action exists is a threshold issue that involves a question of the limits of judicial powers.

I do not conceive that in a case like this, the political question doctrine must be considered first because it is jurisdictional. The jurisdictional aspect of that doctrine extends no further than its rationale: to prevent courts from reaching the merits of issues that, for a variety of reasons, are not theirs to decide. *Baker v. Carr,* 369 U.S. at 217, 82 S.Ct. at 710. By deciding that there is no private cause of action here we do not reach substantive issues that are best decided by the political branches. It may be, moreover, that while the existence of a cause of action is not a jurisdictional issue in the ordinary case, it is, or is closely akin, to a jurisdictional issue when its decision implicates, as here, considerations linked to the proper exercise of the judicial power granted by Article III of the Constitution. It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court, *see Goldwater v. Carter,* 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979), and among scholars, *see, e.g.,* Henkin, *Is There A "Political Question" Doctrine?,* 85 Yale L.J. 597, 622–23 (1976). Given this situation, I would rather not decide whether a political question is involved in a case where that issue has not been briefed and argued. By contrast, the grounds upon which I do decide were thoroughly explored through vigorous adversarial presentations.

al law. *See* Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 Den.J.Int'l L. & Pol'y 1, 2–3 (1980).[9] Nevertheless, to the extent the act of state doctrine is based predominantly, if not exclusively, on separation of powers concerns (as it has increasingly come to be), its own rationale might justify extending it to cover the acts of such entities as the PLO where adjudication of the validity of those acts would present problems of judicial competence and of judicial interference with foreign relations. Such an extension would bring the act of state doctrine closer, especially in its flexibility, to the political question doctrine. *Cf. First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 785–93, 92 S.Ct. 1808, 1822–25, 32 L.Ed.2d 466 (1972) (Brennan, J., dissenting) (act of state doctrine as elaborated in *Sabbatino* equivalent to political question doctrine). Whether the two doctrines should be merged and how, if merged, they would apply to the allegations of appellants' complaint are issues beyond the scope of our inquiry. Instead, those doctrines are drawn upon for what they say about the separation of powers principles that must inform a determination of the appropriateness of appellants' litigating their claims in federal court.

Those principles counsel against recognition of a cause of action for appellants if adjudication of their claims would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations. Appellants' complaint requires a determination, either at the jurisdictional stage or at the stage of defining and applying a rule of decision, whether international law has been violated.[10] I am therefore guided in large measure by the Supreme Court's observation in *Sabbatino* that

> the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

376 U.S. at 428, 84 S.Ct. at 940. There is no need to decide here under what circumstances considerations such as these might deprive an individual of a cause of action clearly given by a state, by Congress, by a treaty, or by international law.[11] In the

9. "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states." Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. *See also Restatement (Second) of the Foreign Relations Law of the United States* § 4 (1965). Furthermore, the act of state doctrine would still not apply, even if the PLO is said to have been the agent of Libya, since the attack did not take place "within [Libya's] own territory." *Sabbatino*, 376 U.S. at 401, 84 S.Ct. at 926.

10. If jurisdiction rested on section 1331, at least one necessary rule of decision would have to be supplied by international law, the federal law under which the case arose. *See Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, — U.S. —, 103 S.Ct. 2841, 2846–48, 77 L.Ed.2d 420 (1983). If jurisdiction rested on section 1350, there are three arguable theories about what law would supply the rule of decision. The rule of decision might be the international law (treaty or customary international law) violated; it might be a federal common law of torts; or it might be the tort law of whatever jurisdiction applicable choice of law principles would point to. *Cf.* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 99–100 (1981). Under the latter two constructions, of course, whether international law was violated would have to be decided as a jurisdictional prerequisite.

