

WHAT DOES TEL-OREN TELL LAWYERS?
JUDGE BORK'S CONCEPT OF THE LAW OF NATIONS IS
SERIOUSLY MISTAKEN

A recent decision of the Court of Appeals for the District of Columbia Circuit, *Tel-Oren v. Libyan Arab Republic*,¹ is sparking considerable controversy and will undoubtedly be examined at length in law journals. The events in issue occurred March 8, 1978, when 13 heavily armed members of the Palestine Liberation Organization left Lebanon for Israel under instructions to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel. On the main highway between Haifa and Tel Aviv, they stopped and seized a civilian bus, a taxi, a passing car, and later a second civilian bus, taking the passengers hostage. While proceeding toward Tel Aviv with their hostages gathered in the first bus, the terrorists fired on and killed numerous occupants of passing cars as well as some of their own passengers. They also tortured some of their hostages. At a shoot-out with the police at a police barricade, the terrorists shot more of their hostages and then blew up the bus with grenades. As a result of the terrorists' actions, 22 adults and 12 children were killed, and 63 adults and 14 children were seriously wounded.

The plaintiffs in *Tel-Oren* are most of those wounded and the survivors of most of those killed, as well as guardians and next friends of the wounded minors. Some of the plaintiffs are citizens of the United States, some of the Netherlands, and some of Israel. They brought suit in the United States against the PLO, the Libyan Arab Republic, the Palestine Information Office, the National Association of Arab Americans and the Palestine Congress of North America. The district court dismissed their action for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. The court of appeals affirmed the dismissal in a brief per curiam opinion, but then appended three separate concurring opinions of Judges Edwards, Bork and Robb, comprising a total of over 50 pages. The judges agreed on very little other than the result, and thus the case is already on its face sharply controversial.

Because Judge Bork's opinion is the most detailed and perhaps the most scholarly, or at least may appear to be so, and because lengthy treatments of the *Tel-Oren* case will soon be appearing, I want to confine my essay here to that opinion, and in particular, Judge Bork's view of international law.

Before addressing Judge Bork's reasoning, however, I want to take brief issue with those persons who feel that it was a severe mistake for the

¹ 726 F.2d 774 (D.C. Cir. 1984). A panel discussion devoted to the *Tel-Oren* case is scheduled for the 1985 Annual Meeting of the American Society of International Law.

plaintiffs to bring their case in a United States court in the first place. Many readers of the opinion have told me informally that the case is a major setback to the cause of human rights enforcement in American courts. The notion of suing foreign states and organizations on a tort that occurred outside the United States seemed, to these observers, to be asking for trouble. If the plaintiffs had not sought redress in U.S. courts, these persons say, the circuit court would not have had the occasion to hand down what may turn out to be a regressive opinion endangering the human rights cause in cases that have a more legitimate claim to jurisdiction in those courts. This may be doubly true if the Supreme Court gets the case and affirms it on the reasoning advanced by Judge Bork.

On a superficial reading, it is quite clear that a terrorist attack perpetrated by the PLO in Israel is not something over which U.S. courts have or should have jurisdiction. Let the victims seek redress elsewhere, whether in Libya, Israel or some other country having close ties to the incident or to the victims. Why stretch American jurisdiction to cover such a case? Such arguments, I submit, depict a traditional resistance to the very concept of human rights in international law. If human rights means anything in international law, it means that traditional state-based jurisdictional exclusivities must give way to a more fundamental realization that the rights of people count for more than the rights of states. I tried to give this perspective an operational meaning in a previous article, in which I argued that the 19th-century notion of nationality as a basis for a state's espousal of a national's claim should be reinterpreted under the human rights law of the 20th century by substituting internationality for nationality.² Specifically, the United States itself has a real interest in seeing to it that nationals of other countries are not the victims of terrorism or genocide perpetrated by their own governments or by other entities in foreign lands.³ The new law of human rights, in short, calls for a change in world view. The interest that a country has in its nationals is expanded, under the law of human rights, to include an interest in non-nationals, especially where basic human rights are threatened.

Let us look at the real basis for the claims by the *Tel-Oren* plaintiffs. Concretely, they were suing in the United States for a sum of money—representing assets owned by the PLO. The action was for money damages against the PLO (for the moment, I omit the other defendants). What the plaintiffs, under my theory, were saying is that the money and other assets owned by the PLO in the United States are already under the general jurisdiction of the United States, and yet the ownership of these assets more properly belongs to the plaintiffs as compensation for the terrorist attack sponsored by the PLO than it belongs to the PLO. Under this view, if the United States wants to allow the PLO to have bank accounts and assets in the United States, it should condition this allowance on the

² D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1123-26 (1982).

