United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari*

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2052

HANOCH TEL-OREN, ET AL., PETITIONERS

v.

LIBYAN ARAB REPUBLIC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's dismissal of petitioners' claims for lack of subject matter jurisdiction under 28 U.S.C. 1331 and 1350.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

*[Reproduced from the text provided by the U.S. Department of Justice. The brief was filed on January 30, 1985. On February 25, 1985, the Supreme Court refused to hear the appeal.]

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case arises out of an armed attack on a civilian bus in Israel on March 11, 1978. Petitioners are Israeli, Dutch, and American citizens who either were injured in the attack or are the survivors of persons killed. Respondents are the Libyan Arab Republic (Libya),[1] the Palestine Liberation Organization (PLO), and two Arab-American groups, the

[1] Although the caption of this case identifies Libya as the Libyan Arab Republic, the official name of the country is the Socialist People's Libyan Arab Jamahiriya.

Palestine Information Organization (PIO) and the National Association of Arab Americans (NAAA).

Petitioners filed suit in the United States District Court for the District of Columbia in March 1981, alleging that respondents were responsible for the 1978 attack and seeking compensatory and punitive damages (Br. in Opp. App. 1-94). Petitioners contended that the PLO had planned, supplied, and financed the attack and had recruited and trained the terrorists who carried it out; that Libya also had planned, supported, and ratified the attack; and that the Arab-American groups had helped to plan, finance, outfit, and direct the operation (Pet. App. 53a-55a; Br. in Opp. App. 17-20).

The complaint charged respondents with various common law intentional torts, and with tortious actions in violation of the law of nations, treaties of the United States, and various United States criminal statutes (Br. in Opp. App. 20-35). The complaint also contained a conspiracy count as to these allegations (*id.* at 35-37). Petitioners alleged jurisdiction under the federal question statute, 28 U.S.C. 1331, and the alien tort statute, 28 U.S.C. 1350.[2] Petitioners apparently failed to complete service upon Libya and the PLO, and neither of those defendants appeared before the district court (Pet. App. 116a n.1; *id.* at 129a n.4). The PIO moved for summary judgment, and the NAAA moved to dismiss the action for lack of subject matter jurisdiction and failure to comply with the District of Columbia statute of limitations, D.C. Code Ann. § 12-301(4) (1981) (Pet. App. 116a).

[2] The complaint also asserted jurisdiction under 28 U.S.C. 1330 and 1332, but petitioners abandoned these grounds of jurisdiction in the court of appeals (Pet. App. 54a n.3).

jurisdiction in the court of appeals (Pet. App. 54a n.3).

2. The district court dismissed the action against all defendants for lack of jurisdiction and because of the statute of limitations (Pet. App. 130a). The district court held first that it lacked federal question jurisdiction under 28 U.S.C. 1331 because the complaint stated no federal private right of action arising under federal criminal statutes (Pet. App. 117a-118a), treaties of the United States (*id.* at 118a-122a), or federal common law, including the law of nations (*id.* at 122a-123a).

The district court next held that it lacked jurisdiction over any of the defendants under the alien tort statute, 28 U.S.C. 1350, which confers federal subject matter jurisdiction over "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." The district court ruled that Section 1350 "in no way provides a cause of action" but "serves merely as an entrance into the federal courts" (Pet. App. 125a).[3] The court concluded that petitioners had failed to demonstrate that either the law of nations or any treaty of the United States conferred a federal private right of action upon them, and therefore they had not met the "jurisdictional prerequisite to § 1350 that a complaint * * * plead a private right of action" (Pet. App. 127a).

With respect to the three Arab-American organizations named as defendants,[4] the district court also

[3] The district court did not reach the question whether the conduct complained of violated the law of nations. Pet. App. 119a.