11. A state-court suit that involved a determination of international law would require consideration of much that I discuss here as well as the principle that foreign relations are constitu-

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absence of such a cause of action, they lead to the conclusion that adjudication of appellants' claims would present grave separation of powers problems. It is therefore inappropriate to recognize a cause of action allowing appellants to bring this suit.[12]

Most important, perhaps, even appellants concede that the incidents described in appellants' complaint are properly understood only when viewed in the context of the continuing conflicts in the Middle East. Indeed, appellants point out that "[o]ne of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotiations by destroying the positive efforts made in the Camp David accords." Brief for Appellants at 15. The Camp David accords, of course, were but one of the major efforts made by the United States to resolve the myriad problems behind the series of military and political conflicts that have kept the Middle East at or near the center of American foreign relations for at least the last fifteen years. A judicial pronouncement on the PLO's responsibility for the 1978 bus attack would likely interfere with American diplomacy, which is as actively concerned with the Middle East today as it has ever been.[13]

The potential for interference with foreign relations is not diminished by the PLO's apparent lack of international law status as a state. Nor does it matter whether the Executive Branch officially recognizes, or has direct dealings with, the PLO. The fact remains that the PLO bears significantly upon the foreign relations of the United States. If any indication of that role is needed, it is provided by the official "observer" status that the PLO has been accorded at the United Nations, G.A.Res. 3237, 29 U.N.GAOR Supp. (No. 31) at 4, U.N.Doc. A/9631 (1974), as well as by the diplomatic relations that the PLO is reported to have with some one hundred countries around the world, *see* Kassim, *supra*, 9 Den. J.Int'l L. & Pol'y at 19; Friedlander, *The PLO and the Rule of Law: A Reply to Dr. Anis Kassim*, 10 Den.J.Int'l L. & Pol'y 221, 232 (1981).

The nature of appellants' international law claims provides a further reason for reluctance to recognize a cause of action for appellants. Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching "sharply on national nerves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940. The *Sabbatino* Court warned against adjudication of such international law issues. *Id.* Because I believe that judicial pronouncements on the merits of this case should be avoided, I mention only briefly some of the difficulties raised by some of the claims in appellants' complaint.

Appellants would have to argue, if their case were adjudicated, for an exception to the general rule that international law im-

tionally relegated to the federal government and not the states. *See Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).

12. The existence of severe separation of powers problems in adjudicating appellants' claims reinforces my conclusion, *see infra* pp. 816–819, that international law affords appellants no cause of action. The potential for interference with governments conducting their foreign relations is central both to separation of powers limits on jurisdiction and to international law's general refusal to grant private rights of action. The existence of such a potential in any case must count strongly against international law's providing a private right of action for that case.

13. Libya must be dismissed from the case because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1976), plainly deprives us of jurisdiction over Libya. *See Verlinden B.V. v. Central Bank of Nigeria*, — U.S. —, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (court must decide immunity question, which is jurisdictional). Because the alleged actions of the PIO and the NAAA all involve giving assistance to the PLO's alleged actions, an adjudication of the claims against them would require adjudication of the claims against the PLO. If, as I conclude, the latter presents sufficiently serious problems that no cause of action can be inferred, so too must the former. I therefore concern myself only with the PLO. Of course, adjudication of the complaint against Libya would present many of the same separation of powers problems as would adjudication of the complaint against the other defendants.

poses duties only on states and on their agents or officials. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law,* 246–47 (1980); *Restatement of the Foreign Relations Law of the United States (Revised)* § 101, at 21 (Tent.Draft No. 1, 1980) ("'International law' ... deals with the conduct of states and of international organizations, and with their relations inter se, as well as some of their relations with persons, whether natural or juridical."); *id.* §§ 701–722, at 137–257 (Tent.Draft No. 3, 1982) (stating international law protections of persons solely in terms of state obligations). If, as would appear, the PLO is not a state, a finding that it should nonetheless be held to the duties imposed by the customary rules of international law governing the conduct of belligerent nations, *e.g.,* Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Protocols I and II of the Geneva Convention of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, *reprinted in* 16 I.L.M. 1391, 1443 (1977), would not entail merely the application of an agreed principle to new facts. Rather, a finding that because of its governmental aspirations and because of the role it has played in the Middle East conflicts the PLO should be subject to such rules would establish a new principle of international law. Likewise, to interpret various human rights documents as imposing legal duties on nonstates like the PLO would require both entering a new and unsettled area of international law and finding there an exception to international law's general rule.[14]

Another difficulty presented by appellants' complaint is that some of the documents on which they rely as statements of customary principles of international law expressly make the purposes of an action relevant to its unlawfulness. For example, appellants allege that appellees violated the proscription, in article 51 of the Protocol I of the Geneva Conventions of 12 August 1949, on "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." They also allege that appellees violated the proscription on genocide, defined in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, to mean acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group. Adjudication of these claims would require inquiry into the PLO's intention in planning the 1978 bus attack (assuming the PLO's involvement) and into the organizational goals of the PLO. The dangers of such inquiry into the intentions of the PLO are similar to those attending an inquiry into the intentions of a state. *See Hunt v. Mobil Oil Corp.,* 550 F.2d at 77 (act of state doctrine bars inquiry into Libya's motivation for actions: "Inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention....").

In addition, appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East. Some aspects of terrorism have been the subject of several international conventions, such as those concerning hijacking, *e.g.,* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Con-

14. One aspect of this problem is the apparent assumption of state action in the definition of certain international legal principles. Thus, the United Nations General Assembly has defined torture as "any act by which severe pain or suffering is intentionally inflicted by or at the instigation of a public official." G.A.Res. 3452, art. 1, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). This assumption of state action is one reason why it is by no means utterly obvious that the torture alleged in appellants' complaint would be prohibited by international law.

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Customary international law may well forbid states from aiding terrorist attacks on neighboring states. *See* Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities,* 26 Am.U.L.Rev. 217, 251–76 (1977). Although that principle might apply in a case like this to a state such as Libya (which is not a proper party here, *see supra* note 13), it does not, at least on its face, apply to a nonstate like the PLO. More important, there is less than universal consensus about whether PLO-sponsored attacks on Israel are lawful. One important sign of the lack of consensus about terrorism generally, and about PLO activities in particular, is that accusations of terrorism are often met not by denial of the fact of responsibility but by a justification for the challenged actions. *See* Blum & Steinhardt, *supra* note 10, 22 Harv.Int'l L.J. at 92. Indeed, one of the key documents relied on as evidence of an international law proscription on terrorism, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 U.N.GAOR Supp. (No. 28) at 121, U.N.Doc. A/8028 (1970), was said by at least one state at the time of its promulgation not to be applicable to Palestinian terrorist raids into Israel supported by Arab states. 24 U.N.GAOR 297, U.N.Doc. A/C.6/SR. 1160 (1969) (remarks of Mr. El Attrash of Syria), discussed in Lillich & Paxman, *supra,* 26 Am.U.L.Rev. at 272 (qualification is significant). Attempts to secure greater consensus on terrorism have foundered on just such issues as the lawfulness of violent action by groups like the PLO fighting what some states view as "wars of national liberation."[15] *See* Franck & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism,* 68 Am.J.Int'l L. 69 (1974); Paust, "*Nonprotected*" *Persons or Things,* in *Legal Aspects of International Terrorism* 341, 355–56 (A. Evans & J. Murphy eds. 1978); *cf.* Verwey, *The International Hostages Convention and National Liberation Movements,* 75 Am.J.Int'l L. 69 (1981) (obligations of national liberation movements were major problem in drafting and promulgating International Convention against the Taking of Hostages).

There is, of course, no occasion here to state what international law should be.

15. It is worth noting that even the 1972 United States Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, 67 Dep't St.Bull. 431 (1972), would present some problems to appellants. First, it makes motive a key to violation. Second, like the European Convention on the Suppression of Terrorism, Jan. 27, 1977, 15 I.L.M. 1272 (1976), the 1972 Draft Convention relies on criminal remedies for the vindication of the rights specified, thus leaving the power to invoke remedies in the hands of states. Third, the 1972 Draft Convention does not protect citizens of a state against attack within the state.

