Michigan Journal of International Law

Volume 10 | Issue 3

1989

Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers

Victor A. Pappalardo
University of Michigan Law School

Note, Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers

*Victor A. