

PROFILE OF A TERRORIST: DISTINGUISHING FREEDOM FIGHTERS FROM TERRORISTS

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Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart, the center cannot hold;
Mere anarchy is loosed upon the world,
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

W. B. Yeats, *The Second Coming*

I. INTRODUCTION

News items, editorial statements and learned writings are increasingly testifying to the internationalization of terrorism.¹ One recent example will suffice to illustrate this commonly understood and accepted phenomenon. Recently, French authorities intercepted a ship carrying arms, ammunition and explosives from Libya to Northern Ireland² and the massacre of Lod Airport was carried out by Japanese terrorists as the surrogates of the Palestinian Liberation Organization.³ As the terrorist becomes increasingly internationalized, he becomes more the enemy of all mankind than at any previous time. In this process, states are seeking ever-widening bases for exercising their jurisdiction in their pursuit of security and the implementation of punishment for indiscriminate killing and injury. This paper will review and advocate developments in this search for a universal or near-universal jurisdiction against a crime which once was seen as consecrated to patriotism but which is now seen as an inhuman, anarchistic act having, possibly, its own twisted validity for its perpetrator but, in truth, being perpetrated against all mankind.

A. A STIPULATED DEFINITION

A cliché often met in discussions of the unlawfulness or depravity of terroristic activities is the limp-wristed response that

1. HYDRA OF CARNAGE (U. Ra'anan, R. Pfaltzgraff, R. Shultz, E. Halperin & I. Lukes ed. 1986).

2. N.Y. Times, Mar. 23, 1987, at A10, col. 6.

3. N.Y. Times, Mar. 23, 1987, at A10, col. 6.

“one man’s terrorist is another man’s freedom fighter.” A contrasting expression of skepticism is that of the late Professor and Justice on the International Court of Justice, Richard Baxter, when he wisely pointed out that only too often accusations of terrorism, in cases where crimes and especially crimes of violence or war have been committed, confuse the issue.⁴ He stigmatized the wholesale resort to the term “terrorism” in contemporary rhetoric as being “imprecise; . . . ambiguous; in and above all [serving] no operative legal purpose.”⁵ Among his conclusions were the following propositions:

1. Banditry is still banditry, and war crimes are still war crimes.
2. It is well either to keep away from distinguishing criminals acting for political motives from other, common criminals. Actually, hijacking has been brought under some degree of control, not by treaties, nor by international law, but by the presence of armed guards.

. . . .

5. Above all, we should not allow talk about wars of national liberation and the events in the Middle East to distort our vision. Indiscriminate violence, whether by way of war crimes, attacks on diplomats, seizure of aircraft, or the killing of civilians in third states, is and remains unlawful. There is perhaps more to be feared in bad law on this subject than there is to be hoped for in good law.⁶

Each of Professor Baxter’s conclusions is completely persuasive. Yet we are left with the feeling that despite all the great heat and very little light (which Professor Baxter pointed out) that the term “terrorism” seems to generate, it may possess a residue of specific and useful meaning. Some have agreed that a common crime or a war crime committed in the context of “terrorism” may be viewed as having an added element of depravity when committed as a terroristic act. Others, alternatively, have held that what would otherwise be a criminal act, may become justified by labeling the act with the appellation “political,” or by attributing it to the facilitation of public ends.⁷

In this latter context, the term terrorism thus becomes a benediction and an exculpation. But it is a benison for the man of

4. See Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974).

5. *Id.*

6. *Id.* at 384-85.

7. For example, in extradition proceedings, where such a characterization excludes the perpetrator from rendition in order to undergo the possibility of politically motivated reprisals administered in the guise of a trial.

blood, for it acts to reinforce his philosophical convictions. If the notion of "public ends" has this important emotional function in the context of extradition, it may not be surprising that publicists who are sympathetic towards "mixed offenses" perpetrated for political ends on land should also exonerate from the universal jurisdiction attached to piracy, *jure gentium*⁸ violations of personal integrity and property rights on the high seas if perpetrated for "public ends." Two contexts, rhetoric and law, may (and frequently do) come together in cases where private and public ends are contrasted and where conduct justified by reference to the latter qualifying term is exonerated thereby.

A recent study in *The Economist*⁹ agrees that "violent resistance to authority is often justified: not a few of today's presidents and prime ministers were yesterday's guerrillas,"¹⁰ but it also makes the point that the distinction between freedom fighters and terrorists is to be found in the targets struck.¹¹ *Bona fide* guerrillas strike at military targets and, although non-combatants may be, and frequently are, killed, that is because they are near or in the military target. The crucial difference being that "harming [the victims] is not the normal purpose of the operation."¹² Terrorists, by contrast, intend to harm non-combatants: attacks on them provide the means whereby the terrorists exert their will upon third persons, upon the general population and upon governments.¹³

The article in the *The Economist* stresses further this reference to targets in stating that the "essential feature of modern terrorism is the severing of the link between the target of violence and the reason for violence."¹⁴ A chilling illustration of this harsh point is the senseless killing of a "wheelchair-bound American on board an Italian cruise ship" to get back at Israel.¹⁵ In these cases,

8. Translated as "by the law of nations."

9. *How To Tell A Terrorist*, 300 THE ECONOMIST 9 (July 26, 1986) [hereinafter *Terrorist*]. While this article may express a common viewpoint, it is the clearest articulation yet seen by this writer, of the importance of the distinction. Its lucid analysis renders the hypothetical confusion between terrorists and freedom fighters all the harder to sustain. See also J. HELMS, ADDITIONAL VIEWS, REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS ON THE SUPPLEMENTARY TREATY WITH THE UNITED KINGDOM, S. REP. NO.703, 99th Cong., 2d Sess. 12-13 (1985) (quoting President Reagan, Secretary of State Schultz and Attorney General Meese).

10. *Terrorist*, *supra* note 8, at 9.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 10.

15. *Id.*

indiscriminate terrorism is heedless of the fact that the victims of, and the reasons for, the violence are complete strangers. The victims, in fact, are killed, are randomly taken as hostages, or are reduced to depersonalized objects, essentially pawns and symbols, for the separate and impersonal purpose of instilling fear into the hearts of a target population and obtaining leverage over a target government. Such haphazardly taken victims have thereby been deprived of any personal validity, whereas, if the victim is also the reason for or object of the violence, his humanity is affirmed by the bloody deed perpetrated against him.

With these clarifications in mind, it is believed that (with some suggested additions) the statutory definition given in the United States Foreign Intelligence Surveillance Act¹⁶ most closely tracks the thoughts in the preceding paragraphs as well as those that follow. That statute (plus an amending paragraph in brackets proposed in this article to identify the haphazard and random character of terrorism more clearly) defines international terrorism as an activity that:

1. [I]nvolve[s] violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States (or of any state or that would be a criminal violation if committed within the jurisdiction of the United States or any state);
 - [1a. Are carried out against persons who:
 - A. have no personal connection with, or are only adventitiously connected with, the objects of the perpetrator(s); or
 - B. Are indiscriminately selected as victims of criminal act(s); or
 - C. Carry some subjective, symbolic significance for the perpetrator(s).¹⁷]

16. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801(c) (1982).

17. Carlos Marighella himself identified this symbolism and the adventitious character of the victims of terrorism when he wrote:

Attacking wholeheartedly this election farce and the so-called "political solution" so appealing to the opportunists, the urban guerilla must become more aggressive and violent, resorting without letup to sabotage, terrorism, expropriations [a euphemism for armed robbery, burglary and theft], assaults, kidnappings, executions [a euphemism for murder], etc.

MARIGHELLA, *MINIMANUAL OF THE URBAN GUERRILLA* 21 (1969) (translation into English held on file in author's library).

Finally, an illustration of the adventitious, impersonal and symbolic nature of the terrorist act is to be found in a Letter to the Editor of the *Syracuse Herald-Journal*. The author wrote:

In response to authorities being baffled by the recent increase of brutal rapes, I would suggest that what we are viewing is the oldest and most vile form of terrorism

2. [A]ppear[s] to be intended:
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of the government by intimidation or coercion; or
 - (C) to effect the conduct of a government by assassination or kidnapping; and
3. [O]ccur[s] totally outside the United States or transcend[s] national boundaries in terms of the means by which they are accomplished, the person they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.¹⁸

By conducting himself in a manner which shows that his targets are always "targets of opportunity" in the widest connotation of that unfortunate term, and are separate (except perhaps by mere fortune) from his object, the terrorist places everyone at potential risk. Hence, since everyone is potentially and without reason his victim, his conduct should be stigmatized as that of one who is *hostis humani generis*,¹⁹ no less than pirates, slave traders and the perpetrators of crimes falling within the Nuremberg Principles.²⁰

II. ASSERTIONS OF NATIONAL JURISDICTION OVER TERRORIST ACTS

A. CRIMINAL JURISDICTION

Should a terrorist act be perpetrated in the United States, the

on the rise. The victims are the innocent, the anger is generalized - directed only at expression - and there is no guessing who, or what, or where, or when, or how, or (most puzzling) why?

In my view, the inhumanity to humankind that we witness between Catholics and Protestants, Israelis and Palestinians, and blacks and whites on the international scene is an expression of feelings of disempowerment.

As we see women as a group rising out of the position of non-choice and becoming economically and politically viable and competitive and empowered, I would predict that we will see a frightening increase in the cruelest and most humanly violating form of terrorism - rape.

Syracuse Herald-Journal, Oct. 4, 1986, at A5, col. 3.

18. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801(c) (1982).

19. Loosely translated, this term is taken to mean one who commits hostilities upon the subjects and property of any or all nations without regard to right or duty or any pretense of public authority.

20. The Nuremberg Principles are implicit in the Charter and Judgments of the International Military Tribunal for the Major War Criminals, *reprinted in* 39 AM. J. INT'L L. 257 (Supp. 1945); *see also* 41 AM. J. INT'L L. 173 (1947).

state on whose soil the act was perpetrated, or the United States, would have criminal jurisdiction over the offense on the traditional basis of the "subjective territoriality" theory.²¹ Jurisdiction is also recognized under the objective territoriality principle where an offense may have been perpetrated abroad but is consummated in the territory of the sovereign claiming jurisdiction.²² Again, states recognize other states' claims to exercise criminal jurisdiction over their own citizens' offenses against its laws when these are committed outside the territories of those states asserting jurisdiction on the basis of nationality. The reciprocal basis of jurisdiction, namely the "passive personality" principle,²³ has long been a matter of debate, but, increasingly, states that have resisted this basis for criminal jurisdiction in the past, are now coming to embrace it as a matter of felt necessity.²⁴ Aside from nationality and territoriality, states also assert, and the Family of Nations generally recognizes, a claim, under the "protective principle,"²⁵ of jurisdiction over crimes against the "security, territorial integrity or political independence of that state."²⁶ Finally there is, of course, the "universality principle"²⁷ which, because of the latitude permitted to states under this rubric, is limited to only a few instances. Those instances, moreover, engage the conscience of mankind and involve piracy, the slave trade and crimes under the Nuremberg

21. *Draft Convention on Jurisdiction as to Crime*, 29 AM. J. INT'L L. 437, 480, 484 (1935) [hereinafter *Jurisdiction with Respect to Crime*].

22. *Id.* at 487.

23. See, e.g., *The Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 65 (Moore, J., concurring); 2 J. MOORE, INTERNATIONAL LAW DIGEST 228, 231-32 (1906); Moore, *Report on Extraterritorial Crime and the Cutting Case*, 9 U.S. FOREIGN REL. 761 (1887).