Nor is there a need to consider whether an extended and discriminating analysis might plausibly maintain that customary international law prohibits the actions alleged in the complaint. It is enough to observe that there is sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles that litigation of appellants' claims would present, in acute form, many of the problems that the separation of powers principles inherent in the act of state and political question doctrines caution courts to avoid. The lack of clarity in, and absence of consensus about, the legal principles invoked by appellants, together with the political context of the challenged actions and the PLO's impingement upon American foreign relations, lead to the conclusion that appellants' case is not the sort that is appropriate for federal-court adjudication, at least not without an express grant of a cause of action.

I turn next to examine treaties, common law, congressional enactments, and customary international law to determine whether any of these sources of law provides a cause of action for appellants. In light of what has been said, it would require a very clear showing that these other bodies of law grant appellants a cause of action before my concerns about the principles of separation of powers could be overcome. But, as will be seen, there is no clear grant of a cause of action to be found. In truth, the law concerning treaties and customary international law of its own force appears actually to deny appellants any cause of action.

III.

Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829), *overruled on other grounds, United States v. Percheman,* 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1883); *Canadian Transport Co. v. United States,* 663 F.2d 1081, 1092 (D.C.Cir.1980); *Dreyfus v. Von Finck,* 534 F.2d 24, 29–30 (2d Cir.), *cert. denied,* 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976). Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action. *Head Money Cases,* 112 U.S. 580, 598–99, 5 S.Ct. 247, 253–54, 28 L.Ed. 798 (1884); *Z & F Assets Realization Corp. v. Hull,* 114 F.2d 464, 470–71 (D.C.Cir. 1940), *aff'd on other grounds,* 311 U.S. 470, 489, 61 S.Ct. 351, 355, 85 L.Ed. 288 (1941); *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d at 1298. When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action. *See Diggs v. Richardson,* 555 F.2d 848, 851 (D.C.Cir.1976).

In Count III of the complaint, appellants alleged that defendants violated the following "treaties of the United States":

—Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I. A.S. No. 3365, 75 U.N.T.S. 287;

—Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993;

—Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Conventions);

—Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N. T.S. 135;

—Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I. A.S. No. 8413 (Organization of American States (OAS) Convention);

—Protocols I and II to the Geneva Conventions of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed

Conflict, *reprinted in* 16 I.L.M. 1391, 1442 (1977);

—Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 U.N.GAOR Supp. (No. 28) at 121, U.N.Doc. A/8028 (1970);

—Universal Declaration of Human Rights, G.A.Res. 217, U.N. 3 GAOR, U.N. Doc. 1/777 (1948);

—International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

—Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A.Res. 2675, 25 U.N.GAOR Supp. (No. 28) at 76, U.N.Doc A/8028 (1970);

—Convention on the Prevention and Punishment of the Crime and Genocide, Dec. 9, 1948, 78 U.N.T.S. 277;

—Declaration of the Rights of the Child, G.A.Res. 1386, 14 U.N.GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); and

—American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970), 65 Am.J.Int'l L. 679 (1971).

Only the first five of these alleged treaties are treaties currently binding on the United States. *See* Treaties Affairs Staff, Office of the Legal Adviser, Department of State, *Treaties in Force* (1983). Even if the remaining eight are relevant to Count II of the complaint as evidence of principles of international law, they are not treaties of the United States. Since Count III (tortious actions in violation of the treaties of the United States) purports to state a cause of action distinct from that stated in Count II (tortious actions in violation of the law of nations), the last eight of the thirteen alleged treaties of the United States can provide no basis for jurisdiction over the claims in Count III under the treaty components of sections 1331 and 1350.

Of the five treaties in force, none provides a private right of action. Three of them—the Geneva Convention for the Protection of Civilian Persons in Time of War, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish Acts of Terrorism—expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing. *See Foster v. Neilson,* 27 U.S. (2 Pet.) at 311–14, 7 L.Ed. 415; *United States v. Postal,* 589 F.2d 862, 876–77 (5th Cir.), *cert. denied,* 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979). These three treaties are therefore not self-executing. Indeed, with respect to the first Geneva Convention, one court has already so held. *Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir.1978).