³ *Id.* at 1114-15, 1147-49.

nonviolation by the PLO anywhere in the world of basic human rights. If plaintiffs such as the ones in *Tel-Oren* can show that they were the victims of a fundamental violation of human rights by the defendant PLO, then the United States should not continue to protect the assets of the PLO in this country against the claims for compensation by such plaintiffs. Or to put the matter a different way, the court of appeals, in dismissing the plaintiffs' claims, was in fact upholding the right of the PLO to ownership of its assets in the United States against the human rights claims for compensation by the *Tel-Oren* plaintiffs. Looked at in this light, I submit that the dismissal of the plaintiffs' claims was not a neutral act, but rather a recognition that at that time the court of appeals was not willing to accept the consequences of the meaning of international human rights. But it does not mean that the plaintiffs were wrong in asking the court to broaden its perspective. (Of course, the plaintiffs did not argue in these terms; I am simply supplying an after-the-fact theoretical perspective for their general right to claim redress in United States courts.)

Incidentally, focusing upon the assets of the PLO in the United States as providing a sufficient basis for the plaintiffs' legal action in this country may be what the Supreme Court had in mind (though it did not say so explicitly) in the recent *Verlinden* case in which the Court found federal court jurisdiction where a foreign plaintiff was suing a foreign country over a foreign contract whose breach occurred abroad.⁴ Particularly since the Supreme Court's opinion in *Verlinden* was unanimous, the case may indicate that the Court is willing to take a far more vigorous attitude toward internationalizing American jurisdiction than lower federal courts have been expecting.

JUDGE BORK'S OPINION

Judge Bork's complex opinion turns on the question whether international law gives the plaintiffs a "cause of action." Since the court's disposition of the case was on the pleadings, dismissing the plaintiffs' action, the following findings are either explicit or implicit in Judge Bork's holding:

(1) The court has jurisdiction over the case, both with respect to the Israeli plaintiffs (28 U.S.C. §1350) and with respect to the American plaintiffs (28 U.S.C. §1331).

(2) The plaintiffs have "standing" to sue; that is, they are the real parties in interest and have allegedly suffered direct injury.⁵

⁴ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). To be sure, the existence of attachable assets has not been a basis in American law for jurisdiction except in certain in rem cases. *Verlinden* did not make it a basis; my argument in the text is merely that *Verlinden* stands for a stronger international perspective than perhaps lower-court judges realize the Supreme Court is willing to take. If, however, courts were to universalize their perspectives on human rights, my position is that those who deny basic human rights should be accountable in any national court where they or their assets may be found.

⁵ In *Davis v. Passman*, 442 U.S. 226, 240 n.18 (1979), the Supreme Court distinguished between standing and having a cause of action. Cf. note 23 *infra*.

(3) The action is not barred by the “political question” doctrine. (However, Judge Robb, concurring in the result, would have barred the case as a “political question.”)

(4) There is no defense of “sovereign immunity” available to the PLO, which is not a “state.” (However, one of the defendants, the Libyan Arab Republic, would have been able to assert a sovereign immunity defense had the case proceeded to the merits.)

(5) There is no “act of state doctrine” defense available to the PLO, for the same reason.

However, the missing ingredient from this list is the elusive notion in U.S. law of “cause of action.” Let us examine briefly what this notion is and what it is not. The idea of a “cause of action” is not the same as that of “jurisdiction.” Let me give a very simple example. Suppose a small-claims court is given jurisdiction over all claims having a value less than \$1,000. That mere statutory grant of jurisdiction does not mean that anyone alleging a claim, no matter how fanciful, of less than \$1,000 may obtain relief in the small-claims court. If *A* sued *B* for \$500 for interfering with astrological wave patterns between *A* and the planet Jupiter, we could simply say that although the small-claims court has “jurisdiction,” *A* has not shown a “cause of action.”

What, then, is a “cause of action”? Rather surprisingly, according to the Supreme Court, the phrase became a legal term of art only in 1848 when the New York Code of Procedure used it in abolishing the distinction between actions at law and suits in equity.⁶ This rather late arrival of the term upon the legal scene raises at least a question when it is applied to interpret the alien tort statute (28 U.S.C. §1350), originally passed as part of the Judiciary Act of 1789. Nevertheless, the term under present law appears to carry two different meanings that tend to overlap. In the first place, having a cause of action refers to having “recognized legal rights” that a litigant claims were invaded, which furnishes a basis for a litigant’s claim for judicial relief.⁷ Second, Judge Bork explains, “to ask whether a particular plaintiff has a cause of action is to ask whether he ‘is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.’ ”⁸ Careful readers of Judge Bork’s opinion will note that he tends to suppress the first, more traditional, reading of the term; rather, he emphasizes the second meaning, which, as we shall see, is conducive to achieving his desired result of a narrow and restrictive interpretation of international law.

Perhaps even more useful to the goal of achieving a narrow reading of international law are the policy pressures adumbrated by Judge Bork that militate against finding for the plaintiffs. These pressures are summarized by the labels “act of state doctrine” and “political question doctrine,” for while these doctrines do not directly apply to the present case, the underlying reasons for them nevertheless exert a steady pressure. The

⁶ 442 U.S. at 238.

⁷ *Id.*

⁸ 726 F.2d at 801 (citing *Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979)).

reasons have to do, vaguely, with separation-of-powers concerns under the U.S. Constitution, judicial interference in foreign policy and the less than precise nature of rules of customary international law. (As an example of the latter, Judge Bork cogently asks whether the law against terrorism applies against an organization such as the PLO, which is not a state and whose members are not public officials. I think this question can be answered in the affirmative under existing customary international law, but only after detailed argument and concededly not as a matter of "black letter" rules.) This is not the place to examine whether the underlying rationales of the act of state and political question doctrines, or even the doctrines themselves, are sound; suffice it for present purposes to note that while Judge Bork uses these rationales as a supporting weight for his analysis of cause of action, it is only a weight and not a conclusive or dispositive consideration. Therefore, we may turn to the main issue, which in Judge Bork's terms is whether international law gives rise to a cause of action in the present case.

Judge Bork does not require an express grant of a cause of action by the rules of international law; indeed, there can be no such express grant because international law clearly is not addressed to the particular concerns of United States courts or their post-1848 concepts of a cause of action. Rather, it would suffice for Judge Bork to be able to infer a cause of action from the body of international law. Nor does Judge Bork draw a distinction between the Alien Tort Claims Act (28 U.S.C. §1350) and the general jurisdiction act (28 U.S.C. §1331) for the purpose of possibly inferring a cause of action from international law, and therefore we need not concern ourselves here with their particular intricacies and differences. However, because the Alien Tort Claims Act is the more specific of the two, providing for federal jurisdiction in "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," Judge Bork's analysis begins with, and focuses largely upon, that Act.

The core of Judge Bork's opinion consists of three arguments: (1) treaties do not provide a cause of action for the plaintiffs; (2) the reasoning applied to treaties carries over to customary international law, which is then seen as similarly not providing a cause of action; and (3) apart from treaties/custom, the law of nations, with very few exceptions, does not provide a cause of action. I will here attempt to summarize Judge Bork's arguments under these three headings, and then, in the next part of this article, I will offer a critique.

(1) The alien tort statute, as we have seen, provides for civil jurisdiction over actions by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States." The *Tel-Oren* plaintiffs listed 13 alleged treaties as having been violated; of these only 5 are currently binding on the United States.⁹ As to those 5, Judge Bork found

⁹ The 13 alleged treaties listed by Judge Bork, of which the first 5 are binding, are: the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Convention with respect to the Laws and Customs of War on Land (both Hague Conventions

by examination of their language that they call for implementing legislation by the states parties, or impose obligations upon those parties to fulfill in good faith the purposes of the treaties. Hence the treaties, Judge Bork concludes, are not self-executing. As a result, they do not grant individuals a cause of action to seek damages for violation of their provisions.

(2) Since the alien tort statute mentions the “law of nations” and “a treaty of the United States” without distinguishing between the two, they stand in parity. Hence if a mere violation of the law of nations would itself provide the plaintiffs with a cause of action, a mere violation of a treaty would do the same. But this would mean, according to Judge Bork, “that all existing treaties became, and all future treaties will become, in effect, self-executing when ratified. This conclusion stands in flat opposition to almost two hundred years of our jurisprudence. . . .”¹⁰ Therefore, a mere violation of the law of nations cannot itself provide a cause of action in U.S. courts. Only those rules of international law which themselves provide that individuals may sue to enforce them may be used to infer a cause of action in American courts. In other words, under Judge Bork’s view, most of the rules of international law are similar to a non-self-executing treaty; they have no impact upon individuals. Only a self-executing treaty, or a rule of international law that itself provides for enforcement by individuals, can give rise to a cause of action in courts of the United States.

