

FEATURE: THE UNITED STATES AS WORLD FORUM

Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation

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I. INTRODUCTION

How do we respond to terrorism? In my view, we must distinguish among three possible legal responses—direct action, criminal remedies, and civil remedies—or, if you prefer, countering terrorism, making terrorists pay, and making terrorists pay up.¹

The first category—direct action, or countering terrorism—encompasses a wide variety of responses: Monitoring terrorist groups, detecting terrorist attacks before they happen, coping with terrorist incidents while they occur, and formulating appropriate responses in the immediate aftermath of terrorist strikes. Although this type of response raises numerous troubling legal problems,² the most difficult questions posed are political and logistical. At the international level, how can the United States coordinate a unified and effective multilateral political and economic response against terrorism?³ At the national level, how can the United States Government best mobilize its military, intelligence, and state and federal law enforcement organizations to respond effectively to particular terrorist incidents?⁴

Criminal and civil responses differ in kind from direct antiterrorist action, inasmuch as they seek not to combat terrorism directly, but rather, to remedy its effects (and by so doing, to contribute to the counterterrorist effort). Criminal remedies address the apprehension, prosecution, and punishment of terrorists. Although frequently overlooked, a relatively comprehensive and complex international legal

1. When this essay was first prepared, I had not yet pondered a fourth possible response to terrorism: Namely, paying terrorists off. *But see* N.Y. Times, Mar. 27, 1987, at 8, col. 3 (remarks of President Reagan) (conceding that the recent United States policy of selling arms to Iran “sort of settled down to just trading arms for hostages, and that’s a little like paying ransom to a kidnapper”).

2. Difficult questions of international legality arise, of course, when a state resorts unilaterally to force in order to rescue its nationals, to apprehend terrorists, or to retaliate against states supporting terrorism. Three recent United States’ actions raise these questions: President Carter’s unsuccessful effort in April 1980 to rescue American hostages in Tehran; the October 1985 interception of an Egyptian aircraft carrying the *Achille Lauro* hijackers; and the April 1986 bombing raid against the headquarters of Libyan leader Qaddafi. For analyses of these questions, see generally Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 138–41 (1986); Note, *Toward a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT’L L. 724 (1986); Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law*, 21 VA. J. INT’L L. 485 (1981). Compare Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS 901, 921–22 (1986) (justifying the United States’ April 1986 bombing raid against Libya on grounds of self-defense) with Fried & Boyle, *The Tokyo Summit Declaration Does Not Support the U.S. Attacks on Libya*, 35 INT’L PRAC. NOTEBOOK 9 (1986) (challenging that justification).

Perhaps the most important question of *domestic* law raised by such unilateral responses is whether the President must consult with Congress before taking counterterrorist action. Compare Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 636 (1986) (testimony of Legal Adviser Abraham Sofaer that the consultation and reporting requirements of the War Powers Resolution do not necessarily apply to antiterrorist acts such as the United States’ 1986 military actions against Libya) with Glennon, *Mr. Sofaer’s War Powers “Partnership,”* 80 AM. J. INT’L L. 584 (1986) (criticizing this assertion).

3. Numerous commentators have addressed this question. See, e.g., TERRORISM: HOW THE WEST CAN WIN (B. Netanyahu ed. 1986).

4. For a treatment of this question, see generally W. FARRELL, THE U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY (1982).

framework already exists to grapple with these tasks. Four tiers comprise this international legal framework: (1) global conventions such as the Tokyo,⁵ Hague,⁶ and Montreal⁷ Conventions on aircraft hijacking and sabotage, and the recent conventions condemning hostage-taking⁸ and crimes against internationally protected persons;⁹ (2) regional pacts, such as the European¹⁰ and Organization of American States¹¹ Conventions on the Suppression of Terrorism; (3) bilateral treaties, particularly those facilitating extradition;¹² and (4) national laws, such as United States federal legislation criminalizing attacks against aviation¹³ and internationally protected persons,¹⁴ hostage-taking,¹⁵ and theft of nuclear materials.¹⁶

5. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

6. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 106.

7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

8. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A/34/39 (1979), *reprinted in* 18 I.L.M. 1456 (1979).

9. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [hereinafter Convention on Internationally Protected Persons]. For a description of these five global conventions, and the problems of obtaining effective enforcement through them, see generally Note, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. INT'L & COMP. L. REV. 323, 326-44 (1986).

Although not expressly directed against terrorism, two other multilateral conventions also attempt to criminalize the possession, diversion, or use of especially dangerous or poisonous materials: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062 (applying controls on toxic weapons that are of potential use to terrorists); Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, *opened for signature* Mar. 3, 1980, *reprinted in* 18 I.L.M. 1419 (1979) (requiring assurances that nuclear materials traded and used for peaceful purposes will be protected during international transport). The texts of the most significant multilateral terrorism conventions are reproduced in TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (R. Lillich ed. 1982).

10. European Convention on the Suppression of Terrorism, Nov. 10, 1976, *opened for signature* Jan. 27, 1977, Eur. T.S. No. 90. The European Convention has been supplemented and stiffened by the Agreement on the Application of the European Convention for the Suppression of Terrorism, *reprinted in* 19 I.L.M. 325 (1980) ("Dublin Agreement").

11. Organization of American States Convention on Terrorism, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 [hereinafter OAS Convention].

12. For a description of the law of extradition specified by these bilateral treaties, see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 475-478 (Proposed Final Draft 1986) [hereinafter REVISED RESTATEMENT]. In addition to the Tokyo, Hague, and Montreal Conventions, a number of bilateral agreements on aircraft hijacking also exist. See, e.g., Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, Cuba-United States, 24 U.S.T. 737, T.I.A.S. No. 7579.

13. See, e.g., Aircraft Sabotage Act, 18 U.S.C. § 1201, 49 U.S.C. §§ 1301, 1472 (Supp. III 1984) (extending United States antihijacking law to reach alleged violators of the Montreal Convention).

14. 18 U.S.C. §§ 112, 878 (Supp. III 1979) (implementing Convention on Internationally Protected Persons, *supra* note 9).

15. As part of the Comprehensive Crime Control Act of 1984, Congress approved the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (Supp. III 1984). That Act implements the international obligations assumed by the United States under the International Convention Against the Taking of Hostages, *supra* note 8.

16. Although the Convention on the Physical Protection of Nuclear Material, *supra* note 9, has not yet entered into force, the United States has already amended its criminal statutes to criminalize the acts

Because this fairly well-articulated legal framework exists, the legal questions regarding criminal remedies usually fall into one of three categories. First, how may nations better utilize existing regional and bilateral extradition arrangements, employ methods of rendition other than extradition (e.g., exclusion and deportation), and invoke other forms of international judicial assistance in criminal matters (e.g., exchange of information, evidence, and prisoners)?¹⁷ Second, how may nations supplement the existing framework through negotiation of new global treaties, regional conventions and bilateral agreements,¹⁸ or enactment of additional national criminal legislation against terrorism?¹⁹ Third, how may citizens ensure that their law enforcement officials' understandable desire to punish terrorists will not lead them to ride roughshod over the civil rights and civil liberties of the accused?

Of the available legal responses to terrorism, civil remedies are far and away the least understood. In contrast to direct action and criminal remedies, civil remedies seek neither to counter terrorism at an international or national level nor to punish individual terrorists directly for their crimes. Broadly construed, the term "civil remedies" encompasses all nonforcible, noncriminal means of sanctioning terrorists and states who support terrorists. Unlike direct action, civil responses to terrorism raise questions that are quintessentially legal, not political and logistical. At the same time, civil remedies differ from criminal remedies in that no highly developed international legal framework governing civil recovery against terrorists currently

proscribed by the agreement. See 18 U.S.C. § 831 (1982). For a compendium of other national laws regarding terrorism, see *LEGISLATIVE RESPONSES TO TERRORISM* (Y. Alexander & A. Nanes eds. 1986).

17. For a recent work examining this question, see J. MURPHY, *PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES* (1985).

18. For a recent, controversial example of such an attempt, see Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, *reprinted in* 24 I.L.M. 1104 (1985) (Senate advice and consent July 17, 1986). This agreement expressly amends the preexisting extradition treaty between the United States and the United Kingdom to exclude from the list of nonextraditable "political offenses" serious offenses typically committed by terrorists. These include aircraft hijacking and sabotage, crimes against diplomats, hostage-taking, murder, manslaughter, malicious assault, kidnapping, and specified firearms, explosives, and serious property damage offenses. See Gilbert, *Terrorism and the Political Offense Exception Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985) (rehearsing arguments for and against applying the political offense exception to terrorism). See generally Note, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty*, 26 VA. J. INT'L L. 755 (1986) (describing treaty's key provisions).

19. Before 1984, the United States had passed only one statute pertaining specifically to antiterrorist activities. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801, 1801(c) (Supp. V 1981) (authorizing electronic surveillance procedures for the gathering of intelligence information regarding terrorists). In late 1984, Congress enacted three antiterrorism bills proposed by the Reagan Administration: The Aircraft Sabotage Act, 18 U.S.C. § 1201, 49 U.S.C. §§ 1301, 1472 (Supp. III 1984) (extending United States antihijacking law to reach alleged offenders of the Montreal Convention); the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (Supp. III 1984) (implementing the international obligations assumed by the United States under the International Convention Against the Taking of Hostages, *supra note 8*); and the 1984 Act to Combat International Terrorism, 18 U.S.C. § 3071 (1984) (authorizing the Attorney General to reward individuals who furnish information regarding certain terrorist acts). Two of these bills are described in Leich, *Four Bills Proposed by President Reagan to Counter Terrorism*, 78 AM. J. INT'L L. 915 (1984).

Title V of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, 99 Stat. 190 (1985), imposes additional prohibitions on assistance to and imports from countries supporting international terrorism, particularly Libya. For the most recent U.S. legislation designed to counter terrorism, see the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986), *discussed in infra note 77*.

exists.²⁰ Moreover, unlike criminal remedies, which look solely toward punishment and deterrence, civil remedies additionally contemplate making terrorists “pay up”—that is, directly or indirectly compensating the victims of terrorist crimes by affording victims or their governments an economic recovery from terrorists or their state supporters.

This essay outlines and explores the questions raised under United States law when individuals and governments invoke civil remedies to make terrorists pay up. Parts II and III argue that the questions of whether and to what extent terrorists should pay for their uncivil wrongs through civil remedies have inspired two ongoing debates. The first concerns questions of *availability* and *obstacles*. Participants in this first debate²¹ ask: What civil remedies are currently *available* against terrorists and nations supporting terrorism, and how can parties injured by terrorists overcome the numerous legal *obstacles* that currently restrict the availability of those civil remedies and reduce their practical chances of recovery? As Part II elaborates, two famous circuit court cases mark the polar positions in this debate: The Second Circuit’s 1981 decision in *Filartiga v. Pena-Irala*²² and the District of Columbia Circuit’s 1984 ruling in *Tel-Oren v. Libyan Arab Republic*.²³

Although the debate over availability and obstacles has achieved a high public profile, it is not the only debate relevant to the subject of civil remedies against terrorism. Part III of this essay argues that those who focus with tunnel vision on the availability of particular civil remedies and the elimination of particular obstacles to recovery risk losing sight of a second, more fundamental debate concerning civil remedies that looms behind the first, namely, the debate over *objectives* and *institutions*. This debate also revolves around two questions: What *objectives* do the recognition and enforcement of civil remedies against terrorism serve and what *institutions* within the national government are best situated to create and enforce these remedies—the courts, Congress, or the Executive Branch?

Parts II and III jointly explain why those concerned about making terrorists “pay up” should refocus their energies from the first debate to the second. As the District of Columbia Circuit’s decision in *Tel-Oren* reveals, the questions of whether and to what extent terrorists should pay up through civil remedies implicate competing national policy objectives. In my view, Congress is the national institution constitutionally and functionally best-suited to balance these competing objectives. For that reason, I believe that the ideal solution to the civil remedy problem would be for Congress to resolve these important policy questions by enacting comprehensive legislation creating civil remedies against terrorism.

Given that the optimal, legislative solution may not be soon forthcoming, however, the question remains whether the federal courts can, without further

20. For example, the family of Leon Klinghoffer, the hostage killed aboard the *Achille Lauro*, can cite no treaty or international convention explicitly affording a civil recovery against the Palestine Liberation Organization (PLO) in an international judicial forum.

21. Litigators in the field commonly address their attention to this debate. See, e.g., Bazylar, *Litigating the International Law of Human Rights: A “How To” Approach*, 7 WHITIER L. REV. 713 (1985) (enumerating litigation problems commonly encountered in human rights cases).

22. 630 F.2d 876 (2d Cir. 1980). See *infra* notes 39–40 and accompanying text.

23. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). See *infra* notes 35–44 and accompanying text.

legislative guidance, provide a "second-best" solution to the second debate. Part IV argues that individual and state litigants have recently asked the courts to do precisely that in a growing number of domestic lawsuits, which comprise a burgeoning phenomenon that I call *transnational public law litigation*. Part IV suggests that the competing policy concerns raised by civil suits against terrorists, such as *Tel-Oren*, are not *sui generis*, but rather, are implicated by this entire class of litigation. Reviewed in this light, *Tel-Oren* ultimately proves less important for its refusal to make terrorists pay up than for its failure to articulate and enunciate new legal norms regarding international terrorism. In *Tel-Oren*, the court refused to promote the use of transnational public law litigation to combat terrorism, thereby throwing back to Congress the task of developing civil antiterrorist remedies. Part IV concludes that, after *Tel-Oren*, Congress should respond to the missed opportunity by enacting legislation that promotes the nascent transnational public law litigation genre.

II. THE FIRST DEBATE: AVAILABILITY AND OBSTACLES

A. *What Civil Remedies are Available Against Terrorism?*

When Americans think about civil remedies, they tend reflexively to think first of remedies provided by the courts, usually the federal courts. Yet the federal civil judicial remedies currently available against terrorists remain relatively few in number.²⁴ If one looks beyond the courts and thinks imaginatively, however, the

24. The most prominent remedy available to alien plaintiffs against individual terrorists acting under color of state law is found in the Alien Tort Statute, 28 U.S.C. § 1350 (1982), discussed in greater detail in *infra* notes 34-58 and accompanying text. Deportation and exclusion are also applied as civil sanctions against alleged individual terrorists in so-called "disguised extradition" proceedings (*i.e.*, efforts to deport terrorists after the failure of criminal extradition proceedings). *See, e.g.*, McMullen v. Immigration and Naturalization Service, 658 F.2d 1312, 1313-14 (9th Cir. 1981) (I.N.S. attempt to deport member of Provisional Irish Republican Army to Ireland after failing to extradite him to the United Kingdom).

The principal civil judicial remedies available to the United States Government against groups supporting terrorists are found in the Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (1984) [hereinafter FARA] and the civil remedies provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1984) [hereinafter Civil RICO]. FARA establishes a comprehensive scheme of registration, reporting, and disclosure requirements for "agents" of "foreign principals." Under FARA, the Attorney General has compelled the Northern Irish Aid Committee to register as a foreign agent, to disclose its purposes, to make revelations regarding its political propaganda activities and to account for its expenditures. *See* Attorney General v. Irish N. Aid Comm., 465 F.2d 1405 (2d Cir.), *cert denied*, 409 U.S. 1080 (1972).

Civil RICO authorizes government suits and private treble damage actions by persons injured in their business or property against RICO "enterprises" engaging in a "pattern of racketeering." *See* 18 U.S.C. § 1964(c) (1982). RICO defines "pattern of racketeering" to include the commission of a series of predicate acts, including "any act or threat involving murder, kidnapping . . . arson, . . . or extortion," within a ten-year period. *Id.* §§ 1961(1), (5). For RICO purposes, an "enterprise" is further defined to include "any . . . group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). The United States has brought criminal RICO actions against Serbo-Croatian terrorists extorting contributions from United States residents. *See* U.S. v. Bagaric, 706 F.2d 42 (2d Cir. 1983). Recently, the United States Attorney's Office for the Southern District of New York has considered invoking Civil RICO to seek injunctions limiting the activities and obtaining forfeiture of the assets of other organizations supporting terrorist groups. *See* Summary of Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists, American Bar Association National Conference on the Law in Relationship to Terrorism (June 6, 1986) (remarks of Carl

nonforcible, noncriminal remedies available to combat terrorism span a far broader range than one might first assume.

The array of possible "civil" antiterrorist responses run the gamut from those remedies directed primarily against terrorist individuals and groups to those intended primarily to sanction their state supporters. Immigration measures and curtailment of travel rights are prime examples of nonforcible, noncriminal actions targeted against individual terrorists.²⁵ A listing of the available nonforcible, noncriminal sanctions against state supporters of terrorism, by contrast, encompasses nearly every tool of economic warfare currently available to nations:²⁶ denial of import benefits,²⁷ export

T. Solberg, Chief of Civil Division, Office of United States Attorney for the Southern District of New York (copy on file with *Texas International Law Journal*). At least one criminal RICO prosecution has been brought against a foreign "enterprise" based on its overseas activities. See *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Under these RICO precedents, private citizens could conceivably seek treble damages, costs, and attorney fees from groups supporting foreign terrorists, claiming injury from the overseas activities of those groups.

25. The seven major democracies and the European Community agreed to take such actions at the May 1986 Tokyo Summit. See Tokyo Economic Summit, Statement on International Terrorism, May 5, 1986, ¶ 4, reprinted in 25 I.L.M. 1005 (1986). Shortly after the summit, Great Britain expelled three Syrian diplomats because of their refusal to answer questions about their reported role in a plot to blow up an Israeli airplane. See N.Y. TIMES, May 14, 1986, at A26, col. 1. The United States also recently took deportation measures against suspected terrorists. See *supra* note 24. For an example of legislation recently proposed to authorize the exclusion of aliens affiliated with terrorist organizations from the United States, see H.R. 3903, 99th Cong., 1st Sess. (1985).

26. For a survey of these sanctions, see J. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 911-52 (2d ed. 1986). For a criticism of their effectiveness, see generally G. HUFBAUER & J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED (1985).

27. Section 502(b)(7) of the Trade Act of 1974, which authorized the creation of the United States Generalized System of Preferences, bars any country that "aid[s] or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism" from eligibility for duty-free treatment. 19 U.S.C. § 2462(b)(7) (1982 & Supp. III 1986). Although the Statute permits the President to waive application of this provision, he may do so only after determining that granting such a country developing country status "will be in the national economic interest of the United States" and reporting that determination to Congress. *Id.*

Subject to consultation and reporting requirements, the International Security and Development Act of 1985, Pub. L. No. 99-43, § 505, 99 Stat. 190 (1985), authorized the President to ban the importation into the United States of any good or service from any country that supports or harbors terrorists. See 22 U.S.C. § 2349aa-9 (1986). Moreover, following the murder of American Leon Klinghoffer aboard the *Achille Lauro*, Senator Bentsen introduced S. 1778, a bill designed to deny trade preferences, including most-favored nation privileges, to any country listed by the Secretary of State as supporting terrorism. See *Sen. Bentsen Introduces Bill To Deny MFN Benefits to Terrorist Countries*, 2 INT'L TRADE REP. (BNA) 1340 (Oct. 23, 1985).

controls,²⁸ financial embargoes and economic boycotts,²⁹ withholding of foreign aid,³⁰ termination of arms sales,³¹ and suspension of air flights by both official and nongovernmental institutions,³² to name but a few.

28. The Fenwick Amendment to the Export Administration Act of 1979 [hereinafter EAA] required the Secretaries of Commerce and State to notify key congressional committees at least 30 days before licensing the export of goods or technology valued at more than \$7 million to any country that the Secretary of State determined "has repeatedly provided support for acts of international terrorism," if "such exports would make a significant contribution to the military potential of such country . . . or would enhance the ability of such country to support acts of international terrorism." Pub. L. No. 96-72, § 6(i), 93 Stat. 513 (1979). See generally Note, *Export Controls and the U.S. Effort to Combat International Terrorism*, 13 LAW & POL'Y INT'L BUS. 521 (1981).

The 1985 amendments to the EAA strengthened this provision so that once made, such a determination may not be rescinded unless the President first certifies to Congress that the target country has not provided support for major terrorists during the preceding six months and that the country has provided assurances that it would not support acts of international terrorism in the future. See 50 U.S.C. app. § 2405(j)(2) (Supp. 1987). Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399 § 509, 100 Stat. 853 (1986) (to be codified at 50 U.S.C. app. § 2405(j)(1)), further amends that provision to require presidential notification for any sale of goods or technology valued at more than \$1 million. The 1986 amendment further prohibits export of any item on the United States Munitions List to any country that the Secretary of State determines engages in or provides support for international terrorism. The same amendment permits the President to waive this prohibition for ninety days, however, if he determines that the proposed export is important to national interests and submits a report to Congress justifying the determination and describing the proposed export. *Id.* Arguably, the Reagan Administration violated all of these provisions by its recent conduct during the Iran-*Contra* affair. See *supra* note 1.

29. Recent examples include the economic sanctions imposed by President Reagan against Libya in January 1986 and against Syria in November of the same year. See generally *Documents Showing the Evolution of Sanctions Against Libya*, 25 I.L.M. 173 (1986); *Administration Announces Economic Moves Against Syria, Citing Terrorism Support*, 3 INT'L TRADE REP. (BNA) 1382 (Nov. 19, 1986). Sanctions were imposed in both of these cases following presidential declarations of national emergency and executive orders issued pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982).

The Terrorist Subsidy Prevention Act, another bill in the 99th Congress proposing financial embargoes against terrorists, would have amended the EAA to allow the President to control capital transfers from United States banks to countries defined as supporting international terrorism. The list of such countries currently includes Syria, Libya, Southern Yemen, Iran, and Cuba. See *Measure to Control Capital to Terrorist List Nations, Garn, Moynihan Bills to be Combined*, 3 INT'L TRADE REP. (BNA) 893 (July 9, 1986). Three other measures introduced in the 99th Congress would have taken a different tack, applying government financial boycotts to private parties who do business with terrorists. See *Pentagon Backs Bill Denying Contracts To Firms With Ties To Terrorist Nations*, 3 INT'L TRADE REP. (BNA) 618 (May 7, 1986).

30. See, e.g., § 503 of the International Security and Development Act of 1985, 22 U.S.C. § 2371 (1977) (prohibiting foreign assistance to countries supporting or granting sanctuary to terrorists under the Foreign Assistance Act of 1961, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Arms Export Control Act); the 1976 Terrorism Amendment to the Foreign Assistance Act of 1976, 22 U.S.C. § 2371(a)(1976) (requiring the President to terminate all assistance under the Foreign Assistance Act to any government that aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism), discussed in Lillich & Carbonneau, *The 1976 Terrorism Amendment to the Foreign Assistance Act of 1976*, 11 J. INT'L L. & ECON. 223 (1977); see also Bretton Woods Agreements Act—Financing Facility, (codified at 22 U.S.C. § 286e-11(1982)) (barring International Monetary Fund from assisting any country harboring international terrorists); Omnibus Multilateral Development Institutions Act of 1977, 22 U.S.C. § 262d (1977)) (requiring United States Executive Directors of the World Bank group and the International Monetary Fund to oppose assistance or loans to any state providing refuge to individuals committing acts of international terrorism by hijacking aircraft, unless national security necessitates otherwise); 1978 Amendment to the Export-Import Bank Act, Pub. L. No. 95-481, § 607, 92 Stat. 1601 (1978) (barring foreign governments that aid, abet, or grant sanctuary from prosecution to any individual or group which commits an act of international terrorism from receiving funds appropriated by the Export-Import Bank).

31. The International Security Assistance and Arms Export Control Act provides: "Unless the

The existence of this unusually broad range of remedies counsels against imposing a “*New Yorker* magazine view of the world” upon the topography of “available” civil remedies.³³ We must beware of myopically depicting the landscape of civil remedies as dominated by courts and damage awards, with nonjudicial remedies sketched only dimly in the distance. A broader construction of the term “civil remedies” would recognize the availability to the Executive Branch and private organizations of a wide range of noncriminal, nonforcible remedies against terrorists and their state supporters, with judicial remedies representing only the tip of the iceberg.

All of this having been said, public attention nevertheless returns almost invariably to the judicial remedy as the civil remedy best adapted not only to making terrorists “pay” in some general sense, but also to making them literally “pay up,” in the specific sense of compensating the victims of their acts. Whether compensation is in fact likely or possible, however, depends upon the extent of the legal obstacles to civil recovery, the other issue dominating this first debate.

B. *Tel-Oren’s Legacy: Obstacles to Civil Recovery*

Under existing United States law, the obstacles to civil relief comprise a veritable minefield of difficulties for parties seeking recovery from terrorists and their state supporters. This situation results primarily from the District of Columbia Circuit’s 1984 ruling in *Tel-Oren v. Libyan Arab Republic*,³⁴ which splashed cold water on efforts by victims of terrorism to obtain a civil recovery against their assailants in federal court.

President finds that the national security requires otherwise, he shall terminate all sales under this chapter to any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism.” 22 U.S.C. § 2753(f)(1) (Supp. 1986). The recent Reagan Administration arms sales to Iran may also have violated this provision. See *supra* note 1.

32. At the 1978 Bonn Economic Summit Conference, the seven major industrialized nations signed a nonbinding agreement to suspend air service to and from countries that refuse to extradite or prosecute hijackers or to return hijacked aircraft or passengers. See Bonn Economic Summit Declaration, Joint Statement on International Terrorism, July 17, 1978, 14 WEEKLY COMP. PRES. DOC. 1308–09 (July 24, 1978), reprinted in 17 I.L.M. 1285 (1978). Eight years later, the heads of the same seven nations and representatives of the European Community agreed in Tokyo to “make the 1978 Bonn Declaration more effective in dealing with all forms of terrorism affecting civil aviation”. See Tokyo Economic Summit, Statement on International Terrorism, May 5, 1986, ¶ 5, reprinted in 25 I.L.M. 1005 (1986); *id.* ¶ 2 (urging nations to collaborate in international fora such as the International Civil Aeronautics Organization and the International Maritime Organization to take countermeasures against terrorism).

In accordance with these multilateral declarations, President Reagan and Secretary of Transportation Dole recently responded to the hijacking of a Trans World Airliner in Athens by invoking various provisions of the Federal Aviation Act. Those orders barred Lebanese air carriers from flying to and from the United States and prevented United States and foreign air carriers from carrying passengers to and from Lebanon. See Sofaer, *Fighting Terrorism Through Law*, 85 DEP’T STATE BULL. 38, 40–41 (1985). Shortly after the same incident, a private, nongovernmental organization, the International Airline Pilots Association, proposed a worldwide pilots boycott against governments found responsible for terrorist acts against airplanes. See N.Y. TIMES, Apr. 3, 1986, at A8, col. 4.

33. I refer, of course, to the famous *New Yorker* magazine cover that shows Fifth Avenue in the immediate foreground, with New Jersey, Los Angeles, and Japan visible in the distance and Chicago and Hawaii reduced to tiny bumps on the horizon. See THE NEW YORKER, Mar. 29, 1976.

34. 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1000 (1985).

By now, the facts of *Tel-Oren* are familiar.³⁵ *Tel-Oren* arose out of a March 1978 terrorist attack by thirteen members of a Palestine Liberation Organization (PLO) faction on more than 100 Israeli civilians traveling on an Israeli highway. During that attack, the terrorists seized, tortured and shot hostages, eventually killing thirty-four and seriously wounding nearly eighty others. Several years later, Israeli plaintiffs who were either personally injured in the attack or who survived those killed in the attack, sued the PLO, the Libyan Arab Republic, and three Arab-American groups in the United States District Court for the District of Columbia. The plaintiffs asserted subject matter jurisdiction based, *inter alia*, on the Alien Tort Statute.³⁶ That Statute, first enacted in 1789, grants the federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁷

Tracking the Statute’s language, the *Tel-Oren* plaintiffs alleged that they were aliens victimized by torts authored by the PLO and supported by Libya and the three private groups; these torts, they claimed, amounted to torture and terrorism in violation of United States treaties and the “law of nations.”³⁸ At first blush, the Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*,³⁹ seemed to compel acceptance of their claim. In that famous case, the Second Circuit held that the Alien Tort Statute conferred subject matter jurisdiction over a tort suit brought by aliens against aliens for official torture occurring overseas.⁴⁰ Nevertheless, the district court dismissed the

35. *Tel-Oren* has already attracted reams of commentary. See, e.g., *Agora: What Does Tel-Oren Tell Lawyers?*, 79 AM. J. INT’L L. 92 (1985); Recent Development, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697 (1985); Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211 (1985); Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163 (1985); Note, *Limiting the Scope of Federal Jurisdiction Under the Alien Tort Statute*, 24 VA. J. INT’L L. 941 (1984).

36. 28 U.S.C. § 1350 (1982). Plaintiffs also claimed subject matter jurisdiction under the general federal question provision, *id.* § 1331 (1982); the federal diversity provision, *id.* § 1332 (1982); and the Foreign Sovereign Immunities Act of 1976, *id.* §§ 1330, 1602–1611 (1982). See *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 545 (D.D.C. 1981).

37. Congress originally enacted the Statute as part of the Judiciary Act of 1789. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789). The Statute’s obscure provenance led Judge Friendly to dub it a “legal Lohengrin; . . . no one seems to know from whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). *But see* Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 11–31 (1985) (arguing that drafters intended the Statute to extend federal authority over certain tort actions brought by aliens in which federal jurisdiction might otherwise have been unavailable).

38. The plaintiffs construed this term to mean universally recognized norms of customary international law not codified in treaties or international conventions, as they existed at the time of the lawsuit. On appeal, only Judge Edwards endorsed this meaning of the “law of nations.” See 726 F.2d at 777 (Edwards, J., concurring).

39. 630 F.2d 876 (2d Cir. 1980).

40. In *Filartiga*, two Paraguayan citizens invoked the Alien Tort Statute to sue a Paraguayan police official who had tortured their relative to death in Paraguay. 630 F.2d at 878. The district court originally dismissed the action for lack of subject matter jurisdiction, but on appeal the Second Circuit reversed. Judge Kaufman, writing for the court, construed the words “violation of the law of nations” in the Statute to embody evolving notions of customary international law. *Id.* at 881. Under this interpretation, all individuals, regardless of their nationality, possess a fundamental human right to be free from “deliberate torture perpetrated under color of official authority.” *Id.* On remand, the district judge then awarded the two Paraguayan citizens a default judgment against the Paraguayan police chief of nearly \$10.4 million in compensatory and punitive damages. See 577 F. Supp. 860 (E.D.N.Y. 1984). For further description and discussion of *Filartiga*, see Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims*:

Tel-Oren action against all defendants for want of subject matter jurisdiction,⁴¹ the D.C. Circuit unanimously affirmed in a per curiam opinion,⁴² and the Supreme Court denied certiorari.⁴³

The voluminous concurring opinions in *Tel-Oren*, authored by Circuit Judges Edwards, Bork, and Robb, presented mutually conflicting rationales for affirming the district court's judgment.⁴⁴ Although two of those opinions expressly declined to undercut *Filartiga*,⁴⁵ their import clearly was to the contrary. Taken together, the three *Tel-Oren* opinions present an array of legal doctrines that dramatically restrict the practical availability of federal civil judicial remedies to victims of terrorism.

After *Tel-Oren*, ten distinct obstacles confront victims seeking a tort recovery from terrorists and their state supporters in federal courts. First and foremost, substantial barriers exist to subject matter⁴⁶ and personal jurisdiction.⁴⁷ A second

The Alien Tort Claims Act after Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981); Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981).

41. *Tel-Oren*, 517 F. Supp. 542 (D.D.C. 1981). The district court reasoned that § 1350 "serves merely as an entrance into the federal court and in no way provides a cause of action to any plaintiff." *Id.* at 549. The judge further concluded that none of the treaties cited by the plaintiffs nor the law of nations conferred a private right of action on individuals to enforce those international obligations in domestic courts. *Id.* at 545–50. On appeal Judge Bork essentially endorsed the district court's view. *See* 726 F.2d at 799 (Bork, J., concurring) ("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 False . . .").

42. 726 F.2d at 775 (per curiam). Before issuing the ruling, the D.C. Circuit held the case under submission for nearly two years. *See id.* at 774.

43. 470 U.S. 1003 (1985). In response to the Court's invitation, 469 U.S. 811 (1984), the Solicitor General filed an amicus brief urging that review be denied. That brief argued against review, largely because of the lower court judgment's lack of clarity and the absence of a circuit conflict. *See* Brief for the United States as Amicus Curiae, *Tel-Oren v. Libyan Arab Republic*, reprinted in 24 I.L.M. 427 (1985) [hereinafter *Government Tel-Oren* brief].

44. *See* 726 F.2d at 775–98 (Edwards, J., concurring); *id.* at 798–823 (Bork, J., concurring); *id.* at 823–27 (Robb, J., concurring). The extent of the judges' disagreement was so vast that Judge Bork concluded that "it is impossible to say even what the law of this circuit is" with respect to the meaning and application of the Alien Tort Statute. 726 F.2d at 823 (Bork, J., concurring).

45. Judge Edwards claimed to "adhere to the legal principles established in *Filartiga* but [found] that factual distinctions preclude reliance on that case to find subject matter jurisdiction in the matter now before us." *Id.* at 776. Judge Bork, by contrast, distinguished *Filartiga* from *Tel-Oren* on three grounds: The *Filartiga* defendant "was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive." *Id.* at 820. For these reasons, Judge Bork concluded that "not all of the analysis applied here would apply to deny a cause of action to the plaintiffs in *Filartiga*." *Id.*

46. A court relying on the district court's opinion in *Tel-Oren*, as generally approved by Judge Bork on appeal, *supra* note 41, would dismiss claims under the Alien Tort Statute unless plaintiffs could demonstrate that either the law of nations or a treaty of the United States explicitly conferred a private right of action. *See infra* note 50. Furthermore, the court would likely dismiss any federal question claims on the ground that neither federal common law, federal criminal statutes against terrorism, nor treaties of the United States expressly created a civil cause of action on behalf of plaintiffs and that the case therefore did not "arise under" the Constitution, laws, or treaties of the United States for purposes of 28 U.S.C. § 1331 (1982). Finally, alien plaintiffs invoking diversity jurisdiction would face constitutional problems, because Article III of the Constitution does not recognize federal jurisdiction over suits brought by aliens against other aliens on nonfederal causes of action. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (sustaining constitutionality of the Foreign Sovereign Immunities Act against a challenge based on this ground).

47. Serious problems of personal jurisdiction arise when defendants are terrorists or groups supporting

question, seemingly mundane but critical in practice, is how does one *serve* a terrorist with the process required to perfect personal jurisdiction?⁴⁸ Third, even assuming that a United States court is willing to assert jurisdiction, how may an alien plaintiff defeat a foreign defendant's inevitable motion to dismiss a suit alleging terrorist acts committed on foreign soil, based on the revitalized doctrine of *forum non conveniens*?⁴⁹ Fourth, may victims of terrorist acts *state a claim* sufficient to survive defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and if so, under what body of law would that cause of action arise?⁵⁰ Fifth, who, if anyone, would have *standing* to sue terrorists in a federal court?⁵¹ Sixth, in a case alleging state-

terrorism who are neither present within the United States nor possess minimum contacts with it sufficient to satisfy the due process standard stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 55 U.S.L.W. 4197, 4200 (Feb. 24, 1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."). In *Filartiga*, the defendant Pena was arrested in New York for violating his visitor's visa and ordered deported. The plaintiffs were fortunate enough to serve the defendant with a summons and a civil complaint while he was in a New York detention center awaiting deportation. The district court then stayed the deportation order to ensure Pena's availability for trial. 630 F.2d at 879. The Second Circuit, *id.* at 880, and the Supreme Court then denied further stays, *Filartiga v. Pena-Irala*, 442 U.S. 901 (1979), after which the defendant was deported to Paraguay. Obviously, however, the defendant will rarely be so readily available.

48. This problem arose in *Tel-Oren*, in which there was doubt as to whether the PLO or Libya had been properly served. 517 F. Supp. at 545 n.1. This defect, highlighted by the Solicitor General in his amicus brief urging denial of certiorari, probably contributed to the Supreme Court's decision not to hear the case. *See* Government *Tel-Oren* brief, *supra* note 43, 23 I.L.M. at 434 ("In these circumstances, we question whether this Court should exercise its discretionary jurisdiction to construe a statute as complex and little understood as the alien tort statute in a context in which the outcome of the case is unlikely to be affected.").

49. Since the Supreme Court's decision in *Piper v. Reyno*, 454 U.S. 235 (1982), the doctrine of *forum non conveniens* has become increasingly important in all types of transnational lawsuits, particularly in those involving transitory torts. *See, e.g., Tompkins, The Doctrine of Forum Non Conveniens in the Litigation of Foreign Aviation Tort Claims in the United States*, 2 NOTRE DAME INT'L & COMP. L.J. 1 (1984). In an order upheld in large part on appeal, Judge Keenan recently invoked that doctrine to dismiss the suit brought in the Southern District of New York against Union Carbide by the Government of India and Indian plaintiffs injured in the Bhopal tragedy. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part*, 809 F.2d 195 (2d Cir. 1987). *See generally* Weiberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT'L L.J. 307, 313-15 (1985).

50. This was the heart of the controversy in *Tel-Oren*. Judge Bork argued against assertion of subject matter jurisdiction on the ground that the plaintiffs had "failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely." 726 F.2d at 799 (Bork, J., concurring); *id.* at 801 ("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."). For Article III reasons, the alien plaintiffs in *Tel-Oren* could not rely solely upon state tort law to sue other aliens in United States federal court. *See supra* note 46. In Judge Bork's view, no federal statute gave the plaintiffs a cause of action against the terrorists, 726 F.2d at 811, and the treaties upon which plaintiffs relied had either never been ratified by the United States or, even if ratified, were not self-executing. *Id.* at 808-10. Finally, he concluded that separation of powers concerns counseled against federal courts' inferring private rights of action directly from emerging norms of customary international law condemning terrorism. *Id.* at 801-08, 810-19. Judge Bork left open the possibility, however, that these concerns would not "deprive an individual of a cause of action clearly given by . . . Congress." *Id.* at 804.

In response, Judge Edwards argued that the Alien Tort Statute provides both a right to sue and a forum. *Id.* at 777, 780. Accordingly, in his view, plaintiffs need not look to the "law of nations" as a source of a cause of action. *Id.* at 779.

51. For instance, many governments sue on behalf of their citizens as *parens patriae*, as India recently chose to do in the Bhopal litigation? The similar question of whether the Republic of the Philippines has standing as a "person" to sue ex-President Marcos under the RICO Statute, 18 U.S.C. § 1961 (a), is currently pending in *Republic of the Philippines v. Marcos*, Nos. 86-6091 & 86-6093, *appeal pending*, 9th Cir. 1986 (appeal from *Republic of Philippines v. Marcos*, No. 86-3859 MRP (GX) (C.D. Cal. 1986)) (ruling that a

sponsored terrorism, how would prospective plaintiffs overcome any immunities the defendants might possess against civil suit—*diplomatic immunity* in the case of foreign individuals⁵² or *foreign sovereign immunity* in the case of foreign governments?⁵³ Seventh, would the United States court abstain from reviewing the subject matter of the suit as *nonjusticiable* under the Act of State Doctrine, the political question doctrine, or both?⁵⁴ Eighth, even assuming that any given suit could survive these pretrial obstacles, how could a plaintiff obtain *discovery* of the evidence necessary to prove causation of a terrorist attack?⁵⁵ Finally, how could plaintiffs *attach* assets of

foreign government has standing).

52. Article 31 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 3240–41, T.I.A.S. No. 7502, 500 U.N.T.S. 95, grants diplomatic agents immunity from criminal jurisdiction and most civil actions in the receiving state. A number of commentators, however, have recently called for revision of this rule to divest terrorist diplomats of immunity. See, e.g., Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1523–26 (1986) (describing recent incidents of abuse of diplomatic immunity by terrorist-diplomats); Reston, *Reflections on Terror*, N.Y. TIMES, May 14, 1986, at A27, col. 5.

53. In the United States, such immunity is, of course, conferred by the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. §§1330, 1602–1611 (Supp. 1987) [hereinafter FSIA]. Despite their many disagreements in *Tel-Oren*, Judges Bork and Edwards did agree that the plaintiffs' suit against Libya was barred by the FSIA's noncommercial tort exception, which permits a plaintiff to recover against a foreign state only for noncommercial torts that cause injury, death, or property damage "occurring in the United States." *Id.* §1605(a)(5). See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 775–76 n. 1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). A number of courts have recently held that FSIA provides the exclusive basis for withdrawal of foreign sovereign immunity and have therefore dismissed Alien Tort Statute suits against foreign governments on that ground. See, e.g., *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986), *appeal pending* (suit by Liberian corporations against Argentina arising out of bombing oil tanker during Falklands war); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984), *appeal pending*; *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Mar. 7, 1985).

54. As interpreted by Justice Powell's concurrence in *Goldwater v. Carter*, 444 U.S. 996 (1979), the political question doctrine bars federal courts from hearing suits that "involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government"; that "demand that a court move beyond areas of judicial expertise"; and in which "prudential considerations counsel against judicial intervention." 444 U.S. at 998 (1979) (Powell, J., concurring). In *Tel-Oren*, Judge Robb concluded "that the political question doctrine controls. This case is nonjusticiable." 726 F.2d at 823 (Robb, J., concurring). Judges Edwards and Bork each hotly disputed Judge Robb's claim. See *id.* at 796–98 (Edwards, J., concurring); *id.* at 803 n.8 (Bork, J., concurring). See generally Henkin, *Is There a "Political Question" Doctrine*, 85 YALE L.J. 597 (1976) (arguing against strict exemption from judicial review for certain enumerated "political questions").

Similarly, the Act of State doctrine precludes the federal courts from inquiring into the validity of public acts of recognized foreign sovereigns committed within their own territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). That doctrine could theoretically bar examination of state-supported terrorism occurring within a foreign nation's territory. Indeed, a number of recent Alien Tort Statute cases brought by Filipinos charging ex-President Marcos with human rights violations have been dismissed on Act of State grounds. See *Trajano v. Marcos*, Civ. No. 86-0207 (D. Haw. July 18, 1986); *Hilao v. Marcos*, Civ. No. 86-390 (D. Haw. July 18, 1986); *Sison v. Marcos*, Civ. No. 86-0225 (D. Haw. July 18, 1986); *Ortigas v. Marcos*, No. C 86-0975 SW (N.D. Cal. Jan. 22, 1987); *Clemente v. Marcos*, No. C 86-1449 SW (N.D. Cal. Jan. 22, 1987).

55. Even if the Executive Branch should possess the hard evidence necessary to prove that a particular terrorist or terrorist group was responsible for a particular attack, a federal court would not likely order the Government to produce such evidence to a private party seeking compensation against the terrorists in a civil suit. This would be particularly true if the release of that information might jeopardize national security interests or disrupt planned counterterrorist measures. See *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to

states supporting terrorism before judgment and *enforce* any civil judgments ultimately obtained, notwithstanding the restrictive attachment and enforcement provisions of the Foreign Sovereign Immunities Act?⁵⁶

It is no accident that these ten headings sound uncomfortably like a syllabus of topics covered in a first-year Civil Procedure course. This enumeration of the legal obstacles to civil relief against terrorists or states supporting terrorists serves primarily to illustrate that such suits strain the capabilities of the civil adjudication system at each and every step of the litigation process.⁵⁷

Yet to dwell at length on any particular obstacle is probably misguided. A myopic focus on the debate over availability and obstacles too quickly yields a simple, two-part prescription: That courts should solve the problem of availability by construing existing judicial remedies to reach terrorist acts, even when those remedies were arguably never intended to reach those acts,⁵⁸ and that judges should reduce the obstacles to civil relief in terrorist cases by creating judicial exceptions to existing obstacles to civil recovery whenever terrorist acts are alleged.

Unpopular defendants, however, often make bad law. An understandable desire to make civil remedies more effective against terrorism may trigger unprincipled, ad hoc judicial expansion of the available civil remedies and, ad hoc judicial elimination

the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.”).

56. See 28 U.S.C. §§ 1609–1611 (declaring general rule of immunity of foreign state assets from prejudgment attachment and postjudgment execution, subject to limited exceptions). The problem of collecting a judgment against terrorists and states supporting terrorism has plagued victims and their families. Following the 1976 car-bombing of former Chilean Foreign Minister Orlando Letelier, for example, his family recovered \$5 million in a wrongful death action in a District of Columbia District Court. See *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980). When plaintiffs attempted to enforce that judgment against Chile’s wholly-owned state airline, however, the Second Circuit barred enforcement on the ground that the airline, as a juridical entity distinct from Chile, could not be held accountable for the parent’s debt. See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984). The court concluded that “under the circumstances at issue in this case Congress did in fact create a right without a remedy.” *Id.* at 798. Furthermore, the two most prominent Alien Tort Statute cases that have gone to judgment—*Filartiga* and *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985)—resulted in default judgments that have yet to be collected. See Comment, *Alien Tort Claims in the 1980’s: Von Dardel v. Union of Soviet Socialist Republics*, 12 BROOKLYN J. INT’L. L. 469, 502–03 & n.167 (1986); *supra* note 40.

57. Indeed, based upon recent rulings, four of these obstacles to civil relief—subject matter jurisdiction, stating a claim, justiciability, and enforcement of judgments—have grown increasingly prominent in restricting the practical availability of civil judicial remedies to victims of terrorism. See *supra* notes 46, 50, 54 & 56.

58. It seems clear, for example, that none of the civil remedies described *supra* note 24 were originally enacted with the intention of targeting groups supporting international terrorism. Now that *Tel-Oren* has restricted the practical availability of relief under the Alien Tort Statute, victims of terrorism seem likely to turn to other civil remedies. The use of those alternatives, however, also raises serious policy concerns. Ironically, suggestions that Civil RICO be construed to combat terrorism arise amidst growing public concern that civil litigants are abusing that Act’s broad and vaguely worded provisions. See, e.g., Boucher, *Bill Curbing RICO’S Use Advances*, NAT’L L.J., Sept. 1, 1986, at 15, 19, col. 4 (charging that “[t]he federalization of thousands of mere commercial disputes . . . threatens to swamp a federal judiciary never designed to handle such cases.”). Similarly, the United States Government’s use of “disguised extradition” proceedings to expel suspected terrorists, see *supra* note 24, has stimulated serious protests from civil libertarians claiming abuse of the deportation process. See, e.g., NAT’L L.J., Sept. 29, 1986, at 3, col. 1 (describing objections to Justice Department claims that deportation of an Irish Republican Army member to Ireland would be “prejudicial to the national interest,” after the Department had failed to win defendant’s extradition to Great Britain).

of particular litigation obstacles. Without a broader understanding of the policy concerns implicated by civil suits against terrorists, such an outcome would ultimately prove both unwise and uninformed. However important the debate over availability and obstacles may be, it is not the only debate relevant to civil recovery against terrorism.

III. THE SECOND DEBATE: OBJECTIVES AND INSTITUTIONS

A. *The Objectives of Civil Remedies*

What larger objectives are served by recognizing and enforcing remedies against terrorism? Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.

At the same time as judicial remedies against terrorists promote these objectives, however, they simultaneously raise two sets of serious concerns: Judicial competence concerns and separation of powers concerns. The former address the possibility that individual courts might lack the competence to conduct either the fact-finding or the legal analysis necessary to decide particular civil suits against terrorists, as well as the larger fear that the federal court system as a whole might be incapable of controlling the potential docket-flooding posed by such cases. Separation of powers concerns suggest that federal courts cannot adjudicate cases involving allegations of state-sponsored terrorism, which have heavy foreign policy overtones, without exceeding their constitutionally defined role or interfering with the foreign relations function of the coordinate political branches.

While traditional tort law and public international law objectives generally cut in favor of granting civil remedies against terrorism, judicial competence and separation of powers concerns cut in exactly the opposite direction. Thus, the task of enforcing civil remedies against terrorists is inherently double-edged. Just as judges enforcing criminal remedies against terrorists must balance the desirability of swift and sure punishment against the need to protect the rights of the accused, judges enforcing civil remedies must balance traditional tort and public international law objectives against bona fide concerns about judicial competence and separation of powers.

It is important to recognize that where one stands in the debate over objectives and institutions ultimately determines where one sits in the debate over availability and obstacles. Perhaps more than any other factor, this reality explains the deep division among the judges who decided *Tel-Oren*. In that case, Judge Robb argued that the court should dismiss the Israeli plaintiffs' suit against the PLO and Libya on

political question grounds essentially because of judicial competence concerns.⁵⁹ In his concurring opinion, Judge Robb emphasized the inability of individual judges to find the international law and determine the facts necessary to decide individual terrorism cases, as well as the incompetence of the federal system as a whole to handle such cases.⁶⁰ Judge Bork's concurring opinion, on the other hand, relied almost entirely on separation of powers concerns. In arguing against jurisdiction, Judge Bork expressed his fear that judicial implication of private civil rights of action in terrorism cases would inevitably create a clash between the judicial and political branches of government, thereby violating the principle of separation of powers.⁶¹ Judge Edwards offered two theories of the Alien Tort Statute which demonstrated a greater willingness to apply civil remedies to promote the broader objectives of traditional tort and public international law.⁶² In the end, however, his opinion also ultimately denied

59. See 726 F.2d at 823–27 (Robb, J., concurring). Although any judicial reliance on the political question doctrine usually reflects a mix of separation of powers and judicial competence concerns, Judge Robb's opinion focused on the "inherent inability of federal courts to deal with cases such as this one," *id.* at 823, because "[t]he conduct of foreign affairs has never been accepted as a general area of judicial competence." *Id.* at 825.

60. Judge Robb's opinion suggested that *Tel-Oren* "involve[d] standards that defy judicial application," *id.* at 823, and that such cases "are not susceptible to judicial handling." *Id.* at § 826. Thus, his central concern was that "the pragmatic problems associated with proceedings to bring terrorists to the bar are numerous and intractable." *Id.* (emphasis added).

61. *Id.* at 801–08 (Bork, J., concurring). Judge Bork identified three doctrines that might serve to address these separation of powers concerns: The Act of State doctrine and the notion that such concerns should act as "special factors counselling hesitation" militating against judicial implication of a cause of action. *Id.* at 801–03 (quoting *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)). Judge Bork chose to rely on the third doctrine, refusing to recognize any cause of action not expressly granted to plaintiffs by the Constitution, a statute, a treaty, or the law of nations. 726 F.2d at 801–08. Outside the realm of self-executing treaties, Judge Bork conceded that the Alien Tort Statute might support federal court jurisdiction in three types of cases: Those involving piracy, violations of safe conducts, and attacks on ambassadors. Each of these, he argued, were violations of the law of nations that were universally recognized when the First Judiciary Act of 1789 was first enacted. *Id.* at 813–14 ("One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations.").

62. Judge Edwards explicitly rejected the two limiting principles offered by his colleagues: Judge Robb's political question approach, *supra* notes 54, 59–60, and the "no private right of action" approach endorsed by both Judge Bork and the District Court, *supra* notes 41, 46, 50 & 61. In their stead, Judge Edwards offered two alternative limiting principles: A "forum-shifting" approach, 726 F.2d at 780–88, and an "international crimes" approach, *id.* at 777–80.

Under the forum-shifting approach, an alien plaintiff would derive his affirmative right to sue from state tort law. If plaintiff could further allege that torts were "committed in violation of the law of nations," that allegation would suffice to shift his tort suit (which would otherwise have to be heard in state court) into federal court, where it would be tried under either state tort law or the law of the situs of the tort. Thus, this approach would treat 28 U.S.C. § 1350 as providing a *federal* remedy for a right originally created by *state* law.

Under the "international crimes approach," which Judge Edwards dubbed the "*Filartiga* formulation," 726 F.2d at 781, the court would approach the statute much differently. It would read the words "tort only, committed in violation of the law of nations" in 28 U.S.C. § 1350 to encompass a few peculiarly heinous acts (e.g., official torture, genocide, slave trade, and summary execution) that customary international law has come to recognize as "international crimes." 726 F.2d at 781. Under the Alien Tort Statute, the federal court would in effect be authorized to create a federal common law of torts compensating victims of those international crimes. See *infra* note 64. Those crimes are so universally condemned that every nation is deemed to have jurisdiction to prescribe domestic remedies against them. See REVISED RESTATEMENT, *supra* note 12, § 404. Thus, unlike the forum-shifting approach, the "international crimes" approach would view 28 U.S.C. § 1350 as a congressionally authorized *domestic* remedy for a right originally created by *international* law.

jurisdiction. Despite some claims to the contrary,⁶³ none of the three *Tel-Oren* opinions fully reflected the Second Circuit's view in *Filartiga* that, at least with respect to established international crimes, federal courts should promote traditional tort and public international law objectives: Namely, to compensate victims, deter perpetrators, and enunciate norms of law condemning such violations.⁶⁴

I elaborate below why I believe that *Tel-Oren* was wrongly decided.⁶⁵ For present purposes, however, *Tel-Oren* teaches that federal judges will encounter severe difficulties when attempting to cope with terrorism by construing statutes not legislatively designed to deal with that problem. Certainly, dangers abound when federal courts manifest their general opposition to terrorism by engaging in an unprincipled, ad hoc expansion of civil remedies and loopholes to existing obstacles to

Both of Judge Edwards' approaches were more receptive to Alien Tort claims than were those of his colleagues, insofar as both Edwards' approaches treated such claims as justiciable and neither required plaintiffs to identify a private right of action expressly conferred upon them by treaties or the law of nations. *Id.* at 788 (Edwards, J., concurring) ("under neither [approach] must plaintiffs identify and plead a right to sue granted by the law of nations"). Nevertheless, Judge Edwards refused to find jurisdiction in *Tel-Oren* under either of his approaches, reasoning that neither terrorism nor torture conducted by a nonstate actor such as the PLO constituted "offenses against the law of nations" for purposes of the Statute. *Id.* at 788, 791–96; see also *infra* note 116.

63. See *supra* note 45. Judge Edwards, in particular, claimed to be "endorsing" *Filartiga* in his "international crimes" approach. 726 F.2d at 777–82 (Edwards, J., concurring).

64. Although both of Judge Edwards' approaches to the Alien Tort Statute, described *supra* note 62, would promote the compensatory objectives of traditional tort law, only an international crimes approach fully promotes traditional tort law's deterrence objective, as well as the objectives of public international law. Under the forum-shifting approach, an alien would assert an international law violation solely as a jurisdictional device to shift a state tort case into federal court. Because state tort law or the law of the situs would then determine liability and damages, however, the federal forum would award the plaintiff no additional compensation for the international law violation and would not award punitive damages if the governing law did not so authorize.

When *Filartiga* returned to the district court on remand, however, the district judge took a markedly different approach. The judge first allowed plaintiffs a wrongful death recovery of compensatory damages, costs, and fees in the amount of \$385,364 based on Paraguayan law. See 577 F. Supp. at 864–65. Although recognizing that Paraguayan law did not provide for recovery of punitive damages, the district judge then awarded an additional \$10 million in punitive damages relying on United States cases, as well as international law. See *id.* at 864–67.

The *Filartiga* court's award suggests that a federal court applying an "international crimes" approach would effectively treat the Alien Tort Statute as statutory authority to develop a specialized federal common law of "torts only committed in violation of the law of nations." Such a federal common law would be similar to that created by the federal courts in the area of collective bargaining contracts after *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957) (reading the grant of federal jurisdiction in § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185, as authorizing federal courts to fashion a federal common law of labor-management). Thus, unlike the forum-shifting approach, the international crimes approach would authorize the federal court first, to declare that an international norm has been violated, and second, to punish the perpetrator and compensate the victim directly for the international law violation. In this sense, of the four approaches offered by the judges in *Tel-Oren*, the *Filartiga*, or international crimes, approach is the judicial approach most fully sensitive to the full range of traditional tort law and public international law concerns.

65. In Part IV, I argue that Judge Edwards missed an opportunity in *Tel-Oren* to use the *Filartiga*, or international crimes, approach described in *supra* notes 62 & 64 to balance all four sets of competing policy concerns. See *infra* note 114–125 and accompanying text. Although *Tel-Oren* may preclude the future use of this approach in the District of Columbia Circuit, I see no reason why future litigants could not urge this approach upon other federal courts, particularly those in the Second Circuit, which are already bound to follow *Filartiga*.

civil recovery. But in *Tel-Oren*, I would argue, Judges Robb and Bork erred too far in the other direction. By adopting approaches that would practically eliminate access to existing civil remedies, neither judge considered, much less accounted for, either the public international law concerns or the traditional tort concerns central to any award of civil remedies against terrorism.⁶⁶ *Tel-Oren* demonstrates that one cannot resolve the debate over availability and obstacles without striking a delicate balance among all four competing policy objectives.⁶⁷ This leads then to my next question, namely, which national institution is best-suited to conduct this delicate balancing?

B. Which Institution Should Ideally Create Civil Remedies?

Which institution within the federal government can best balance the diverse objectives and concerns outlined above? In reviewing the three broad types of responses to terrorism, there seems little doubt that the Executive Branch, and not the federal courts or Congress, is the institution within the national government best suited to engage in direct action, or counterterrorism. Similarly, the courts, and not Congress or the President, appear institutionally best equipped to *enforce* civil and criminal remedies against terrorists, to the extent that such remedies already exist.

Which institution, however, should *create* these remedies, in the process balancing the diverse policy objectives and concerns that determine whether victims

66. Under Judge Robb's political question approach, no court would ever award compensatory or punitive damages against a terrorist or ever declare a norm condemning a terrorist act under the Alien Tort Statute, because no court would ever reach the merits of such a civil claim. Under Judge Bork's "no private right of action approach," a court could issue such a ruling, but only in those few cases in which plaintiffs relied upon a self-executing treaty or based their claim on what Judge Bork treats as the three "recognized" law of nations violations: Piracy, violations of safe conduct, or attacks on diplomats. See *supra* note 61.

Judge Bork's view that aliens may not sue under the Alien Tort Statute without a private right of action expressly created by treaty or customary international law reflects two fundamental misconceptions about modern public international law: First, that only states and not individuals may seek to enforce international law norms and, second, that private remedies against international crimes exist only to the extent that nations have chosen to create such remedies through positive international law. In the post-Nuremberg era, it has become widely accepted that individuals, as well as states, have international human rights. See generally REVISED RESTATEMENT, *supra* note 12, Part VII, Introductory Note; Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.S. L. REV. 11 (1978). Moreover, in asserting rights recognized by customary international law, individuals are not necessarily limited solely to the few remedies that nations are able to agree upon by treaty. Until recently, for example, the United States had not ratified the Genocide Convention, a multilateral treaty applying only to states and providing for only one effective remedy, namely, extradition. Under Judge Bork's analysis, an individual would have no civil cause of action based on genocidal acts, even though customary international law has long recognized both an individual human right to be free from genocide and the universal jurisdiction and obligation of all nations to punish it. See generally REVISED RESTATEMENT, *supra* note 12, § 702 comment d & Reporters' Note 3; *id.* § 404; *id.* § 907 comment a ("If a rule of customary international law has become a part of United States law, a domestic remedy may be available for its enforcement.").

67. Indeed, the confusion among the opinions in *Tel-Oren* stirs uncomfortable memories of the Supreme Court's post-*Sabbatino* rulings regarding the Act of State doctrine, see *supra* note 54, which have regularly resulted in confusing fractured rulings and plurality opinions. See generally Bazzyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 330-44 (1986) (describing these cases); see also *id.* at 344 ("The Justices cannot agree on the meaning of the doctrine, on the role the Executive should play in its application by the courts, or on the status of the various exceptions to the doctrine."). This confusion, I believe, reigns for much the same reason that confusion resulted in *Tel-Oren*, namely, because judges deciding Act of State cases hold differing personal views of the weight to be given traditional tort law and public international law objectives and competing judicial competence and separation of powers concerns.

of terrorism should receive a civil judicial remedy? Both the language of the Constitution and functional considerations point to Congress, and not the federal courts, as the most appropriate institution.

Article I, section 8, clause 10 of the Constitution specifically authorizes Congress to “define and punish . . . Offences against the Law of Nations.” That little-discussed provision may be read to confide in Congress the principal domestic responsibility for creating remedies to enforce under enforced norms of international law.⁶⁸ Congress has invoked that provision on several occasions as a constitutional basis for enacting civil and criminal statutes that have targeted problems related to terrorism.⁶⁹ Pursuant to this constitutional authority,⁷⁰ Congress could pass comprehensive legislation (1) defining the term “terrorism” (*i.e.*, prescribing the scope of the legislation);⁷¹ (2) clarifying the extent to which it believes that the federal courts should punish terrorism through civil, rather than criminal, remedies; (3) striking the proper balance between civil and criminal remedies; (4) defining the proper role of government and private plaintiffs in enforcing those remedies; and (5) prescribing specific rules regarding some of the specific jurisdictional and procedural obstacles to civil recovery described above.⁷² Statutes as diverse as the civil rights laws,⁷³ the federal antitrust laws,⁷⁴ or the federal RICO Statute⁷⁵ might serve as models for this type of comprehensive

68. For various preliminary drafts of this provision, see 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 168, 182 (rev. ed. 1937).

69. The statutes enacted by Congress under its Art. I, § 8, cl. 10 authority include the FSIA, *supra* notes 53 & 56; various statutes criminalizing attacks on aircraft and internationally protected persons, see statutes cited in *supra* notes 13–16 & 19; and the statute criminalizing piracy. 18 U.S.C. §1621 (1982).

70. Congress could supplement its power to define and punish offenses against the law of nations with its authority to “regulate Commerce with foreign Nations,” U.S. Const. art. I, § 8, cl. 3; to “constitute Tribunals inferior to the supreme Court,” *id.* art. I, § 8, cl. 9; and to prescribe the jurisdiction of the federal courts, *id.* art. III, § 2.

71. The definition of international terrorism most frequently found in the United States Code derives from the provision in the Foreign Intelligence and Surveillance Act of 1978, 50 U.S.C. § 1801(c) (1982). At this writing, however, the Federal Bureau of Investigation, the Central Intelligence Agency, and the State Department all employ different definitions of terrorism. Compare UNITED STATES DEPARTMENT OF STATE, *PATTERNS OF GLOBAL TERRORISM: 1984 2* (1985) with R. CLINE & Y. ALEXANDER, *TERRORISM: THE SOVIET CONNECTION* 109–10 (1984).

72. See *supra* notes 46–56 and accompanying text. As a model, Congress could use the FSIA, *supra* notes 53 & 56, which provides comprehensive statutory rules governing subject matter and personal jurisdiction, service of process, venue, immunities, and prejudgment attachment and postjudgment enforcement in all suits against foreign sovereigns.

73. See Civil Rights Act of 1964, 42 U.S.C. § 1971 (1982); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982); Civil Rights Act of 1968, 18 U.S.C. §§ 241–242, 245 (1982); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b) (1982).

74. As currently comprised, the federal antitrust laws provide a complex scheme of private and public enforcement. The Department of Justice may criminally prosecute violators of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982 & Supp. 1986). The Federal Trade Commission may, through administrative proceedings, order parties to cease and desist from practices that violate the Sherman Act, the Clayton Act, 15 U.S.C. §§ 12–27 (1984), or § 5 of the FTC Act, 15 U.S.C. § 45 (1973 & Supp. 1986). The Sherman and Clayton Acts further authorize the Justice Department to bring civil actions to prevent and restrain antitrust violations and to obtain injunctions and decrees ordering divestiture of assets. Other sections of the Clayton Act authorize a private party who has been “injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for treble damages and reasonable attorney’s fees and to introduce a relevant decree in a government-initiated action as *prima facie* evidence of an antitrust violation. See Clayton Act §§ 4–5, 15 U.S.C. §§ 15, 16 (1973 & Supp. 1986).

75. See *supra* note 24.

legislation. Each of these bodies of law defines a new federal offense, articulates how that offense should be punished by private and governmental plaintiffs through a combination of civil and criminal remedies, and prescribes procedural rules for obtaining those remedies.

Article I, section 8, clause 10 aside, there can be little doubt that, as a matter of policy as well as law, Congress is also the institution within the federal government *functionally* best equipped to balance the competing national policy objectives described above. To inform its policy deliberations, Congress can hold hearings at which human rights activists, victims of terrorism, representatives of foreign governments, and officials of the Executive Branch could appear and testify. At those hearings, all interested parties could engage in a wide-ranging debate, designed to discern what specific civil remedies should be available to victims of terrorism and what specific obstacles to civil recovery Congress should eliminate or reduce.

The last Congress witnessed the introduction of a spate of legislative proposals designed to address various facets of the terrorism problem.⁷⁶ Yet even a cursory examination of those proposals reveals that the prevailing legislative approach to the problem of terrorism has been piecemeal and noncomprehensive. Once we recognize that a coordinated legal response to terrorism requires a unified package incorporating all three of the responses described thus far—counterterrorist measures, criminal remedies, and civil remedies—there seems little sense in developing such a plan in a haphazard fashion. Thus, the ideal solution to the problem of civil remedies against terrorism would be for Congress to address that problem within the framework of omnibus antiterrorism legislation.⁷⁷

Practical politics, however, naturally dictate serious limitations upon obtaining any form of omnibus legislation. For that reason, a second-best legislative alternative would consist of developing a package of statutory civil remedy provisions that could be attached to any of a number of bills pending before Congress. The two most obvious vehicles for such legislation would be amendments to the Alien Tort Statute⁷⁸

76. For a listing of just some of the bills proposed, see generally 20 INT'L LAW. 1083, 1086-87 (1986) (listing fourteen terrorism bills considered by the 99th Congress).

77. My colleague Michael Reisman has also suggested a comprehensive legislative approach as the preferred solution to the problem of civil remedies. See Reisman, *Tel-Oren: Toward an Integrated Strategy of National Judicial Enforcement of International Human Rights*, 1985 PROC. AM. SOC'Y INT'L L. 368.

In September 1986, President Reagan signed an antiterrorism bill that purported to be "omnibus" in nature. See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986). That Statute did take initial steps toward an integrated national position regarding direct action against terrorists. Its key titles included provisions regarding diplomatic security, *see id.* tits. I-IV; rewards for information relating to terrorism, *see id.* tit. V; actions to combat international nuclear terrorism, *see id.* tit. VI; security of shipping and military bases, *see id.* tits. IX-XI; and calls for multilateral cooperation in antiterrorist measures ranging from the use of diplomatic privileges and immunities for terrorism purposes, *see id.* § 704, to criminal cooperation, *see id.* tit. XII. But as one key participant in the drafting of that legislation conceded, "this particular piece of legislation . . . if nothing else is piecemeal." Panel on "Terrorism: The Issue Confronting a Free Society," 1986 American Bar Association Annual Meeting (Aug. 11, 1986) (remarks of Joel Lisker, Chief Counsel, Senate Judiciary Committee, Subcommittee on Security and Terrorism) (copy on file with *Texas International Law Journal*). Indeed, the only title of that statute that deals expressly with civil remedies, the grandly named Victims of Terrorism Compensation Act, is in fact quite modest in scope. See Note, *supra* note 69, at 387-89 (describing this legislation).

78. 28 U.S.C. § 1350 (1982).

and the Foreign Sovereign Immunities Act of 1976,⁷⁹ both of which have recently been proposed for legislative revision.⁸⁰

In sum, the second of the two ongoing debates over civil remedies seems far more fundamental than the first. The debate over availability and obstacles is about where we are now; the debate over objectives and institutions is about where we should be. Furthermore, the first debate cannot be intelligently conducted without constant reference to the second. One cannot meaningfully discuss which civil remedies against terrorism should be available and which obstacles to civil recovery should be eliminated without some consensus on what mix of policy objectives these civil remedies should serve and what national institutions should most appropriately provide them. To immerse ourselves only in the first debate ignores the fact that what is really needed is legislative architecture, not judicial patchwork.

Ideally, Congress would address the problem of civil remedies against terrorism as part of a comprehensive statute that targeted the entire terrorism problem through a combination of criminal and nonjudicial civil remedies, in addition to judicial civil remedies. Even without such a comprehensive approach, however, Congress could openly balance tort and public international law objectives against judicial competence and separation of powers concerns by considering and adopting a narrower bill that solely addressed the issue of civil remedies.

IV. A SECOND-BEST SOLUTION TO THE SECOND DEBATE: TRANSNATIONAL PUBLIC LAW LITIGATION

Given that the optimal, legislative solution to the problem of civil remedies against terrorism may not soon be forthcoming, it is important to consider whether courts acting without further legislative guidance can provide a “second-best” *judicial* solution to the second debate. Absent an explicit legislative balancing of the four competing policy objectives described above, judges asked to construe existing statutes to provide civil remedies against terrorism have no choice but to conduct the balancing themselves. But how can judges conduct that balancing in a principled, rather than ad hoc, fashion, without giving overriding or undue weight to any one of the competing policy objectives?

In my view, one cannot fully answer that question without reexamining the three concurring opinions in *Tel-Oren*, and contemplating their broader social implications.

79. 28 U.S.C. §§ 1330, 1602–1611, 1391(b), 1441(d) (1982) (discussed in *supra* notes 53 & 56).

80. The 99th Congress considered both the Torture Victims Protection Act of 1986, S. 2528, 99th Cong., 2d Sess., 132 CONG. REC. 7062 (1986) (a proposal put forward by human rights activists to amend the Alien Tort Statute to create a private tort remedy for torture in violation of the law of nations), as well as a comprehensive bill to amend the FSIA. See S. 1071, 99th Cong., 1st Sess. (1985); H.R. 3137, 99th Cong., 2d Sess. (1985) (companion House bill introduced by Congressman Glickman (July 31, 1985)); H.R. 4592, 99th Cong., 2d Sess. (1986) (introduced by Congresswoman Mikulski). The proposed amendments to the FSIA would, *inter alia*, modify some of the existing rules discussed above, including the Act of State doctrine, *supra* note 54, prejudgment attachment and postjudgment execution of foreign sovereign assets, *supra* note 56. For commentary on these legislative proposals, see Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 INT'L LAW. 1289 (1986); Feldman, *The Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L. Q. 302 (1986); Hoffman & Brackins, *The Elimination of Torture: International and Domestic Developments*, 19 INT'L LAW. 1351, 1360–63 (1985) (describing Torture Victims Protection Act of 1985).

As I have already noted, the opinions in that case reflect considerable tension among the participating judges regarding the weight to be given traditional tort law and public international law objectives and to countervailing concerns about judicial competence and separation of powers.⁸¹ Yet these same objectives and concerns invariably arise whenever governments and private citizens sue one another in federal courts seeking compensation for alleged violations of international law. When viewed in a broader historical context, it becomes clear that the *Tel-Oren* plaintiffs' attempt to secure judicial condemnation of PLO terrorism represented merely one example of a much larger, ongoing phenomenon.

A. *The Emerging Phenomenon of Transnational Public Law Litigation*

The question of how federal judges may properly balance these competing policy objectives and concerns did not originate with *Tel-Oren*. To the contrary, this question has consistently plagued United States courts in the context of transnational commercial litigation since 1964, when the Supreme Court decided *Banco Nacional de Cuba v. Sabbatino*.⁸² The Foreign Sovereign Immunities Act of 1976, far from eliminating the balancing problem in transnational private law litigation, has only multiplied its complexities.⁸³ In recent years, federal judges have been called upon increasingly to address this problem when confronted by the new, burgeoning type of suit: What I call *transnational public law litigation*.⁸⁴

81. See *supra* text accompanying notes 59–64.

82. 376 U.S. 396 (1964). Although the Supreme Court decided a number of significant Act of State cases before 1964, in *Sabbatino* the Court recast the Act of State doctrine into its modern form. See *supra* note 54. Declaring that the doctrine had “constitutional underpinnings” in the principle of separation of powers, 376 U.S. at 423, the Court held that:

the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428. In its current form, however, the doctrine is riddled with exceptions. See generally Bazyley, *supra* note 67.

83. For a discussion of some of the numerous problems of statutory interpretation that have arisen under the Act, see generally Feldman, *Amending the Foreign Sovereign Immunities Act*, *supra* note 80; Feldman, *The Foreign Sovereign Immunities Act of 1976 in Perspective*, *supra* note 80. Many of the practical problems that arise in transnational suits against terrorists first arose in the context of commercial litigation. See von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984 (1985) (discussing litigation issues highlighted in *supra* text accompanying notes 46–56 in the context of private transnational lawsuits).

84. See Koh, *Responsibility of the Importer State*, in TRANSFER OF HAZARDOUS TECHNOLOGY: THE INTERNATIONAL LEGAL CHALLENGE (G. Handl & R. Lutz, eds. 1987) (forthcoming) (describing the litigation following the Bhopal tragedy as an example of this phenomenon). The term “public law litigation” was coined in Abram Chayes’ article, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See also Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation And the Burger Court*, 96 HARV. L. REV. 4 (1982). Not coincidentally, Professor Chayes is also the architect of one of the prime recent examples of transnational public law litigation, Nicaragua’s suit against the United States in the International Court of Justice. See Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985). The argument in this Part largely derives from a forthcoming article on the relationship between transnational public law litigation and the Revised Restatement. That article will sketch both the striking parallels as well as the clear distinctions that may be drawn between Professor

Transnational public law litigation melds two modes of litigation traditionally thought to be distinct. In traditional *domestic* litigation, private individuals bring private claims against one another based on national laws before a competent domestic judicial forum. They seek both enunciation of norms and damages relief in the form of retrospective judgments.⁸⁵ In traditional *international* litigation, state parties bring public claims against other states based on treaty or customary international law before international tribunals of limited competence. Although state litigants ostensibly seek enunciation of public international norms by such tribunals, their primary goal is usually prospective “relief” in the form of a negotiated political settlement.⁸⁶

In transnational public law litigation, these two modes of litigation merge. Private individuals, government officials, and nations sue one another directly and are sued directly in a variety of judicial fora, most prominently domestic courts. In these fora, the actors invoke claims of right based not purely on private or public, domestic or international law but rather on a composite body of “transnational” or “foreign relations” law.⁸⁷ Moreover, contrary to the classical “dualist” vision of international jurisprudence, which views international law as binding only upon nations in their relations with one another,⁸⁸ individual plaintiffs engaged in this mode of litigation usually claim that their personal rights arise directly from this body of transnational law.

As in traditional domestic litigation, the announced focus of a transnational public lawsuit is redress for individual victims, not states. As in traditional international law litigation, however, the transnational public law plaintiff’s underlying aim in bringing the action is not so much retrospective as it is prospective. In transnational public law litigation, plaintiffs invoke the court’s jurisdiction not so much to extract a binding monetary judgment as to provoke a political settlement in which

Chayes’ model of domestic public law litigation and the emerging genre of transnational public law litigation. See *infra* note 104.

85. For the classic statement of this model of adjudication, see Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

86. See generally M. KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* 145–61 (1968). Perhaps the archetype of this form of international adjudication is litigation before the International Court of Justice seeking an advisory opinion pursuant to art. 96 of the United Nations Charter. Such an opinion does not purport to be a binding judgment; rather, it enunciates public international norms in a way that gives some litigants a greater claim of right in subsequent settlement negotiations.

87. The Revised Restatement, *supra* note 12, may be thought of as the most complete compendium of this hybrid body of private and public, domestic and international law.

88. International law scholars distinguish between “monism”—a school of international jurisprudence that views international and domestic law as together constituting a unified legal system—and “dualism,” the school that views international law as a discrete system of law for nations, operating “wholly on an international plane.” Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987). See also Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y. B. INT’L L. 66. Under a strictly dualist view of international law, individuals injured by foreign states would have no right to pursue claims directly against those states. Their governments would pursue those claims for them on a discretionary basis and would subsequently determine the rights of those injured individuals to redress as a matter of domestic law. As noted above, however, substantial inroads into this strictly dualist view of international law have been made in recent years, particularly in the area of international human rights. See *supra* note 66. Viewed in this light, *Filartiga* promoted a distinctly monist view of international law, while Judge Bork’s opinion in *Tel-Oren* advocated the dualist counterpoint. Compare *supra* note 64 with *supra* note 66.

both governmental and nongovernmental entities will participate. Thus, although plaintiffs may request retrospective damages or prospective injunctive relief, a declaratory judgment or default judgment that announces the violation of a transnational norm will serve their purpose. Regardless of whether the plaintiff may directly enforce the judgment against the defendant in the rendering forum, the judgment's value rests principally in its potential use as a judicially-created bargaining chip in other political fora.

The numerous recent examples of this phenomenon may be divided into two distinct categories: Those cases involving state plaintiffs and those involving individual plaintiffs. The litigation brought by the Government of India against Union Carbide in United States and Indian courts in the wake of the Bhopal tragedy provides perhaps the most dramatic example of the first kind of case.⁸⁹ Following an environmental disaster, a state sued a private multinational entity in domestic courts, rather than international courts, making complex claims based on transnational law.⁹⁰ India claims to seek judicial reparations for its citizens' injuries, but its apparent motivation in turning to domestic courts is not to obtain enforceable judicial relief, but rather to obtain a judicial declaration of Union Carbide's liability for the disaster. India could then employ such a declaration to provoke a political settlement that would bind Union Carbide, India, the United States, as well as the private Indian plaintiffs.⁹¹

Similarly, Nicaragua's ongoing attempt to enforce its recent International Court of Justice judgment⁹² against the United States in United States courts marks another

89. See generally Koh, *supra* note 84. The facts of the Bhopal tragedy are well-known. In December 1984, highly toxic methyl isocyanate gas leaked from a pesticide factory located in Bhopal, India, killing more than 2,000 Indian citizens and injuring at least 200,000 others. Many of the victims lived in shanty towns just outside the gates of the factory, which was owned and operated by Union Carbide India, Ltd., a company incorporated and licensed under the laws of India and fifty-one percent owned by Union Carbide, a United States multinational enterprise.

The Union of India and private plaintiffs filed suit against Union Carbide in American courts. In September 1986, after the United States suit was dismissed on grounds of *forum non conveniens*, see *supra* note 49, India and the State of Madhya Pradesh sued Union Carbide in a Bhopal district court; three months later, Union Carbide countersued, charging both governments with contributory responsibility. For descriptions of the legal issues raised by the tragedy, see generally Symposium, *The Bhopal Tragedy*, 20 TEX. INT'L L. J. 267 (1985); Note, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L COMP. L. 109 (1986).

90. In the United States, and now in India, the plaintiffs have offered a novel theory of "multinational enterprise liability." They claim that, notwithstanding traditional notions of limited shareholder liability, a parent multinational corporation controlling a majority interest in a foreign subsidiary that in turn runs a hazardous local production facility has a nondelegable duty to ensure that the activity causes no harm. See Union of India's Complaint, *reprinted* in MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE 1 (U. Baxi and T. Paul eds. 1986).

Plaintiffs have asserted this theory as a novel way to pierce the corporate veil under domestic law. See Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 631 (1986) (discussing possible domestic law theories of piercing the corporate veil in the Bhopal case). Arguably, however, such a theory could derive support from emerging principles of public international law (e.g., international codes of conduct directed at guiding the conduct of multinational enterprises). See Westbrook, *Theories of Parent Company Liability and the Prospects for International Settlement*, 20 TEX. INT'L L.J. 321, 326-27 (1985).

91. Most commentators anticipate that India will ultimately obtain redress not so much by winning a binding monetary judgment as by provoking the negotiation of a complex international settlement in which Union Carbide, India, and the United States will participate. See, e.g., Westbrook, *supra* note 90, at 330-31 (discussing the possibility of a diplomatic settlement); Magraw, *The Bhopal Disaster: Structuring A Solution*, 57 U. COLO. L. REV. 835, 844-47 (1986) (proposing such a settlement).

92. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)

nation's parallel attempt to claim violations of transnational law in domestic courts.⁹³ Nicaragua, like India, sued with the announced aim of obtaining redress for its citizens. Yet having already secured an international judicial declaration that the United States has violated international norms, Nicaragua's domestic litigation appears prompted by its desire to obtain a similar *domestic* judicial declaration, which it could then use to provoke a political settlement with the United States in various political fora.⁹⁴

The Bhopal and Nicaragua cases have migrated from traditional adjudication into the realm of transnational public law litigation. But since *Filartiga*, the most intense transnational public law litigation activity in the United States courts has arisen not from suits by state plaintiffs, but rather from suits by alien plaintiffs against governments and government officials under the Alien Tort Statute. This trend began with *Filartiga* in 1980, when an alien obtained a federal court declaration that another alien, a government official acting under color of state law, had violated plaintiffs' internationally recognized human rights.⁹⁵ Although to this author's knowledge no *Filartiga*-type plaintiffs have actually received compensation for their injuries, some have been satisfied simply with default judgments announcing that defendants have transgressed universally recognized norms of international law.⁹⁶ These small successes encouraged other Alien Tort Statute plaintiffs to pursue a second class of

Merits, 1986 I.C.J. Rep. 14 (Judgment of June 27). For commentary on this judgment, see generally *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (H. Maier ed. 1987).

93. Nicaragua's counsel will attempt to enforce the World Court's judgment directly in United States courts. See N.Y. TIMES, June 28, 1986, at 1, col. 2, continued at 4, col. 4; Effron, *Nicaragua Likely to Press on Ruling*, NAT'L L.J., July 14, 1986, at 3, col. 1. In addition to Nicaragua's efforts to enforce the judgment, a group of United States citizens living in Nicaragua, several United States organizations which send travelers and aid to Nicaragua, and two world peace organizations have sued United States Government officials in a federal district court. These groups charge that the Reagan Administration's noncompliance with the World Court's judgment is "not in accordance with law for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (1982), and constitute[s] an unjustified exercise of state power in violation of plaintiffs' Fifth Amendment due process rights to life, liberty and personal security." Committee of U.S. Citizens Living in Nicaragua v. Reagan, Civ. No. 86-2620 (D.D.C. 1986) (motion for summary judgment filed Nov. 5, 1986).

94. See R. FALK, REVIVING THE WORLD COURT xvi (1986) ("Nicaragua's recourse to the [World] Court is at the very least a brilliant move in the struggle to convince world public opinion that they are victims of illegal U.S. activities and that their approach is to seek peaceful settlements to the conflict."); Chayes, *Nicaragua, the United States and the World Court*, *supra* note 84, at 1477 ("I think it is evident that the actions of the [World] Court to date and the efforts of the [Reagan] Administration to escape adjudication have already influenced the debate about whether and on what terms to continue financial assistance to the contras."); Effron, *supra* note 93, at 12 (statement of Professor Michael J. Glennon) ("This is a legal battle and a political battle, and a victory in one realm reinforces the battle in the other.").

95. See *supra* notes 39-40 & 64. For subsequent cases presenting this fact pattern, see, e.g., Ortigas v. Marcos, No. C 86-0975 SW (N.D. Cal. Jan. 22, 1987); Sison v. Marcos, Civ. No. 86-0225 (D. Haw. July 18, 1986); Hilao v. Marcos, Civ. No. 86-390 (D. Haw. July 18, 1986); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985). See generally Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 5-6 nn. 17, 19 (1985) (collecting post-*Filartiga* Alien Tort Statute cases).

96. See, e.g., cases cited in *supra* note 56. At this writing, the *Filartiga* family has still not collected the default judgment in its case. The defendant, Pena-Irala, has not as yet been tried in Paraguay, to which he was deported. See N.Y. TIME, Mar. 28, 1986, at A34 (Letter to the Editor from R.H. Hodges, Pelham, New York).

defendants: Not just foreign government officials, as in *Filartiga*, but foreign governments as well, as in *Tel-Oren*.⁹⁷

Most recently, aliens, frequently joined by United States citizens and Congressmen, have begun to file such suits against yet a third class of defendants—the United States Government and its executive officials.⁹⁸ Plaintiffs in these suits seek not just to obtain individual redress for past wrongs, but prospectively to curb particular United States foreign policy programs—for example, the Reagan Administration's support of the *contras*⁹⁹ or its policy of detaining Cuban and Haitian refugees¹⁰⁰—on the ground that those programs contravene treaties or customary international law. As in *Filartiga*, the plaintiffs seek not so much to win judgments as to reach the merits and provoke judicial declarations calling on American officials to account for their activities under international law.¹⁰¹ To the extent that plaintiffs may

97. See, e.g., *Martin v. the Republic of South Africa Transvaal Dep't of Hosp. Services*, 84 Civ. 9094 (CES) (S.D.N.Y. filed Dec. 17, 1984) (suit by black American dancer denied emergency medical treatment by two state-funded hospitals in South Africa) (decision pending); *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986) (suit by Liberian corporations against Argentina arising out of bombing of oil tanker during Falklands war); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613 (D.D.C. 1984), *appeal pending* (action arising from the deaths of passengers killed when Korean aircraft was shot down by Soviet military aircraft); *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985) (action by Argentine citizens against Argentina for claims of torture; \$2.6 million default judgment originally rendered, but subsequently vacated after reconsideration on grounds of foreign sovereign immunity).

98. See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (suit by twelve Nicaraguans, twelve Congressman, and two other Americans challenging U.S. policy in Nicaragua); *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985); *Ramirez de Arellano v. Weinburger*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *judgment vacated*, 471 U.S. 1113 (1985); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (suit by Congressmen challenging legality of United States military presence in and military assistance to El Salvador); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985) (suit brought by association of British women, United States citizens living in England, and two United States Congressmen challenging legality of United States deployment of cruise missiles in Great Britain); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986) (suit against United States by foreign shipowner seeking \$1.6 million in damages for striking a mine laid by United States in Nicaraguan harbor).

99. See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Ramirez de Arellano v. Weinburger*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *judgment vacated*, 471 U.S. 1113 (1985) (remanded for reconsideration in light of Foreign Assistance and Related Programs Appropriations Act) (challenging occupation of plaintiffs' Honduran land for use as training facility).

100. See, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (excludable Cuban refugee sought habeas corpus relief from federal detention); *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

101. The question whether United States officials have a constitutional duty to obey international law has recently generated substantial literature. See, e.g., Henkin, *supra* note 88; *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); Kreisberg, *Does the U.S. Government Think That International Law is Important?*, 11 YALE J. INT'L L. 479 (1986); Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1985); Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 321 (1985); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS L.Q. 719 (1982).

be said to have won such judicial declarations, they have sought to use them primarily as political constraints upon the defendants' future conduct.¹⁰²

Transnational public law litigation thus constitutes a novel and expanding effort by both state and individual plaintiffs to fuse international legal rights with domestic judicial remedies. Lawsuits which do not fit neatly into the confines of either traditional international or traditional domestic litigation have migrated into this third litigation realm. Moreover, the realm of transnational litigation, which itself originated in the context of private commercial suits against foreign governments, has now expanded to include public human rights suits against the United States, foreign governments, and United States and foreign officials. The new breed of transnational public law litigants seeks to couple an evolving substantive notion—the principle of individual and state responsibility for violations of public international law¹⁰³—with a familiar process—domestic adjudication in a United States federal court.

Why this phenomenon has only recently arisen deserves far more extensive treatment than can be offered here.¹⁰⁴ Broadly speaking, however, there seems little

102. See, e.g., Chayes, *Nicaragua, the United States and the World Court*, *supra* note 84, at 1481 (arguing that “in rendering judgment in the *Nicaragua* case, the [World] Court will . . . exercise its function as a spokesman for universal values” and act as “teacher to the citizenry”); Gerstel & Segall, *Conference Report: Human Rights in American Courts*, 1 AM. U. INT’L L. & POL’Y 137, 143 (1986) (quoting statement of human rights lawyer) (“Where the President is aiding in the torture of others, we want the judiciary to be able to come in against the President. The purpose of continuing lawsuits which may be frivolous, therefore, is to attempt to bring the action into a legal context. It is necessary to create a means for dialogue even if you know you are going to lose.”).