[4] In addition to the PIO and the NAAA, petitioners' complaint also named as a defendant a third Arab-American group, the Palestine Congress of North America (PCNA). The district court dismissed the action against the PCNA on the same grounds as the action against the two other Arab-American groups, and petitioners did not pursue their claims against the PCNA on appeal (Pet. App. 2a n.1).

reasoned that "[t]hese three defendants have not been connected to the claimed torts sufficiently to permit the action to proceed against them," concluding that "vague, conclusory allegations of conspiracy are insufficient to predicate an action for damages" (Pet. App. 127a). As an alternative basis for dismissal against all defendants, the district court ruled that petitioners had failed to bring suit within the applicable one-year District of Columbia statute of limitations (*id.* at 127a-129a).

3. The court of appeals affirmed the dismissal of the action in a brief per curiam order (Pet. App. 1a-3a). Judge Edwards, Judge Bork, and Senior Judge Robb each filed a separate concurring opinion indicating different reasons for affirming the result reached by the district court (*id.* at 4a-114a).

a. Judge Edwards focused on the construction of the alien tort statute as applied to the allegations against the PLO.[5] While finding that the law of na-

[5] In a footnote, Judge Edwards agreed with the district court that jurisdiction over Libya was barred by the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-1611, and that petitioners' allegations against the Arab-American organizations were "too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated" (Pet. App. 4a n.1). Judge Edwards also disposed of petitioners' reliance on 28 U.S.C. 1331 in a footnote. He was willing to assume for the sake of argument that the law of nations constitutes a "law of the United States" for purposes of the federal question statute, but he concluded that petitioners could not identify any right to sue granted by the law of nations and also observed that "the law of nations quite tenably does not provide these plaintiffs with any substantive right that has been violated" (Pet. App. 13a n.4). Judge Edwards expressed no view on the correctness of the district court's statute of limitations ruling.

tions provides no right to sue, Judge Edwards read *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as holding that the alien tort statute itself provides a cause of action (Pet. App. 5a-14a). Judge Edwards endorsed that view, but he reasoned that the cause of action provided by Section 1350 is limited to "international crimes"—"a handful of heinous actions—each of which violates definable, universal and obligatory norms" (Pet. App. 16a-17a). He concluded that the PLO's acts of terrorism did not violate international law because "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus" (*id.* at 46a). Judge Edwards thus concluded that "under current law terrorist attacks [do not] amount to law of nations violations" (*ibid.*). Finally, Judge Edwards was of the view that petitioners could not allege that the PLO's acts of terrorism violated international law because "[t]he Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law" (*id.* at 37a).[6]

b. Judge Bork agreed with Judge Edwards (see note 5, *supra*) that "Libya must be dismissed from the case because the Foreign Sovereign Immunities Act * * * plainly deprives us of jurisdiction over

[6] Judge Edwards also put forth an alternative hypothesis with respect to the meaning of the alien tort statute. Under that theory, the statute was simply intended "to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis" (Pet. App. 19a). Even under this theory, however, Judge Edwards concluded that petitioners could not maintain their suit because of the PLO's status as a non-state and the absence of any international consensus that politically-motivated terrorism is an international crime.

Libya" (Pet. App. 66a-67a n.13). With respect to the PLO, Judge Bork adopted the district court's conclusion that petitioners had failed to state a cause of action sufficient to support jurisdiction under either 28 U.S.C. 1331 or 1350 (Pet. App. 53a-54a). Judge Bork reasoned that the separation of powers principles underlying the act of state and political question doctrines counseled against recognizing any cause of action not expressly granted (*id.* at 58a-73a), and he agreed with the district court that Section 1350, like Section 1331, is purely jurisdictional, neither expressly nor impliedly creating a private cause of action (Pet. App. 79a-90a). Judge Bork suggested that Section 1350, which was enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77, may have been intended to provide jurisdiction for causes of action expressly authorized by treaty and perhaps for the three international crimes recognized by Blackstone—violation of safe conducts, infringement of the rights of ambassadors, and piracy (Pet. App. 84a-85a). The meager history of the statute led Judge Bork to conclude that any broader reading of the jurisdictional grant would be contrary to congressional intent (*id.* at 81a-83a).[7]

c. Without addressing the jurisdictional issue raised by Section 1350 or the applicability of the local statute