24. See, e.g., 18 U.S.C. §§ 113A, 2331(e) (Supp. 1986). Congress passed these sections in 1986 amending the Omnibus Diplomatic Security and Anti-Terrorism Act of 1984. See S. 4418, 99th Cong., 2d Sess., 122 CONG. REC. 4418 (1986) (statement of Senator Arlen Specter introducing §1429). This bill was adopted unanimously by a 92-0 vote, and eventually became law under the name of the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 22 U.S.C. § 4801 *et seq.* (1986).

25. The "protective principle" is defined as the recognition in international law that each state may exercise jurisdiction over crimes against its security or its vital economic interests. J. CASTEL, INTERNATIONAL LAW 633 (3rd ed. 1976).

26. *Jurisdiction with Respect to Crime*, *supra* note 20, art. 7, at 543; see also *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968). In *Pizzarusso* it was held that the United States did have jurisdiction to convict an alien for the crime of knowingly making a false statement under oath on a visa application taken by an American consular official in a foreign country.

27. The "universality principle" states that all states are entitled to arrest pirates on the high seas and to punish them irrespective of their nationality and the place of commission of the crime. J. CASTEL, INTERNATIONAL LAW 636 (3rd ed. 1976).

Principles.²⁸

While terrorists, in the sense of being indiscriminate killers whose random acts of violence put everyone potentially at risk, may well invite the stigma of being, like pirates, the enemies of mankind, that comprehensive characterization of terrorism has not yet come about. On the other hand, domestic legislation, such as the recent amendments to the Omnibus Diplomatic Security and Anti-Terrorism Act (1986 Act),²⁹ have greatly extended the enacting states' criminal jurisdiction to include competence based on the "passive personality" principle.³⁰ Indeed, a combination of the 1986 Act and the Ker-Frisbie rule³¹ give states adhering to the passive personality principle plus the doctrine of *male captus bene detentum*³² a very wide scope of criminal jurisdiction, but, of course, not as wide as the universal jurisdiction.

B. JURISDICTION IN TORT

Because U.S. legislation treats alien victims of foreign torts and tortfeasors differently from citizens who have been injured by foreign tortfeasors, these two categories will be treated separately. Following an analysis of these two distinct bases of tort claims, this section will discuss the impact of the Alien Torts Statute³³ and the Foreign Sovereign Immunities Act of 1976³⁴ and possible reforms thereto on such tort claims. Also, the question will be raised as to the possibility of treaties giving rise to independent causes of action in tort.

28. See *supra* note 19 and accompanying text.

29. Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 22 U.S.C. § 4801 *et seq.* (1986).

30. See *supra* note 23 and accompanying text.

31. That is, the rule that a person forcibly abducted and taken from one state to another to be tried for a crime does not invalidate his conviction in a court of the latter state under the due process clause of the fourteenth amendment.

This rule was founded on the decisions of the United States Supreme Court in *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), which applied the old Roman Law doctrine of *male captus bene detentum* (translated as "a bad capture [but] a good detention"). That is, the wrongfulness of the capture does not vitiate the detention.

This rule was upheld recently (subject to some qualifications, however) in *United But see*, at . Judges Oakes's dicta asserts a more restrictive (but unexceptionable) reading of the rule in his separate but concurring opinion in the case. This principle was also invoked in *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Israel, Dist. Ct. Jerusalem, 1961).

32. This term is translated as "A bad capture [but] a good detention."

33. 28 U.S.C. § 1350 (1982).

34. 28 U.S.C. §§ 1330, 1602-1611 (1982).