(3) Even apart from the analogy between non-self-executing treaties and the rules of customary international law, Judge Bork finds that nearly all rules of international law address states and not individuals. He relies extensively upon Oppenheim for this proposition, quoting from the eighth edition:

Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.¹¹

Noting that international law is becoming increasingly concerned with individual rights, Judge Bork nevertheless finds that human rights law today remains vague and at a high level of generality, consists more of

of 1899 and 1907), the Charter of the United Nations, the Geneva Prisoners of War Convention of 1949, the OAS Convention of 1971 on Terrorism, the Protocols to the Geneva Conventions on Humanitarian Law of 1949, the General Assembly Declaration on the Principles of Friendly Relations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the General Assembly Resolution on Protection of Civilian Populations in Armed Conflicts, the Genocide Convention, the General Assembly Declaration on the Rights of the Child and the American Convention on Human Rights. 726 F.2d at 808–09.

¹⁰ *Id.* at 820.

¹¹ I L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 19 (H. Lauterpacht 8th ed. 1955), quoted *in id.* at 817.

aspirations and ideals than of legal obligation, and in any event is not intended for judicial enforcement at the behest of individuals. On this latter point, the *Filartiga* case,¹² upholding jurisdiction upon an allegation of official torture abroad of the son of an alien suing in the United States, is of questionable merit "because the court there did not address the question whether international law created a cause of action that the private parties before it could enforce in municipal courts."¹³

The argument that nearly all rules of international law are addressed to states and not individuals is another way of saying that individuals are not members of the class of litigants that may appropriately invoke the power of the court, which, as we have seen, is the second of two meanings that can be applied to the term "cause of action." Judge Bork's position, therefore, is a general one: that while nations are members of the class of litigants designated by the rules of international law, individuals are not; hence, the former may have a "cause of action," but the latter do not. Moreover, Judge Bork's position applies equally to the alien tort statute (28 U.S.C. §1350) and the general jurisdiction statute (28 U.S.C. §1331); indeed, it would apply to *any* attempt by an individual to invoke international law in United States courts. There is thus an enormous breadth to Judge Bork's ruling: it would pretty much wipe out the invocation of customary international law in American courts (for the instances in which nations, as opposed to individuals, would bring suit in American courts are extremely rare).

But the breadth of coverage of Judge Bork's principle would include the alien tort statute itself, and this gives rise to a particular difficulty: how would that statute *ever* apply to an alien suing for a tort? Judge Bork asks what kinds of alien tort actions Congress might have had in mind in 1789 in enacting the statute. He finds in Blackstone (who was familiar to the Founding Fathers of the Constitution and the attorneys in the first Congress) three classes of cases: violation of safe conducts, infringement of ambassadorial rights and piracy. Judge Bork concludes that these three classes are possibly the only ones Congress meant to reach, but in any event, the present case of torture clearly does not fall under any of them. Judge Bork admits that this leaves "quite modest" the "current function" of section 1350,¹⁴ but given the policy reasons for not entangling courts in foreign affairs questions, that constricted view of section 1350 is acceptable to Judge Bork.

CRITIQUE

(1) Judge Bork argues that only self-executing treaties can give rise to a cause of action for individuals. He thus makes an ingenious link between the concept of "cause of action" and treaties that are "self-executing," a link that I believe is unexceptionable, harmless, and yet irrelevant. It is true that a non-self-executing treaty cannot give rise to a cause of action for individual plaintiffs, but for a reason entirely different from what Judge Bork thinks. The reason is not that there is any intrinsic link

¹² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹³ 726 F.2d at 820 (Bork, J., concurring). ¹⁴ *Id.* at 816 (Bork, J., concurring).

between “cause of action” and “self-executing”; rather, it has to do with the unlikelihood that a non-self-executing treaty would be “violated” in a manner that could cause harm to an individual plaintiff.