[7] Because he found that the complaint was correctly dismissed on jurisdictional grounds, Judge Bork did not reach the questions whether the district court had properly dismissed the action against the Arab-American organizations on the grounds that the allegations of the complaint were insufficiently specific and the action was barred by the local statute of limitations (Pet. App. 53a n.2). Judge Bork also declined to decide the question whether the PLO, as a non-state, should be subject to obligations imposed by international law (*id.* at 67a-69a).

politically-motivated terrorism is an international crime.

of limitations, Senior Judge Robb voted to affirm the dismissal of the action on the ground that the case presented a nonjusticiable political question (Pet. App. 105a). Judge Robb reasoned that the case was not susceptible of judicial handling, involved standards that defied judicial application, and raised questions touching on sensitive matters of diplomacy that historically have been within the exclusive domain of the political branches of government (*id.* at 105a-114a).

DISCUSSION

The United States of course unqualifiedly condemns the terrorist acts that led to this lawsuit. As Judge Robb stated, "the attack on the Haifa highway amounts to barbarity in naked and unforgivable form" (Pet. App. 105a). Moreover, this case presents difficult and unresolved questions regarding the meaning and application of the alien tort statute, a rarely used and little understood provision of the Judicial Code. Nevertheless, we do not believe that the dismissal of this case is appropriate for review by this Court.

Neither the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions of the participating judges creates any clear conflict in the circuits. The only proposition for which the judgment below may fairly be read—that in the circumstances of this case, petitioners have not alleged facts sufficient to support the district court's exercise of subject matter jurisdiction under 28 U.S.C. 1331 or 1350—does not conflict with the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980). Furthermore, the existence of alternative, dispositive grounds for dismissing petitioners' suit, upon which the court of appeals did not pass,

makes this an especially inappropriate case in which to address the complex questions of domestic and international law presented in the petition.

1. Of the four questions presented for review by petitioners (Pet. i), we believe that only the first two —those addressing the contemporary meaning and proper application of the alien tort statute, 28 U.S.C. 1350—raise issues that might someday merit this Court's attention.[8] The panel's inability to agree upon a rationale for its ruling, however, coupled with the length and complexity of the three concurring opin-

[8] Petitioners' third question, regarding the applicability of the political question doctrine to cases of this kind (Pet. i, 23-27), could be significant in another case but is not properly presented here, because a majority of the panel voted to affirm the dismissal on other grounds, thereby avoiding application of the political question doctrine. See Pet. App. 48a-52a (Edwards, J., concurring); *id.* at 63a n.8, 103a-104a (Bork, J., concurring).

Nor does petitioners' fourth question, in which they ask the Court to decide whether American citizens have causes of action "arising under * * * treaties of the United States" within the meaning of 28 U.S.C. 1331, warrant review. For the reasons stated by the district court (Pet. App. 117a-122a), Judge Edwards (*id.* at 13a n.4), and Judge Bork (*id.* at 73a-78a), the United States treaties relied upon by petitioners (Pet. 27-29) are not self-executing, nor do they grant individuals the right to seek damages in domestic courts for violation of their provisions. Indeed, at least one court of appeals has held that the principal treaty relied on by petitioners (Pet. 28), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, does not provide a private right of action. *Huynh Thi Anh* v. *Levi*, 586 F.2d 625 (6th Cir. 1978). The three cases cited by petitioners (Pet. 27-29) are inapposite because each involved entirely different treaties and thus shed no light on the availability of a private cause of action to enforce the treaties at issue in this case.

ions, leaves the precise basis and scope of the court of appeals' judgment unclear. Left undisturbed, that ambiguous judgment would have little, if any, precedential value. Moreover, further review of the judgment below, without the benefit of a majority opinion, would be imprudent and premature, particularly when the complex issues of federal jurisdiction, international law, and statutory construction may well be clarified or resolved without such review (see pages 10-12, *infra*).