1. *The Alien Tort Statute — Aliens as Victims*

In 1789, the First Congress incorporated a provision into section 9 of the Judiciary Act, a provision which has been named the Alien Tort Statute.³⁵ This provision, which has remained substantially unchanged since the time of its enactment, prescribes that:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.³⁶

In *Filatiga v. Pena-Irala*,³⁷ Dolly Filatiga, living in Washington, brought a civil suit against Pena-Irala alleging that he had wrongfully caused her brother's death by torture. She sought 10 million dollars as compensatory and punitive damages.³⁸ At the time of Joelito Filatiga's torture and death, Pena-Irala was a Paraguayan police officer and a supporter of the Stroessner regime there.³⁹ Dolly had been taken into Pena-Irala's home to view her brother's body which bore marks of severe torture.⁴⁰ The Second Circuit Court of Appeals reversed the District Court for the Southern District of New York on the ground that the plaintiff's suit did implicate the law of nations, in that torture is contrary to customary international law and that, accordingly, the district court had jurisdiction under the Alien Torts Act and Dolly Filatiga had a cause of action thereunder.⁴¹ Since Paraguayan law forbade the use of torture, the court stated that Pena-Irala had merely acted "under color of state law," but not validly as an officer of the state, and therefore was not protected under the Foreign Sovereign Immunities Act.⁴²

In a later case before the Court of Appeals for the District of Columbia Circuit, this holding was distinguished on the ground of sovereign immunity, that is, the state action was merely "colorably" state action. Thus, in *Tel-Oren v. Libyan Arab Republic*,⁴³

35. 28 U.S.C. §§ 1350 (1982).

36. *Id.*

37. 630 F.2d 876 (2d Cir. 1980).

38. *Id.* at 879.

39. *Id.* at 878.

40. *Id.*

41. *Id.*

42. 28 U.S.C. §§ 1330, 1602-1611 (1982).

43. 726 F.2d 774 (D.C. Cir. 1984). Plaintiffs were survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel in 1978. *Id.* at 775. The action was instituted for compensatory and punitive damages stemming from the attack naming Libya as the defendant. *Id.* The district court dismissed the action for lack of subject matter jurisdiction. *Id.*; see *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C.

Judge Edwards pointed out that "jurisdiction over Libya is barred by the Foreign Sovereign Immunities Act . . . which preserves immunity [of the sovereign state tortfeasor] for tort claims unless injury or death occurs in the United States."⁴⁴

2. *Amending the Foreign Sovereign Immunities Act — Citizens as Victims*

Since the *Tel-Oren* decision, the American Bar Association and the Department of State have tentatively proposed, and the Congress is in the process of considering, various amendments to the Foreign Sovereign Immunity Act's restriction of U.S. courts' jurisdiction over non-commercial torts inflicted by states leading to death or injury in the United States.

In the face of some commentators, especially since the *Tel-Oren* decision, the Department of State takes the view that while the tort provisions of the Foreign Sovereign Immunities Act should be amended so as not to limit the U.S. courts' jurisdiction over torts causing injury in this country, those amendments should not go so far as to eliminate the discretionary acts exclusion.⁴⁵ An argument against eliminating the discretionary acts exclusion runs as follows: the Federal Tort Claims Act contains this exclusion as far as suits against the United States are concerned.⁴⁶ It would, clearly, be most invidious if the United States were, in removing the present limits, also to remove a shield from foreign sovereign state defendants in tort cases in its courts, when it retains that same shield for itself.

But would the presence of this defense immunize governments and officers who are pursuing policies of terrorism from answerability in our courts? Engaging in an act of terrorism abroad is *per se* an internationally wrongful act, and such an act may not fall within the traditional defenses of sovereign immunity and act of

1981). The Court of Appeals affirmed. *Id.* at 775.

44. *Id.* at 775-76 n.1. *But see* *Letelier v. Republic of Chile*, 488 F.Supp. 259 (D.D.C. 1980) (*Letelier I*). Note the comment of the United States Court of Appeals for the Second Circuit in the *Leteliers'* suit following their default judgment in *Letelier I*, in which they sought to levy execution against the Chilean state-owned airline: "the Congress did in fact create a right without a remedy." *Letelier v. The Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984).

45. Verville, *Amending the Foreign Sovereign Immunities Act*, 86 DEPT. OF STATE BULLETIN 73, at 76 (No. 2114, Sept. 1986).