To see why this is so, let us consider what a non-self-executing treaty is all about. Such a treaty binds the states parties to it to enact legislation that will implement the treaty principles in their own domestic spheres. Hence, a non-self-executing treaty can only be *violated* if a party to it fails to pass the requisite implementing legislation. In the event of such a failure, that party will be in breach of the treaty vis-à-vis the other parties, but the breach will consist solely in that party's failure to enact the requisite legislation. Suppose, for example, that the United States enters into a treaty with Poland containing the provision that Polish ham should be allowed to be sold in American supermarkets without interference by state or local government, and that the United States undertakes to implement this principle by passing the appropriate legislation. If, after the treaty enters into force, the United States fails to enact the legislation, Poland will have a legitimate complaint that the United States has committed a breach of the treaty. Now suppose that an importer asks for a restraining order in court against local officials seeking to bar the sale of Polish ham. The court might say, along with Judge Bork, that the treaty does not give the importer a “cause of action” in this matter. But the court would be more accurate in saying that the local ordinance barring the sale of Polish ham, which the local officials are seeking to enforce, is valid law because the treaty has not been implemented by Congress. The local ordinance, therefore, is not in *violation* of the treaty. In fact, there has been no violation of the treaty that is relevant to the importer's lawsuit. The “violation” of the treaty that has occurred has nothing to do with Polish ham, or the right to import and sell Polish ham. Rather, the “violation” is at an entirely different level, consisting of the failure of Congress to pass implementing legislation.

Technically speaking, the importer of Polish ham would only have a claim, akin to a shareholder's derivative lawsuit, against the United States Congress, charging that as a member of the public he has been deprived of a property interest (profits in the sale of Polish ham) owing to the failure of Congress to live up to its treaty commitments to Poland. Under present U.S. law, such a lawsuit would have practically no chance of success; it would be barred by lack of standing, the “political question” doctrine and the general constitutional right of Congress to enact or not to enact legislation. But I spell it out here to underline my main point, which is that an individual is not directly “hurt” (except in this attenuated sense of a citizen's derivative lawsuit against Congress) by a “violation” of a non-self-executing treaty.¹⁵

¹⁵ A non-self-executing treaty may nevertheless indirectly produce domestic private effects, including those of influencing the interpretation of a statute, evidencing federal foreign policy that may preempt the states, and generating a rule of customary law that in turn may apply to private parties. *See, e.g.*, Paust, Book Review, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 239-42 (1981); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, ch. 5 (1971).

(2) Given the preceding argument, we now see that Judge Bork's fear, that allowing a cause of action under section 1350 for a mere violation of the law of nations would equate to rendering all treaties self-executing, is misplaced. For a non-self-executing treaty is not "violated" the way a rule of customary international law would be violated. Under section 1350, *only* self-executing treaties are capable of being violated in a way that per se affects individual rights. There is no danger that non-self-executing treaties could ever be included under section 1350; nor could their violation be held parallel to violations of the law of nations, simply because only governments can violate non-self-executing treaties and, if and when they do, the "violation" consists only of failure to enact implementing legislation and not the sorts of substantive violations of treaty principles that might be helpful to individual plaintiffs in tort actions under section 1350.

Judge Bork's entire analogy and his fears thus melt away. Not only is there no danger that non-self-executing treaties may be rendered self-executing if his "cause of action" reading of section 1350 is not upheld, but also there is no need to reconceptualize the entire body of customary international law to force it into a category of "providing no cause of action" on Judge Bork's analogy to non-self-executing treaties.

(3) If Judge Bork is mistaken about the parity between the law of nations and treaties in section 1350, he is also on very thin ice about what is left in section 1350, given his own theory that rules of customary international law must impliedly give rise to an individual cause of action before they can be invoked by individuals in U.S. courts. For under his restrictive interpretation of section 1350, it is hard to think of any rule of international law that would be available to an alien suing in tort. As Judge Edwards points out in criticism of Judge Bork's view of section 1350, even the three offenses recognized by Blackstone—violation of safe conducts, infringement of ambassadorial rights and piracy—are not now, and were not in 1789, rules that impliedly create a private right of action to secure their enforcement.¹⁶ Hence, Judge Bork's reading of section 1350 completely guts the statute, even in its original intention as defined by Judge Bork himself.

More generally, Judge Edwards cites Professor Henkin for the proposition that "international law itself, finally, does not require any particular reaction to violations of law."¹⁷ There is a variety of mechanisms by which international rules are enforced. Indeed, as I have argued elsewhere, the very same mechanisms that give rise to international rules of law and ensure their survival over the years against potential competing rules are the mechanisms that account for their enforcement in given cases.¹⁸ To

¹⁶ 726 F.2d at 779 (Edwards, J., concurring).

¹⁷ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 224 (1972), cited in *id.* at 777-78.

¹⁸ D'Amato, *supra* note 2, at 1117-22; see also D'Amato, *Is International Law Really "Law"?*, 79 Nw. L. REV. (forthcoming, 1985).

attempt to reshape all of international law through the particular post-1848 American mechanism of a "cause of action" is like trying to force a camel through the eye of a needle. The needle's-eye view is provincial as well as distorting, and ultimately is no more than a surrogate for Judge Bork's attempt to declare all international law irrelevant to decisions reached by American courts.