As noted, Judge Robb expressed no view regarding the district court's jurisdiction under the alien tort statute to hear petitioners' claims. While the divergent views of Judges Edwards and Bork (compare Pet. App. 4a-52a (Edwards, J., concurring) with *id.* at 53a-104a (Bork, J., concurring)) regarding the historical purposes of the alien tort statute and its contemporary significance may be of academic interest, they are merely dicta and do not represent the position of the District of Columbia Circuit. As a result, it is virtually "impossible to say * * * what the law of th[e] circuit is" with respect to the meaning and application of Section 1350 (Pet. App. 104a (Bork, J., concurring)).[9] Despite their substantial differences of opinion on numerous points, however, it is significant that Judges Edwards and Bork each took pains to point out that his reading of the alien

[9] Judges Edwards and Bork even disagreed about the extent of their disagreement. Although Judge Edwards identified four central propositions over which he believed he and his colleagues differed (Pet. App. 7a-8a), Judge Bork stated that, in fact, he "accept[ed] the first three [propositions] entirely and also agree[d] with the fourth, but in a more limited form" (*id.* at 98a). For his part, Judge Edwards remarked that Judge Bork "has completely misread my opinion" (*id.* at 52a).

tort statute, if adopted by the panel, would not necessarily conflict with the decision of any other circuit, including the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, *supra*.[10] Absent a circuit conflict, differences of opinion arising within a single panel of the District of Columbia Circuit regarding the scope and application of a particular statute, however sharply stated, do not warrant this Court's exercise of certiorari jurisdiction.

The likelihood that the District of Columbia Circuit will itself soon be called upon to resolve these issues only reinforces the conclusion that further review of

[10] In *Filartiga*, the Second Circuit held that the alien tort statute conferred federal jurisdiction over a suit brought by Paraguayan nationals against a former Paraguayan police official for wrongfully causing the death of their relative in Paraguay, allegedly by the use of torture. Judge Bork concluded that *Filartiga* differs from this case in three important respects: unlike the PLO in this case, the defendant in *Filartiga*, a state official acting in his official capacity and in direct contravention of the Paraguayan constitution and laws, "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" (Pet. App. 97a). These factual distinctions led Judge Bork to conclude that "not all of the analysis employed here would apply to deny a cause of action to the plaintiffs in *Filartiga*" (*ibid.*). Judge Bork's quarrel with *Filartiga* was based on an issue that the Second Circuit did *not* address—the question whether international law created a cause of action that the plaintiffs before it could enforce in United States courts. Similarly, Judge Edwards "adhere[d] to the legal principles established in *Filartiga* but [found] that factual distinctions [relating to the PLO's status as a non-state actor as opposed to a person acting under color of state law] preclude[d] reliance on that case to find subject matter jurisdiction in the matter now before us" (Pet. App. 5a).

the instant case would be inappropriate. On May 24, 1984, an entirely different panel of the District of Columbia Circuit (Tamm, Ginsburg, and Scalia, JJ.) heard argument in *Sanchez-Espinoza* v. *Reagan*, No. 83-1997. In that case, Nicaraguan and European plaintiffs have attempted to invoke 28 U.S.C. 1350 to sue officials of the United States government in federal court, charging that they have been the victims of allegedly tortious acts conducted and sponsored by the United States in Nicaragua in violation of the law of nations.[11] The *Sanchez-Espinoza* panel may well produce a majority opinion that makes it possible to "say * * * what the law of [the District of Columbia] circuit is" with regard to the meaning of the alien tort statute (Pet. App. 104a (Bork, J., concurring)). Alternatively, should the *Sanchez-Espinoza* panel fail to produce a majority opinion, or should the panel members adopt interpretations of Section 1350 that partially or totally differ from those expressly by the judges in this case, the District of Columbia Circuit might be inclined to rehear the case en banc in order to resolve the question of statutory construction.