46. Federal Tort Claims Act, 28 U.S.C. § 1350, 1605(a)(5)(A). An interesting example of where a court has upheld the distinction can be found in *Chute v. U.S.*, 446 F. Supp. 61 (D. Mass. 1978).

state. Equally it would fall outside any defense based upon discretionary acts, since there is no presumption that an official acting in the state's name has the discretion to engage in wrongdoing with impunity. Rather, such conduct should, under an extension of the precedent created in the extradition proceedings against the former dictator of Venezuela in *Jimenez v. Aristeguieta*,⁴⁷ be treated as the wrongful act of the individual purporting to act as the Head of State (or perhaps the Head of Government where the Head of State performs only ceremonial functions) under "color of state law."⁴⁸ Hence, as with the states of the United States, especially in connection with civil rights cases,⁴⁹ such conduct should be reviewable in an appropriate judicial forum.⁵⁰

The Department of State's position of maintaining political branch control over tort claims arising out of terrorists' acts is reflected in the testimony of Ms. Elizabeth Verville, Acting Legal

47. 311 F.2d 547 (5th Cir. 1962), *cert. denied sub nom. Jimenez v. Hixon*, 373 U.S. 914 (1963) (the Act of State doctrine will not permit U.S. courts to pass upon the validity of foreign government actions performed in their capacity as sovereigns within their own territory).

Filatiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), is a more recent decision to hold an individual officer responsible for an act performed in the name of the state (Paraguay) but illegal under international law (and the law of Paraguay), on the ground that the act was done "under color of state law" and hence within the reach of the Alien Torts Statute. See Alien Tort Statute, 28 U.S.C. § 1350.

On the other hand, *Jimenez* may well be regarded as more closely relevant since it set aside the Act of State defense to a dictator's misuse of power and so permitted extradition back to Venezuela. *Jimenez*, 311 F.2d at 557-58. In the present hypothetical situation, jurisdiction should be asserted under the Alien Torts Statute against an individual, but the conduct might well be seen as falling within the Act of State protection for Heads of State (or of Government) were it not for the ruling in *Jimenez*.

48. 630 F.2d 876 (2d Cir. 1980)

49. *Baker v. Carr*, 369 U.S. 186, 217 (1962) where the Court stated the principle as follows:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

50. *Id.* at 217.

Adviser of the Department of State.⁵¹ Ms. Verville stated:

In other kinds of tort cases, we may have an even greater need to maintain some political branch control of the actions taken in response to foreign state wrongdoing, even in our own territory. Where the act is criminal, we may elect to pursue the individual perpetrators for prosecution and demand their extradition from the offending state. Against the state itself, we can attempt to obtain redress of private injury through diplomatic pressures. However, the decision on sanctions against the economic interests of the state or seizure of state property in such cases, with its concomitant potential for retaliation and disruption of broader relations between the United States and that country, might not always be best left solely a matter of judicial response to private petition.⁵²

On the other hand, this thesis may limit the scope of the courts of this country considerably more than would be consistent with the argument that in a world following the horizontal rather than the vertical model⁵³ for the vindication of rights, its perception of the pervasive need for the political branches to act on behalf of residents here is, generally speaking, unexceptionable. But, what should be stressed is that the judiciary should also be seen as having an important role. There should be acceptance of the possibility that, in appropriate cases, the judiciary, especially because of their time-honored resistance to criteria of judgment other than those seeking objective bases and professional approbation, can give a lustre of fair play and justice to such calls for vindication.

3. *Common Law Developments*

While Judge Bork's concurring opinion in *Tel-Oren* has drawn the heaviest criticism, some discerning critics have also found Judge Edwards' opinion wanting. Thus, Professor Jordan Paust, at the 1985 Annual Meeting of the American Society of International Law, commented:

Seemingly at the base of Judge Edwards' curious remarks about individual responsibility is an evident confusion with respect to the nature and function of international legal processes and the

51. Verville, *supra* note 45 (testimony given before the Subcommittee on Administrative Law of the House Committee on the Judiciary).

52. *Id.* at 76.

53. See Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 26 RUTGERS L. REV. 1 (1961).

role of domestic tribunals in identifying clarifying and applying international law. This role has been demonstrated in federal opinions since the 1700s. Judge Edwards seems to assume that merely because there had been lack of full and effective remedies for private persons at the international level, nonstate actors could and can assert their rights only through diplomatic processes, that states alone were and are able to assert their rights only through diplomatic processes, that states alone were and are able to assert rights, and that only states or those acting "under color of state law" were or are liable. None of those assumptions is correct, however, and the trends in judicial decision provide sufficient refutation.⁵⁴

Paust argued, instead, that litigation by private individuals in our domestic courts against the U.S. Government and against foreign governments, arising out of violations of international law has a long history and respectable provenance, including the decision of the U.S. Supreme Court in *The Santissima Trinidad*.⁵⁵ In April 1817, the Spanish consul filed a libel in the District Court of Virginia against cargoes taken off of two Spanish ships, the *Santissima Trinidad* and the *St. Andes*, by crewmen of two ships owned and commanded by American citizens.⁵⁶ At the time of the capture of the *Santissima Trinidad* and the *St. Andes*, the 1795 Treaty of Spain forbidding American citizens from taking commissions to cruise against Spain was still in force.⁵⁷ It also applied to prohibit the augmentation of the cruisers' armaments in American ports, which here also took place and thus provided a further cause of action.⁵⁸ The district court decreed restitution to the cargo owners.⁵⁹ This was affirmed first by the circuit court, and then by the Supreme Court of the United States.⁶⁰ Justice Story observed that:

But as to captures made during the same cruise, the doctrine of this Court has long established that such illegal augmentations [of the cruisers' armaments] is a violation of the law of nations, as

54. Paust, *Remarks, Panel on Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?*, 79th ANN. MTG. A.S.I.L. PROC. 361, 364 (1985).

55. 20 U.S. (7 Wheat.) 283 (1822); Paust, *supra* note 54, at 363; see also Reisman, 79th ANN. MTG. A.S.I.L. PROC. at 370-72. Reisman has stated, "I am grieved by the drastically reduced role for the judiciary in human rights cases that emerges from *Tel-Oren* and some other recent decisions I believe that national courts may yet be used as fora for enforcement of international human rights." *Id.* at 370-71.

56. 20 U.S. at 284.

57. *Id.* at 285.

58. *Id.*

59. *Id.* at 290.

60. *Id.* at 355.

well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct.⁶¹

Another scholar, Harold Honju Koh, has also written convincingly in support of an expanded role for domestic courts.⁶² He indicates the emergence of "transnational public law litigation." Professor Koh aptly points out that "*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."⁶³ Professor Koh further argues that "after *Tel-Oren*, Congress and not the courts must now play the role of Sancho Panza with respect to civil remedies against terrorism."⁶⁴

On the other hand, an alternative suggestion could be that the courts, envisaging the important policy goals to be realized, should develop a common law civil cause of action from the post *Tel-Oren* Omnibus Diplomatic Security and Anti-Terrorism Act of 1987.⁶⁵ In such an exercise, the courts would, necessarily, be faced with the task of selecting their rationale from the contrapuntal decisions following, on the one hand, *J.I. Case v. Borak*⁶⁶ and *Cort v. Ashe*⁶⁷ on the other. In the former case, the plaintiff filed a stockholders' derivative suit against the J.I. Case Co. for, *inter alia*, damage and rescission for a consummated merger which had been approved as a result of a proxy statement which the plaintiff claimed contained false and misleading statements.⁶⁸ While Congress, in enacting the Securities and Exchange Act of 1934,⁶⁹ "made no specific reference to a private right of action under section (14)(a) . . . ,"⁷⁰ the Su-

61. *Id.* at 348-49.

62. Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 *TEX. INT'L L. J.* 169 (1987).

63. *Id.* at 208-09.