If we take the traditional meaning of "cause of action," none of this straining is necessary. Under this meaning, which I previously labeled as the first reading of the term given by the Supreme Court, a litigant has a cause of action when he refers to recognized legal rights that he claims have been invaded by the actions of the defendant.¹⁹ Since international law is a part of American law,²⁰ international law may well provide, in appropriate cases, such recognized legal rights. There is a huge number of cases in American law that have turned on rights founded in international law,²¹ including nearly all the cases where the defendant has prevailed not because the plaintiff has failed to state a cause of action, but because the plaintiff's action was barred by defensive doctrines such as sovereign immunity or act of state.²² Thus, by departing from the traditional meaning of "cause of action," Judge Bork's restrictive secondary view of that term logically entails departing from the rule of decision in all of these cases throughout American history.

But what about this second meaning that Judge Bork ascribes to "cause of action," namely, to ask whether the plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the court's power? Judge Bork's argument, as I understand it, is that the proper class of litigants for nearly all rules of international law is the class of nations. International law is a creature of nations, and they may properly invoke it. Thus, individuals do not belong to this proper class of litigants and have no "cause of action" under nearly all rules of international law.

Whether or not this second meaning that Judge Bork gives to the notion of "cause of action" stands up under scrutiny,²³ let us for the moment assume it is correct and inquire whether, in fact, international law is addressed to nations and not to individuals. Judge Bork's authority for his viewpoint is Lassa Oppenheim, a prominent English positivist whose

¹⁹ See *supra* text at note 7.

²⁰ *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

²¹ I estimate some 5,700 cases cited in 1-20 AMERICAN INTERNATIONAL LAW CASES (F. Deák ed. 1971-1982).

²² See, e.g., cases cited in Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983).

²³ It is very close to the notion of "standing," as Judge Bork admits in a footnote, 726 F.2d at 803 n.8. A careful reading of *Davis v. Passman*, 442 U.S. 226 (1979), indicates that the Supreme Court did not endorse in its text the idea of defining a cause of action according to the proper class of litigants, but did make an attempt to define it as such in a (possibly clerk-written?) footnote, 442 U.S. 240 n.18. Even in that footnote, it is hard to discern a real difference between "standing" and this second meaning of "cause of action."

massive text on international law first appeared in 1905; its subsequent editions were last revised by Sir Hersch Lauterpacht in 1955.²⁴ (An examination of the works of some other writers cited by Judge Bork indicates that they, too, largely relied upon Oppenheim.) Was Oppenheim correct in saying that states are primarily the exclusive subjects of the rights and duties arising from international law?

In the first three editions of his book, Oppenheim expressed the view that states only and exclusively are the subjects of international law; later editions qualified this statement by phrases such as "principal," "primarily" and "as a rule." As Lauterpacht, his most recent reviser, writes at length in the eighth edition, individuals may directly be subjects of international law.²⁵ Piracy is a classic example; pirates are by definition outside the municipal laws of the various states, and are subject in the first instance directly to duties imposed by international law.²⁶

To be sure, Oppenheim and other positivists at the turn of the century had some success in arguing that states alone were the subjects and objects of *international law*. The very phrase "international law," which had been invented by the leading positivist Jeremy Bentham in a book he published in 1789,²⁷ seemed to call for an exclusive state-oriented view of that body of law. The elaborate fiction was invented that when an alien is injured abroad, it is the alien's home state that is really injured under international law and not the alien himself. Thus, in the classic *Lotus* case,²⁸ although the person injured was Lieutenant Demons, in fact France "espoused" his claim and brought an action in the Permanent Court of International Justice against the state of Turkey. To carry the fiction through to its logical conclusion, one might suspect that if France had won that case, there would be a definite monetary amount awarded to France to redress France's "injury" and, in turn, the measure of that amount of money would conveniently be based on the damages suffered by Lieutenant Demons. This, indeed, is how the positivist fiction was embellished.

Oppenheim's state-oriented view of "international law," however, has been only a fiction, even though it has captivated the minds of many

²⁴ I. L. OPPENHEIM, *supra* note 11. Oppenheim himself acknowledged contrary views to the proposition that international law concerns only states. See I. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 20 n.1 (2d ed. 1912). Professor Paust has labeled as "nonsense" the Oppenheim-based view that individuals were not in Oppenheim's time, and are not today, recognized as having the direct right under international law to sue or be sued. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 89 (1981).

²⁵ I. L. OPPENHEIM, *supra* note 11, at 19-23.