103. In no small measure, this notion of individual and state responsibility owes its origin to the Nuremberg trials. For recent discussion of the lessons of Nuremberg for the Nicaraguan World Court case, see Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT’L L. 1, 4–12 (1987). For a consideration of the broader significance of those trials, see Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 199 (1985). For broader analyses of the significance of recent developments in international law to the relationship between the state and the individual and the decline of the “dualist view” of international law discussed in *supra* note 88, see Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U.L. REV. 929 (1986); Sohn, *supra* note 66; Higgins, *supra* note 66.

104. A brief outline, however, may lend some clarity to the picture painted above. In a forthcoming article, I argue that the Supreme Court’s 1964 decision in *Sabbatino*, *Filartiga*, and *Tel-Oren* mark three watersheds in the development of transnational public law litigation. Not coincidentally, *Sabbatino* and *Tel-Oren* also coincide roughly with the appearance of the first Restatement of Foreign Relations Law (in 1965) and the Revised Restatement) (which will appear in its final form in 1987).

In *Sabbatino*, the Court explicitly linked the Act of State Doctrine to the concept of separation of powers for the first time, casting a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of public international law. *Sabbatino* was decided at a time when courts were beginning to embrace “the passive virtues.” See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961). Understandably, federal courts read the Supreme Court’s opinion in *Sabbatino* together with notions of judicial deference to executive discretion in foreign affairs, see *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), and political question notions imported from the domestic electoral context, *Baker v. Carr*, 369 U.S. 186 (1962), as a general directive to stay out of foreign affairs adjudication. This chill stimulated a period of judicial withdrawal from the arena of international norm-enunciation that lasted for more than a decade.

In the 1960s and 1970s, however, the domestic civil rights movement and the international human rights movement coincided with the two other trends: A declining faith in the International Court of Justice as an instrument of international dispute resolution and a growing willingness by domestic courts to subject the commercial conduct of foreign sovereigns to legal scrutiny. At the domestic level, the federal courts directed the rise of the “new” equal protection; the “due process revolution” triggered by *Goldberg v. Kelly*, 397

doubt that the decision of transnational plaintiffs to shift the locus of their litigation activity from international to United States judicial fora was inspired by two complementary trends: Growing acceptance by litigants of United States courts as instruments of social change¹⁰⁵ and declining faith in international adjudication as a meaningful process for enunciating international norms or curbing national governmental misconduct.¹⁰⁶ The former trend encouraged cases to migrate from traditional domestic litigation into the transnational realm; the latter trend forced state plaintiffs to file suits that otherwise would have been brought in international fora as transnational cases. In the 1970s, *domestic* public law litigants first undertook *Bivens* and Section 1983 litigation in federal courts to provoke the reform of state and federal institutions through the enunciation of constitutional norms.¹⁰⁷ Today, individual and state litigants undertake transnational public law litigation primarily to achieve clarification of rules of public international conduct and to provoke reform of national

U.S. 254 (1970); the growing accountability of government officers for officially inflicted injuries through the decline of sovereign and official immunities; and the growth of the *Bivens* doctrine and Section 1983 litigation. See generally J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 657-772 (1975). These trends fostered both greater public acceptance of the notion that federal courts may—and indeed should—restructure wrongful systems, such as schools, prisons, and hospitals, and increased confidence in the courts' ability and expertise to engage in such reform.

This growing faith in the capacity of the domestic courts to engage in domestic public law litigation coincided with an explosion of transnational *commercial* litigation. As nations entered the marketplace and the United States adopted the doctrine of restrictive sovereign immunity by statute, see Foreign Sovereign Immunities Act, discussed in *supra* notes 53 & 56, federal courts became increasingly obliged to adjudicate business actions brought by individuals and private entities against foreign governments. This plethora of transnational suits not only returned domestic courts to the business of adjudicating international law (from which they had excluded themselves since *Sabbatino*), but also stimulated a reawakening interest in the black-letter doctrine of international and foreign relations law. That interest at least in part triggered the legal community's call in the late 1970s for a Revised Restatement of Foreign Relations Law.

The increased willingness of courts to adjudicate domestic public and transnational commercial law cases in the 1970s, however, enhanced growing national frustration at the courts' apparent paralysis and impotence in the public realm of foreign affairs, particularly with regard to adjudication of the constitutionality and international legality of the Vietnam War. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). The Second Circuit's 1980 decision in *Filartiga*, spurred in part by a government *amicus* brief pressing the Carter Administration's human rights policy, finally signaled an invitation to private litigants to venture into the field of transnational *public* law litigation. Although the Burger Court and the Reagan foreign policy have since sought to dampen the zeal of transnational public law litigants, plaintiffs have now turned precedents such as *Filartiga* into vehicles to urge domestic courts to enunciate norms of public international and foreign relations law that restrain the conduct of United States Executive Branch officials in the world arena. The D.C. Circuit's ruling in *Tel-Oren* (particularly Judge Bork's opinion), however, has now at least partially withdrawn *Filartiga's* invitation.

105. Two famous articles capture the social goals and functions of this changing conception of the role of domestic courts. See Chayes, *The Role of the Judge in Public Law Litigation*, *supra* note 84; Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

106. See, e.g., R. FALK, *supra* note 94, at 1-24 (1986) (describing the decline in reliance upon international adjudicative processes since 1930); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 240-43 (3d ed. 1985) (describing the "World Court Crisis" of the 1970s and 1980s).

107. See generally Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). In *Bivens* suits, federal courts have implied private rights of action for damages directly from the United States Constitution. See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 278 (1979).

governmental conduct.¹⁰⁸ Just as *Bivens* provoked judicial creation of the United States law of “constitutional torts,”¹⁰⁹ *Filartiga* raised both expectations and fears that the judicial creation of a parallel law of “international torts” might be forthcoming.¹¹⁰

B. *The Opportunity Tel-Oren Missed*

Set against this historical background, it becomes clear that the refusal of all three judges in *Tel-Oren* to hear plaintiffs’ claims on the merits has implications not only for the current availability of civil remedies against terrorism, but also for the broader question of whether transnational public law litigation in United States courts will flourish or die out. All three opinions in *Tel-Oren* promote views that seem likely to discourage the development of transnational public law litigation. Yet all three are also fundamentally flawed. Upon closer examination, two of the opinions fail to offer a principle for construing the Alien Tort Statute that would permit judges to balance all four of the competing policy objectives outlined above. Both Judge Bork and Judge Robb make the overbroad claim that transnational public law cases are, by their very nature, not susceptible to domestic adjudication. Each judge succumbs to what could be called “jurisdictional overkill caused by doctrinal oversight.” Each judge articulated a principal underlying concern—judicial competence in the case of Judge Robb and separation of powers in the case of Judge Bork—and then answered that concern by proposing a rigid, blanket approach to the Alien Tort Statute that would

108. Recently, transnational public law litigation has also become a type of “institutional reform” litigation in the sense that litigants seek to use the courts not to reform prisons or school systems, but rather to alter the manner in which the President and Congress carry out United States foreign policy. In both cases, litigants have viewed the institution of domestic adjudication as a mechanism for encouraging social change and inducing government compliance with legal norms. See, e.g., Chayes, *Nicaragua, the United States, and the World Court*, *supra* note 84, at 1479–80 (comparing the World Court’s *Nicaragua* decision with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

109. See generally P. SCHUCK, *SUING GOVERNMENT* (1983); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 69 (1980).

110. As Judge Bork’s opinion in *Tel-Oren* implicitly recognized, Alien Tort Statute suits urge nothing less than the creation by domestic courts of a system of public tort remedies to combat international crimes. Such a system would be closely analogous to the system of public remedies developed by the federal courts to combat constitutional wrongs in the context of Section 1983 and *Bivens* litigation. See 726 F.2d at 801 (Bork, J., concurring) (concluding that separation of powers concerns should operate in *Tel-Oren* as “special factors counselling hesitation,” quoting *Bivens*, 403 U.S. at 396, in the judicial implication of implied rights of action). Some commentators also view the development of such a public international tort system with alarm. See, e.g., Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 474–78 (1986). In fact, however, such a system might be particularly desirable in the international realm because of the pronounced diversity that exists with respect to degrees of political development, national culture, and economic systems. In such a realm, the two principal alternative systems of creating norms and influencing state behavior toward individuals—contract and regulation—both tend toward impotence. International contracts often prove unacceptable means for creating norms because of gross disparities in bargaining power. Coordinated international regulation often proves inefficient or impossible because of conflicts in national regulatory philosophies, value systems, and discrepancies in administrative structures. Thus, a system of transnational public law litigation, which places special emphasis on the evolution of tort principles by domestic courts as a means of structuring national incentives and creating international norms, may ultimately prove to be the most effective means of promoting what I have called public international law objectives. I am grateful to my colleague Peter Schuck for this insight.

not only inhibit its use against terrorism, but would also strip it of virtually all contemporary validity.¹¹¹

Both judges failed to recognize, however, that the severity of their primary concerns will vary from case to case. Judge Robb failed to recognize that a federal court's competence to decide a particular transnational suit will turn critically upon the particular facts and law relevant to the decision.¹¹² Similarly, Judge Bork overlooked the fact that the intensity of the separation of powers concerns in a public transnational law case will also vary from case to case, depending upon whether the defendants are aliens acting under color of state law, foreign governments, or the United State Government or its officials.¹¹³ By prescribing a blanket rule to govern *all*

111. Judge Robb's political question approach and Judge Bork's rigid "no private right of action" approach both effectively reduce the Alien Tort Statute to a dead letter. It is difficult, however, to reconcile Judge Robb's refusal to interpret the Statute with the Supreme Court's recent pronouncement that "under the Constitution one of the judiciary's characteristic roles is to interpret statutes and we cannot shirk this responsibility [on political question grounds] merely because our decision may have significant political overtones." *Japan Whaling Association v. American Cetacean Society* 106 S. Ct. 2860, 2866 (1986).

Similarly, although Judge Bork concluded that courts cannot exercise Alien Tort Statute jurisdiction without invading the exclusive domain of the political branches, he implicitly conceded that some suits brought under the Statute's "law of nations" language would not create separation of powers problems. *See supra* note 61. If Judge Bork did not intend for even those cases to be heard, instead construing the Statute to authorize the federal courts to hear only alien suits for torts in violation of self-executing treaties, then he has all but read the words "in violation of the law of nations" out of the Statute. Under 28 U.S.C. § 1331 (1982), federal courts may already exercise federal question jurisdiction over cases "arising under" self-executing treaties of the United States. Thus, in the name of separation of powers, Judge Bork would have rendered 28 U.S.C. § 1350 totally redundant. In my view, a judicial approach to a statute that effectively reads it out of the books creates, rather than alleviates, separation of powers concerns. *Cf. Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring) ("Vigorously waiving in one hand a separation of powers banner, ironically, with the other [Judge Bork] rewrites Congress' words and renounces the task that Congress has placed before him.").

112. *Tel-Oren* revealed that federal judges may alleviate concerns about judicial incompetence on a case-by-case basis without giving 28 U.S.C. § 1350 an unduly constricted reading. Although Judge Robb argued that federal judges could not determine the facts necessary to decide *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring), he overlooked that all facts in that case were essentially uncontroverted. In *Tel-Oren*, the PLO had publicly taken credit for the terrorist attack, and Libya had endorsed and ratified it. *See id.* at 799 (Bork, J., concurring) (PLO "claimed responsibility" for the attack and Libya gave terrorists a "hero's welcome"). Moreover, although Judge Robb further argued that federal judges cannot handle the difficult questions of international law necessary to decide cases like *Tel-Oren*, Judges Bork and Edwards effectively rebutted that concern by engaging in extended subtle analyses of international law issues.

Nor was Judge Robb's political question approach justified by a broader fear that a finding of justiciability in *Tel-Oren* would inundate the courts with Alien Tort Statute suits. As noted above, the doctrines of personal jurisdiction, *forum non conveniens*, and exhaustion of local remedies, combined with practical limits on the availability of service of process, attachable assets, and discovery in Alien Tort cases would screen out virtually all such suits before they reached the merits. *See supra* text accompanying notes 46–56. Only the rare meritorious case without fatal procedural infirmities, such as *Filatiga*, would go all the way to judgment. Given that federal judges regularly apply these doctrines of civil procedure to ensure that individual cases are justly and efficiently decided, it seems anomalous for courts to abstain from deciding all Alien Tort cases on political question grounds, citing "pragmatic problems" and "judicial incompetence as the rationale." *See supra* notes 59–60.

113. The separation of powers concerns implicated by a federal court's consideration of an Alien Tort Statute case rise dramatically, depending upon whether the defendant is (1) an alien acting under color of state law, (2) a foreign state or head of state, or (3) a United States official of the United States itself. As one moves along this spectrum, however, the number of doctrines of federal jurisdiction available to address these concerns on a discretionary, case-by-case basis also increases. For example, in a case such as *Filatiga*, in which an alien sues another alien acting under color of state authority for an international crime, federal court adjudication would not necessarily interfere with the conduct of foreign affairs by the Executive

transnational public law cases, each judge overlooked the possibility that the federal courts might be able to accommodate all four policy objectives underlying the civil remedies debate by hearing some Alien Tort Statute cases, while selectively applying existing doctrines of civil procedure and federal jurisdiction to target judicial competence and separation of powers concerns as they legitimately arise.

In a different vein, Judge Edwards' concurring opinion in *Tel-Oren* did not so much turn a deaf ear to transnational public law claims as it missed an opportunity to clarify the international legal norms condemning torture and terrorism conducted under color of state authority. In *Filartiga*, the Second Circuit construed the Alien Tort Statute as authorizing federal courts to hear claims by aliens that alien officials acting under color of state authority had committed official torture, an act that civilized nations now recognize as a universal crime.¹¹⁴ Although adopting the *Filartiga* approach in theory,¹¹⁵ Judge Edwards nevertheless denied jurisdiction in *Tel-Oren*, relying on the curious reasoning that neither terrorism nor torture conducted by a nonstate actor such as the PLO constituted offenses against the law of nations.¹¹⁶

Branch. By definition, an international crime is one condemned not only by the United States, but also by the governments of all civilized nations, including the country in whose territory and by whose national the crime was committed. See Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 I.L.M. 585, 605 (1980) ("The compatibility of international law and Paraguayan law [condemning official torture] significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement."). See also *supra* note 62. Thus federal courts may make rulings in such cases without necessarily touching upon national nerves or embarrassing the Executive Branch in the conduct of its political functions. Cf. *Sabbatino*, 376 U.S. at 428 ("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").