64. *Id.* The reference to "Sancho Panza" arises from his quoted comment, "[r]ights. . . preoccupy a Don Quixote; remedies are the work of a Sancho Panza." See *id.* at 208. The phrase is taken from P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 27 (1983).

65. See *supra* notes 23-25 and the accompanying text.

66. 377 U.S. 426 (1964).

67. 422 U.S. 66 (1975).

68. *Borak*, 377 U.S. at 429-30.

69. 15 U.S.C. § 78a et seq.

70. *Borak*, 377 U.S. at 431.

preme Court found, in an unanimous opinion, that "private parties have a right . . . to bring suit for violation of Section 14(a) of the act."⁷¹

Although, in the latter case, *Cort*,⁷² the Supreme Court, through Justice Brennan, refused to create a private cause of action on behalf of the plaintiff, rather it set out criteria for the judicial recognition of such statute-based private remedies.⁷³ Justice Brennan stated:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' — that is, does the statute create a right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?⁷⁴

The above criteria have subsequently come under the fire of judicial critics. Thus Justice Powell dissenting in *Cannon v. University of Chicago*⁷⁵ stated "the *Cort* analysis too readily permits courts to override the decision of Congress not to create a private action" ⁷⁶ The refusal in *Cort* marked the emergence of a more cautious trend which has been reflected in later cases of the Supreme Court.⁷⁷ Arguably the Court would appear to be following a policy, if not one of retrenchment, at least one of lessened enthusiasm. But ambivalence appeared to hold the Court back from becoming committed entirely in one direction or the other — for finding the implication of causes of action when the statute failed explicitly to create one or, alternatively, to rebuff without equivocation or hesitation, pleas to find the implication of causes of action where statutes do not expressly create them.

While in *Transamerica Mortgage Advisors, Inc. v. Lewis*,⁷⁸ the

71. *Id.* at 430-31.

72. 422 U.S. 66 (1975).

73. *Id.* at 77-85.

74. *Id.* at 78 (citations omitted).

75. 441 U.S. 677, 740-41 (1979).

76. *Id.* at 740-41. (Powell, L., dissenting).

77. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

78. 444 U.S. 11 (1979).

Supreme Court acted as if it had thrown out Justice Brennan's four tests created in *Cort*, criteria one, three and four of Brennan's formulation seem to have evaded rescission by that judgment. *Naturam expellas furca, tamen usque recurret.*⁷⁹ Be that as it may, the Congressional Record leading to the 1986 provisions of the Omnibus Act shows that even compliance with *Cort* and, further, the later and more negative cases,⁸⁰ would not rule out the possibility that the courts may rely on Congress' emphasis on the need to protect potential victims from terrorists. The fate of Leon Klinghoffer was so prominent in the debates that the courts might well feel impelled to decide in favor of creating a private cause of action in cases touching on the subject matter of the Omnibus Act

III. CONCLUSION

The quotation from Yeats at the outset of this offering reflects the incompleteness of the moral as well as the legal order of today's world. The "passionate intensity" of the "worst" will not always be restricted to deeds of acceptable force while the "best lack all conviction." Rather, in such a world the chthonic fires of humanity's pre-human past break out. There is no "civilization" capable of imposing the restraints of man's image of himself as a rational creature when values are rejected in order to indulge rage and hate. Moreover, such a mood reminds us of Oscar Wilde's comment on Victorian Romanticism's rejection of Realism:

The nineteenth century dislike of realism is the rage of Caliban seeing his own face in the glass.⁸¹

79. Translated as, "You can expel Nature with a pitchfork, yet it will always return." HORACE, EPISTLES I. x. 24.

80. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Curron*, 456 U.S. 353 (1982); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). It is suggested that *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), may be viewed as standing on one side relative to the above cases since it recognizes a cause of action to enforce fourth amendment rights. On the other hand, it may be viewed as germane to the above discussion in a general sense.

81. O. WILDE, *THE PICTURE OF DORIAN GRAY*, Preface (1891).