²⁶ See the good, but brief, discussion of Judge Edwards, 726 F.2d at 794 (Edwards, J., concurring). See also A. RUBIN, *PIRACY, PARAMOUNTCY AND PROTECTORATES* 10-12, 34-46 (1974).

²⁷ J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 326 n.1 (Hafner ed. 1948). According to Professor Janis, Bentham deliberately changed Blackstone's fundamental assertion that the law of nations applied to individuals as well as states, Bentham opting positivistically for only the latter. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AJIL 405 (1984).

²⁸ The Case of S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ, ser. A, No. 10.

people, including Judge Bork. In the *Lotus* case itself, the question on damages agreed to by France and Turkey was, "Should the reply be in the affirmative [to the first question that Turkey acted in conflict with the principles of international law], what pecuniary reparation is due to M. Demons . . . ?"²⁹ Thus, in the classic "positivist" case, the parties by the very terms of their *compromis* saw through the legal fiction and put the issue of damages, their measure and their payment directly upon the injured individual. Nevertheless, through the years many writers, and some states, have found it convenient to adopt the positivist fiction, which tends to exalt the state over the individual. Judge Bork may be sympathetic to this view. But it does not mean that the view correctly reflects the reality of international law.

The 19th-century emphasis on states as subjects of "international law," as coined by Bentham, changed and distorted what the law of nations was at the time of the Judiciary Act of 1789. The law of nations was viewed then in a manner similar to the Roman conception of *jus gentium*. The *jus gentium* was part of the genius of the Roman Empire; instead of applying the laws of Rome directly to foreigners within the empire, the Romans invented the *jus gentium*, which incorporated the customs of the foreigners directly into the law that would be applied to them. The *jus gentium* therefore would apply when a foreigner within the empire was involved in a case, in the same way that section 1350 allows the "law of nations" to be applied to an action in tort by an "alien."

The phrase "law of nations" says a great deal, in contrast to Bentham's phrase "international law." The latter suggests a law that regulates the interactions of nations. But the former suggests a law that is "of" the nations, a law that comes from them and exists as a system of rules and norms. Even Blackstone, despite a prepositivist streak in his writings, regarded the law of nations as "this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of."³⁰ As well summarized by Professor Alfred Rubin, "to Blackstone, the principal parts of the 'law of nations' were not those governing sovereigns in their relations with each other, but those rules of natural law which were, or should have been, identical in all states."³¹

Moreover, we must realize that, from the perspective of 1789, the term "nations" was a lot looser than it is today. Vast areas of Europe were not "nations" in today's sense, the Ottoman Empire was a loose federation of principalities, Germany and Italy were not yet unified, Africa was a "dark continent" and the term "nations" connoted "foreign lands" as well as "states" in the modern sense. The three Blackstonian categories of rules of the law of nations were recognized under the "law of nations" as

²⁹ *Id.* at 5.

³⁰ 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1790).

³¹ Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 21 INT'L PRAC. NOTEBOOK 19, 21 (1983).

applying to individuals, not just "states." An individual with a safe conduct had a right to be respected not only by states or nations, but also by principalities, duchys, groups, armed bands in de facto possession of territory, public organizations (such as the later Red Cross), nonpolitical entities such as the Holy See, capitulatory regimes and so forth. Indeed, the list of political, quasi-political and nonpolitical entities of 1789 was probably longer and more complex than it is today, given the recent spread of the modern state across the world's land surface. The law of nations in 1789, to be sure, applied to interstate transactions such as treaties, but it applied as well to nonstates (treaties could be made with the Vatican). A writer in 1789 would have boggled at the attempt to define the law of nations in terms of its subjects and objects. Instead, classical writers of that time sensibly confined their treatises to the content of the rules of the law of nations. It was simply understood that these rules would apply to whatever entities were appropriate (for example, individuals in the case of piracy, political entities in the case of treaties). All of this was severely distorted when Oppenheim came along and attempted to recast this sprawling and subtle law into the narrow mold of "states."