In the second class of cases, when an alien sues a foreign government or a foreign head of state directly for an international crime, separation of powers concerns become more serious. In those cases, however, federal courts may address these concerns by applying existing doctrines designed specifically to address them. Where appropriate, courts may dismiss suits against heads of state on grounds of head of state or diplomatic immunity. See generally Note, *Resolving the Confusion over Head of State Immunity: The Defined Right of Kings*, 86 COLUM. L. REV. 169, 170-71 (1986). See also *supra* note 52. Courts may dismiss suits against foreign states on grounds of foreign sovereign immunity or the Act of State doctrine as those principles appropriately apply. See *supra* notes 53-54, 56.

Finally, when an alien sues the United States Government and its officials for their alleged violations of international law, Judge Bork's separation of powers concerns will be at their height. Yet here again, however, courts may apply the law of domestic sovereign immunity and the Federal Tort Claims Act to protect the United States on a case-by-case basis. The law of official immunities developed in the *Bivens* and Section 1983 context will answer those concerns as they legitimately arise. See generally P. SCHUCK, *supra* note 109 (describing these doctrines). Cf. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (applying these various doctrines to dismiss claims against various United States defendants). In short, because federal courts have ample avenues available to them to target separation of powers concerns on a case-by-case basis, no justification arises for dismissing suits that do not raise those concerns on jurisdictional grounds, as Judge Bork would do.

114. See *supra* notes 40, 62, 113.

115. See *supra* notes 45, 62-63 and accompanying text.

116. See *supra* note 62. Judge Edwards found no universal consensus that terrorism constituted a violation of the law of nations, 726 F.2d at 795 (Edwards, J., concurring), or that international law imposes obligations on nonstate actors, such as the PLO, when they commit torture. *Id.* at 791-95. Judge Edwards' reasoning thus leaves a curious anomaly: After *Tel-Oren*, aliens may sue terrorists who torture them overseas while acting under color of state authority by direct analogy to *Filartiga*, but may not sue foreign states or nonstate actors such as Libya or the PLO for the same acts, so long as those acts are committed overseas. See *supra* note 53 (barring suit against Libya because tort occurred overseas). Nor, according to

In my view, all of the judges in *Tel-Oren* overlooked an approach that would have allowed them to promote traditional tort law and public international law objectives, without raising undue judicial competence and separation of powers concerns. That approach, which provides a principle whereby judges could balance these four competing policy objectives on a case-by-case basis, grows directly out of *Filartiga*. Under this approach, a federal court would read the Alien Tort Statute to authorize federal courts to incorporate into *federal common law* the notion that certain forms of terrorism constitute international crimes.¹¹⁷ At least with respect to those international crimes which are subject to universal jurisdiction,¹¹⁸ the Alien Tort Statute arguably confers upon the federal courts authority to fashion a federal common law of public tort remedies.¹¹⁹ Moreover, *Sabbatino* would provide judicial precedent for the development of such a body of federal common law.¹²⁰ Applying

Judge Edwards, may those plaintiffs sue even terrorists who act under color of state law for terrorism (as opposed to torture), because there is no international consensus condemning terrorism.

In my view, Judge Edwards overlooked two key questions. First, even if the PLO is not itself a state, did that organization in fact torture the *Tel-Oren* victims “under color of state authority” (as Pena tortured *Filartiga*) by virtue of the Libyan government’s alleged support for the terrorist attack? Second, even assuming no international consensus condemning “terrorism,” as that term is broadly defined, does an international consensus nevertheless condemn an organized and deliberate attack upon innocent civilians without a collateral military target, as occurred in *Tel-Oren*? Cf. REVISED RESTATEMENT, *supra* note 12, § 404 comment a (“Universal jurisdiction is increasingly accepted for . . . indiscriminate violent assaults on people at large.”). Had Judge Edwards applied the *Filartiga* “universal crimes” approach to these two questions, see *supra* notes 62 & 64, he might have upheld Alien Tort Statute jurisdiction in *Tel-Oren*.

117. Cf. *supra* note 116. This approach, which the district judge applied on remand in *Filartiga*, is the approach most fully sensitive to both traditional tort law and public international law objectives. See *supra* note 64. It would permit an alien to sue in federal court under the Alien Tort Statute only for those torts that rise to the level of international crimes, as those crimes are defined by modern customary international law. See *infra* note 118.

118. See, e.g., REVISED RESTATEMENT, *supra* note 12, § 404 (defining crimes subject to universal jurisdiction as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism); see also *id.* § 702 (declaring that a state violates international law if, as a matter of state policy it practices, encourages, or condones official genocide, slave trade, murder, torture, prolonged arbitrary detention, or systematic racial discrimination).

119. With respect to the international crimes enumerated in *supra* note 118, the Alien Tort Statute arguably confers upon the federal courts authority to fashion a federal common law of tort remedies for international crimes. That body of common law would be analogous to the constitutional common law of tort remedies for constitutional wrongs developed in the *Bivens* context. See Monaghan, *The Supreme Court, 1974 Term—Foreword Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The federal courts’ authority to create such a narrow body of federal common law would derive directly from the jurisdictional grant in the Alien Tort Statute, 28 U.S.C. § 1350. Cf. *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957) (reading jurisdictional provision of the Taft-Hartley act to authorize the federal courts to create a federal common law of labor-management contracts). Alternatively, one might justify creation of a federal common law of tort remedies for international crimes based on the theory of “protective jurisdiction” urged by Professor Mishkin. See Mishkin, *The Federal “Question” Jurisdiction in the District Courts*, 53 COLUM. L. REV. 157, 184–96 (1953) (reading a jurisdictional statute as a “law of the United States” under which a case may arise for federal question jurisdiction purposes even in the absence of a statutorily created cause of action, so long as Congress exercises substantial legislative power in the field). See also Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948). As noted above, Congress has substantial legislative power to “define and punish offenses against the law of nations.” See *supra* text accompanying notes 68–80. In either event, 28 U.S.C. § 1350 would provide both a federal right and a remedy, thereby obviating Judge Bork’s concern about the absence of a federal cause of action. See *supra* notes 50, 61.

120. See *supra* notes 54, 82. In *Sabbatino*, the Supreme Court declared that, notwithstanding *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), “an issue concerned with a basic choice regarding the competence and function of the Judiciary and the national Executive in ordering our relationship with other members of the

this approach, federal courts could take jurisdiction over Alien Tort suits brought by aliens against terrorists and their state supporters. If practical problems rendered particular cases unsusceptible to judicial disposition, judges could apply civil procedure doctrines to address these judicial competence concerns in a discretionary manner.¹²¹ If the identity of the particular defendant made separation-of-powers concerns peculiarly intense, judges could similarly apply doctrines of federal jurisdiction to address those concerns on a case-by-case basis.¹²² In short, had the judges in *Tel-Oren* sensitively applied the *Filartiga* approach, together with existing doctrines of civil procedure and federal jurisdiction, they could have paved the way for at least a default judgment against terrorists—thereby promoting traditional tort and public international law objectives—without raising undue judicial competence and separation of powers concerns.¹²³ By refusing to apply such an approach in *Tel-Oren*, the District of Columbia Circuit dampened hopes raised by *Filartiga* that transnational public law litigation might provoke a broader integration of United States federal common law and the emerging customary international law of international crimes. Such a ruling would have served three salutary functions. First, it would have spurred further dialogue among United States, foreign, and international courts regarding the content of emerging international norms against terrorism.¹²⁴ Second, it would have

international community must be treated exclusively as an aspect of federal law.” 376 U.S. at 423–25. If federal courts may fashion federal common law to articulate rules governing judicial abstention from terrorist cases, there seems no reason why the judges in *Tel-Oren* could not have found similar judicial authority to develop a specialized federal common law of “torts only committed in violation of the law of nations” under the Alien Tort Statute.

121. See *supra* note 112 and accompanying text.

122. See *supra* note 113 and accompanying text.

123. Under the approach urged in the text, the D.C. Circuit would still have directed the district court to dismiss the *Tel-Oren* plaintiffs’ suit against Libya on grounds of foreign sovereign immunity. See *supra* note 53. Moreover, if the PLO had been improperly served, the suit against that entity would also have been dismissed on that ground, without prejudice to the filing of a new complaint after proper service or attachment of PLO assets. But if service was proper, the District Court would have had jurisdiction to proceed to the merits against the PLO. The District Court could then have held the PLO civilly liable based upon its acts of official torture and indiscriminate terrorist attacks on innocent civilians. See *supra* note 116. By defining those acts as international crimes subject to universal jurisdiction, the federal court could have concluded that those acts gave rise to federal common law tort claims which conferred a compensatory and punitive damages remedy on behalf of plaintiffs. See *supra* notes 64, 117–120. Even assuming that the PLO did not appear to defend, and that plaintiffs were not actually able to collect on the default judgment, the court would still have declared a norm of United States law condemning torture and terrorism, thereby promoting public international law objectives. Moreover, the PLO would have been deterred in the future from placing its financial assets in the United States. See generally D’Amato, *Judge Bork’s Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT’LL. 92, 93–94 (1985). See also Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists, American Bar Association National Conference on the Law in Relationship to Terrorism (June 6, 1986) (remarks of Steven Schneebaum) (copy on file with *Texas International Law Journal*) (“Even if it’s the case . . . that a lawsuit against a terrorist is ultimately not effective to get real money damages for a plaintiff who has been injured, it may still result that after cases like [*Tel-Oren*], it will be that much more difficult for terrorists to find safe haven in the United States to be protected from their victims False.”).

124. Had *Tel-Oren* fostered the development of a federal common law of tort remedies for international crimes, that common law could not only have defined compensable offenses, see *supra* note 110, but also set federal standards of civil liability, appropriate measures of punitive damages and standards of official immunity. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800 (1981) (setting a comparable judicial standard of official immunity against constitutional tort claims). Moreover, by encouraging interaction between domestic and international law through transnational public law litigation, such a decision would have furthered the trend toward state responsibility for international crimes and movement toward a “monist” view of international

better served public international law and traditional tort law objectives by enunciating a domestic norm against international terrorism and increasing the likelihood that victims of terrorism could secure compensation and deterrence through civil remedies. Third, it would have expanded the federal courts' role in enforcing such civil remedies, thereby making the federal courts a more significant player in the war on terrorism.¹²⁵

In sum, the judges in *Tel-Oren* missed an important opportunity to construe the Alien Tort Statute to provide a civil remedy against a modern social problem, terrorism. Even if the District of Columbia Circuit had not made the PLO "pay up," it could at least have promoted the ends of transnational public law litigation by articulating and enunciating a transnational norm condemning international terrorism. Taken together, the three opinions in *Tel-Oren* leave little room for victims of terrorism to secure civil remedies in United States courts through transnational public law litigation.¹²⁶ Yet, as noted above, the equally ancient constitutional authority to "define and punish offences against the law of nations" authorizes and indeed challenges Congress to address the same problem through legislative enactment of civil remedies.¹²⁷ Whether Congress soon rises to that challenge and legislatively modifies the ruling in *Tel-Oren* will determine the extent to which future victims can turn to transnational public law litigation to combat terrorism.

law. See *supra* notes 88 & 103. By refusing to embark on such a judicial task, however, the *Tel-Oren* judges have effectively thrown the task of creating such a comprehensive body of civil remedy law back to Congress. But see *supra* note 65 (suggesting that litigants might still urge this approach upon courts that follow *Filartiga*).

125. Such an expanded role for the federal courts in enforcing international law norms would reaffirm the evolving international law rule that all individuals have fundamental human rights to be free from certain state-sponsored conduct (e.g., genocide, torture, and certain forms of terrorism). See *supra* note 118. By implication, such a ruling would also constitute a general judicial endorsement of the use of transnational public law litigation to temper the actions of national decisionmakers. Indeed, one immediate and palpable consequence of *Tel-Oren* has been a reduction in the exposure of United States Government officials to Alien Tort Statute liability. See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (dismissing Alien Tort suit brought against Reagan Administration officials based in part on the reasoning of *Tel-Oren*).

126. See *supra* text accompanying notes 46–56. As noted above, however, litigants might still urge the approach endorsed in *supra* text accompanying notes 117–23 upon courts that still follow *Filartiga*. See *supra* notes 65, 124; see also Gerstel & Segall, *supra* note 102, at 158–59 (citing suggestion of conference participant that "a tort suit brought against the PLO by the family of Leon Klinghoffer and aliens held hostage on board the *Achille Lauro* would present a fact pattern similar to that considered in *Tel-Oren*. National outrage at the brutal murder of an American in a wheelchair, however, might produce sufficient pressure to yield a markedly different result.").

127. See *supra* notes 68–80 and accompanying text. Indeed, perhaps the most favorable reading that one can give to Judge Robb's opinion in *Tel-Oren* is as a judicial call for congressional reenactment of the Alien Tort Statute in order to ensure that it continues to fit within our nation's current statutory topography. 726 F.2d at 827 (Robb, J., concurring) ("When a case presents broad and novel questions of this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President."). As Dean Calabresi has suggested, when a judge is asked to construe a statute as obscure and as ancient as the Alien Tort Statute, perhaps his most proper role would be to "ask, cajole, or force another body (usually the legislature. . .) to define the new rule or reaffirm the old" in order to ensure that the Statute enjoys contemporary legislative support. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 166 (1982).

V. CONCLUSION

“Rights,” one commentator has written, “preoccupy a Don Quixote; remedies are the work of a Sancho Panza.”¹²⁸ The District of Columbia Circuit’s decision in *Tel-Oren* both restricted the availability of civil recovery by victims against terrorists and their state supporters and erected obstacles to such recovery. In the process, the three opinions in that case dramatically limited the role of federal courts in combatting terrorism through transnational public law litigation and retarded the development of a transnational norm recognizing an individual human right to live free from terrorism. *Tel-Oren* has forced both advocates and opponents of civil remedies against terrorism to reconsider what broader objectives civil remedies should serve and which institutions within the national government are best positioned to create and enforce those objectives.

Tel-Oren was wrongly decided, and each of the judges failed properly to balance the four competing policy objectives that underlie all civil litigation in this field. All three judges missed the opportunity to apply a principled approach to *Tel-Oren* that would have satisfied all four of those policy objectives. After *Tel-Oren*, Congress and not the courts must now play the role of Sancho Panza with respect to civil remedies against terrorism. Absent further legislative action, *Tel-Oren* will prevent transnational public law litigation from playing a substantial role in encouraging the development of domestic and international norms against terrorism. In the wake of *Tel-Oren*, only renewed legislative attention by Congress—the institution constitutionally and functionally best qualified to formulate national responses to terrorism—can sustain the momentum of transnational public law litigation and produce a balanced national statement about how we want to make terrorists both pay and pay up.

128. P. SCHUCK, *supra* note 109, at 27.