Articles 1 and 2 of the United Nations Charter are likewise not self-executing. They do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself. They address states, calling on them to fulfill in good faith their obligations as members of the United Nations. Sanctions under article 41, the penultimate bulwark of the Charter, are to be taken by states against other states. Articles 1 and 2, moreover, contain general "purposes and principles," some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals.[16] These considerations compel the conclusion that articles 1 and 2 of the U.N. Charter were not intended to give individuals the right to enforce them in municipal courts, particularly since appellants have provided no evidence of a contrary intent. *See Pauling v. McElroy,* 164 F.Supp. 390, 393 (D.D.C.1958), *aff'd,* 278 F.2d 252 (D.C.Cir.), *cert. denied,* 364 U.S.

16. For example, private enforcement of what is perhaps the fundamental principle of the Charter—the nonaggression principle of article 2, section 4—would flood courts throughout the world with the claims of victims of alleged aggression (claims that would be extremely common) and would seriously interfere with normal diplomacy.

835, 81 S.Ct. 61, 5 L.Ed.2d 60 (1960); *Dreyfus v. Von Finck*, 534 F.2d at 30; *People of Saipan v. Department of Interior*, 502 F.2d 90, 100–03 (9th Cir.1974) (Trask, J., concurring), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); *Sei Fujii v. State*, 38 Cal.2d 718, 242 P.2d 617 (1952).

The Hague Conventions similarly cannot be construed to afford individuals the right to judicial enforcement. Although the Conventions contain no language calling for implementing legislation, they have never been regarded as law private parties could enforce. If they were so regarded, the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation or the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. It is for these reasons that the Conventions are best regarded as addressed to the interests and honor of belligerent nations, not as raising the threat of judicially awarded damages at war's end. The Hague Conventions are not self-executing. The Second Circuit has drawn the same conclusion, *Dreyfus v. Von Finck*, 534 F.2d at 30, and appellants have pointed to no case holding otherwise in the more than three-quarters of a century since the Conventions were adopted.

None of the five treaties relied on by appellants thus even impliedly grants individuals the right to seek damages for violation of their provisions. Appellants have, therefore, failed to state a cause of action for violation of any treaties of the United States. Count III of their complaint, consequently, does not come within the arising-under jurisdiction of section 1331. Nor does it come within section 1350, because this provision, like section 1331, is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions. *See Dreyfus v. Von Finck*, 534 F.2d at 28 (affirming dismissal for lack of cause of action under treaties in suit by alien where jurisdiction expressly based on sections 1331 and 1350).[17]

IV.

Appellants' argument that they may recover damages for violations of international law is simple. International law, they point out, is part of the common law of the United States. This proposition is unexceptionable. *See, e.g., The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820). But appellants then contend that federal common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights. I cannot accept this conclusion.[18]

17. Because none of the treaties cited by appellants provides them a cause of action, it is unnecessary to decide whether any of the treaties imposes duties on parties such as appellees here. Thus, in particular, there is no need to inquire into the contacts with the United States of appellees and their actions. That inquiry is also unnecessary for a decision on Count II of appellants' complaint, as I conclude that appellants have no cause of action for that count on grounds independent of the closeness of appellees' United States contacts.

18. The district court rejected it on the general ground that "an action predicated on ... norms of international law must have at its basis a specific right to a private claim" found in international law itself. 517 F.Supp. at 549. That formulation is very likely too strong, as it would seem to deny Congress the power to provide individuals a statutory right of action to seek damages for international law violations not actionable under international law itself.

Appellants' argument reflects a confusion of two distinct meanings of "common law". That term has long referred to the body of court-made law whose origins can be traced to the medieval English legal system. It has also come to refer generally to law (mostly court-made) not based on a statute or constitution. "Federal common law", in particular, has been used "to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973) ("*Hart & Wechsler*"). To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.