Yet in the 20th century, particularly among American and English writers who were more persuaded by positivism than their continental colleagues, the state-oriented view of international law for a while made considerable headway. Recently, there has been a sharp reversal of the trend. The newly emerging laws of human rights have changed the perspective away from state-based claims; after all, some of the worst violations of human rights (genocide, torture) are perpetrated by states themselves. In the mid-1930s, when Stalin supervised the genocide of ten million Russian kulaks, the world took little notice; under positivist theory, what a nation did to its own citizens did not amount to a breach of "international law." Today, in the post-Nuremberg world, genocide is a crime that makes relevant, for international legal purposes, what a state does to its own citizens. It also makes relevant, in a way that Oppenheim possibly could not have thought, a claim by an outsider state on behalf of those persons subject to severe human rights deprivations. In the *Tel-Oren* case, it makes relevant to the real interests of the forum court an incident of torture and murder that occurred outside the territorial United States. Ironically, this recent turn to human rights law is in historical perspective a return to the pre-19th-century conception of the "law of nations." While "torture" in the *Filartiga* case may not itself have been part of the law of nations in 1789, the idea of including the concept of torture as part of the law of nations is a lot closer to the original climate of opinion behind section 1350 than Judge Bork's positivistic reluctance to give any real meaning to that statute.

Judge Bork, in sum, has seriously misunderstood the law of nations as it was meant to be understood in the jurisdictional provisions of the Judiciary Act of 1789. He views it through the distorting glasses provided by Oppenheim, and not the way it really was then or is now. But even if

we assume that Judge Bork's constricting notion of "cause of action" as referring to a proper class of plaintiffs is correct, a proper view of the law of nations would support a finding that the plaintiffs in *Tel-Oren* have at least established a cause of action.

CONCLUSION

I am not sure, as a matter of strategy, that the *Tel-Oren* case was worth bringing in the first place. Perhaps our judiciary is not ready for a case such as this one, which may be somewhat ahead of its time. Common law proceeds incrementally, and perhaps a lot of backing and filling was necessary in the human rights field before a claim such as the one in *Tel-Oren* would get a proper hearing.

But I am less concerned about strategy than I am about the state of ignorance regarding international law that is reflected from the bench and from the secondary place held by international law in the curricula of American law schools.³² I feel that we students of international law have not done enough to bring out the richness, depth, subtlety, intellectual value, theoretical challenges, historical evolution and fundamental importance of our subject. Our present students will someday be judges and government officials. If they fail to learn enough in depth about international law in the law schools, they will not pick it up in a crash course led by competing attorneys in an innovative case such as *Tel-Oren*.

PROFESSOR RUBIN'S REPLY DOES NOT LIVE UP TO ITS TITLE

If there were a truth-in-advertising law that applied to essays in the *American Journal of International Law*, Alfred Rubin's reply to my article on Judge Bork could be charged with deceptive packaging. His tentative and speculative contentions hardly prove his title statement that I am "seriously mistaken." Yet his very failure of proof means that my arguments remain valid and that I have suffered no damage. As a result, I may lack standing, or have no cause of action, to bring a case of deceptive advertising against Professor Rubin.

So I am remitted to some brief observations. Rubin says it is "impossible" for national judges to be objectively seen as applying any universal law. But consider the universal prohibition against torture. Is it clearly impossible for a trial judge in the United States objectively and convincingly to find that torture occurred on an Israeli highway when all the witnesses said it did and the perpetrators admitted it and accepted the responsibility publicly? Rubin would grant the same judge the ability to detect torture when it occurs closer to his courthouse, such as in a nearby basement prison cell. According to Rubin, the judge can easily reach an objective conclusion of torture or no torture in that case, even if the facts are in sharp dispute. The conclusion is easily reached, presumably because, as the crow flies or as distances can be measured through earth and concrete, if proximity to the judge reaches a certain mystical point, what was previously impossible to determine suddenly becomes possible (*lex mirabilis*).

Professor Rubin is not against *all* universal rules, for he has discovered a universal rule of natural law all his own. It goes like this: "natural law is the law to be found reflected best to suit local perceptions in the legal order closest to particular aspects of a case." This is a notion I have not been able to find in Grotius, Pufendorf, Oppenheim or even Story, though I suspect that one of these days it may turn up in Woody Allen.

of law recognized by civilized nations at least as much as any rules relating to human rights. It is surprising that so little has been published on the rules and their ramifications.

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Professor Rubin's argument reduces to one proposition: that we should perpetuate the 19th-century distortion of the law of nations rather than go back to the original meaning at the end of the 18th century. Apparently, Rubin is willing to forget that the statute we are discussing was enacted in 1789. He also seems to forget that international law has changed since the 19th century, and that the present law of human rights does not incorporate his pet 19th-century notions of state sovereignty and jurisdictional insularity. Or if he hasn't forgotten that, he presumably believes that the world is entitled to change the law once but not twice. The first change was in the 19th century and we're stuck with it (even though it was a mistake); the second change in the 20th century does not count (even if it restores the original meaning). Despite the fancy packaging, does he expect anyone to *buy that*?

ANTHONY D'AMATO