In sum, "[s]ince section 1350 appears to be generating an increasing amount of litigation" (Pet.

[11] In our brief on appeal in *Sanchez-Espinoza*, we have argued that the alien tort statute is purely jurisdictional and cannot be interpreted either to mandate the creation of a federal common law of international tort or to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law. See Br. for the Federal Appellees at 9, 32-40. We have also argued that the alien tort statute does not waive either the sovereign immunity of the United States or the official immunities of individual government officials from alien tort claims arising out of actions in foreign countries. See *id.* at 40-44.

App. 104a (Bork, J., concurring)),[12] we think it likely that any arguable inconsistencies between the Second Circuit's approach to the alien tort statute in *Filartiga* and the approaches taken by the panel members in this case either will be reconciled without the need for review by this Court or will ripen into a sharper conflict that would permit this Court to review the complex issues raised by the petition after they have been more fully analyzed by the lower federal courts. See, *e.g.*, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).[13]

2. Review of the issues relating to Section 1350 in the instant case would appear to be inappropriate for the additional reason that any decision rendered by this Court might not affect the result in this case. The court of appeals' affirmance of the district court's

[12] In addition to the District of Columbia Circuit, other federal courts also are considering claims based on the alien tort statute. See, *e.g.*, *Siderman de Blake* v. *Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984) (awarding a default judgment to Argentinian plaintiffs who claimed official torture by the Argentinian government in Argentina, predicating jurisdiction on Section 1350). We are advised that the district court is reconsidering its judgment in *Siderman de Blake* in light of the Foreign Sovereign Immunities Act.

[13] As described by Judge Edwards, the alien tort statute is "an aged but little-noticed provision of the First Judiciary Act of 1789" (Pet. App. 4a). It has been invoked only rarely in its nearly 200-year history; indeed, "[t]his old but little used section is a kind of legal Lohengrin; * * * no one seems to know whence it came." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Clearly, further elucidation by the lower courts of the issues raised in the petition would be of assistance to this Court.

dismissal of petitioners' action did not rest exclusively upon a construction of the alien tort statute. Two of the three panel members, Judges Edwards and Bork, agreed that the Foreign Sovereign Immunities Act bars the exercise of jurisdiction over Libya (see Pet. App. 4a-5a n.1 (Edwards, J., concurring); *id.* at 66a-67a n.13 (Bork, J., concurring)). That ruling, which petitioners have not challenged in this Court, is clearly correct. The "noncommercial tort" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(5), renders foreign sovereigns immune from suit for all noncommercial tortious acts except those that cause "personal injury or death, or damage to or loss of property, *occurring in the United States*" (emphasis added). See *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), cert. denied, No. 84-47 (Oct. 9, 1984); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), cert. denied, No. 83-1890 (Oct. 9, 1984).

In addition, the court of appeals never reached or resolved the question whether petitioners ever obtained personal jurisdiction over Libya and the PLO by effecting service on them. The district court held that they did not (Pet. App. 116a n.1, 129a n.4), and petitioners have not contended otherwise in this Court. Similarly, at least one panel member agreed with the district court's holding that petitioners' allegations did not connect the remaining defendants, the Arab-American organizations, "to the claimed torts sufficiently to permit the action to proceed against them" (*id.* at 125a).[14] Finally, the court of

[14] Judge Edwards specifically agreed with this aspect of the district court's decision (Pet. App. 4a n.1). Judge Robb did not discuss the issue, and Judge Bork declined to pass on it (*id.* at 53a n.2, 55a n.4). Nevertheless, Judge Bork confined his jurisdictional analysis wholly to petitioners' allegations against the PLO (*id.* at 67a n.13).

appeals never reached the district court's alternative holding that the entire action was barred by the local statute of limitations.

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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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