Thus, the step appellants would have us take—from the phrase "common law" to the implication of a cause of action—is not a simple and automatic one. Neither is it advisable. The considerations of separation of powers rehearsed above provide ample reason for refusing to take a step that would plunge federal courts into the foreign affairs of the United States.

Appellants, seeking to recover for a violation of international law, might look to federal statutes either for a grant of a cause of action or for evidence that a cause of action exists. These notions may be quickly dismissed. The only plausible candidates are the two jurisdictional statutes relied on by appellants, sections 1331 and 1350 of Title 28 of the United States Code. Neither of those statutes either expressly or impliedly grants a cause of action. Both statutes merely define a class of cases federal courts can hear; they do not themselves even by implication authorize individuals to bring such cases. As the Supreme Court has stated, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951). *See also Dreyfus v. Von Finck*, 534 F.2d at 28 (neither 1331 nor 1350 grants a cause of action).

Although the jurisdictional statutes relied on by appellants cannot be read to provide a cause of action, those statutes might conceivably provide evidence of Congress' recognition (as opposed to creation) of one. Appellants do not suggest that section 1331 is evidence of any such recognition, as nothing in its language or history could support such a reading. Rather, appellants focus on section 1350, which is concerned expressly and only with international law (treaties and customary international law) and therefore might suggest that Congress understood, when providing jurisdiction through section 1350, that some individuals would be able to take advantage of that jurisdiction because they had causes of action for torts committed in violation of the law of nations.[19]

The broadest reading of section 1350 as evidence of congressional recognition of such a cause of action is that it merely requires that a plaintiff prove that the actions complained of violated international law. If that jurisdictional prerequisite is met, according to appellants, the plaintiff has a cause of action for tort damages, as he would for any tort. This approach is adopted by the Second Circuit in *Filartiga*, as well as by Judge Edwards. I believe, nonetheless, that this construction of section 1350 must be rejected for several reasons.

19. Appellants argue that a citizen's access to federal courts to seek damages for a tort committed in violation of international law should be the same as an alien's access. International law's special concern for aliens might suggest to the contrary, *see* L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 685–803, 805, and the restriction of section 1350 to aliens might reflect that concern. This question need not be pursued, however, since, for reasons having nothing to do with appellants' citizenship, they have no cause of action in this case.

First, appellants' broad reading would have to apply equally to actions brought to recover damages for torts committed in violation of treaties, since treaties stand in exactly the same position in section 1350 as principles of customary international law (the law of nations). Such an application would render meaningless, for alien plaintiffs, the well-established rule that treaties that provide no cause of action cannot be sued on without (express or implied) federal law authorization. *See supra* p. 784.

Judge Edwards' approach, as well as the analysis of the Second Circuit in *Filartiga*, would also make all United States treaties effectively self-executing. As appellants here seek evidence of a cause of action to vindicate an asserted international law right that they do not assert itself affords them a private right of action, their claim is indistinguishable, under the language of section 1350, from a claim brought to vindicate rights set forth in a non-self-executing treaty.

In addition, appellants' construction of section 1350 is too sweeping. It would authorize tort suits for the vindication of any international legal right. As demonstrated below, that result would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself, and would run counter to constitutional limits on the role of federal courts. Those reasons demand rejection of appellants' construction of section 1350 unless a narrow reading of the provision is incompatible with congressional intent. There is no evidence, however, that Congress intended the result appellants suggest.

What is known of the origins of section 1350 was perhaps best described by Judge Friendly in *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975): "This old but little used section is a kind of legal Lohengrin; . . . no one seems to know whence it came." Section 1350 was enacted, in almost its current form, as part of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77.[20] I have discovered no direct evidence of what Congress had in mind when enacting the provision. The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly. *See* 1 Annals of Cong. 782–833 (J. Gales ed. 1789).

Historical research has not as yet disclosed what section 1350 was intended to accomplish. The fact poses a special problem for courts. A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.

What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. *The Federalist* No. 80 (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this

20. Section 1350, the Alien Tort Claims Act, was enacted by the First Congress in section 9 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 76–77. The original statute read: "[T]he district courts . . . shall . . . 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."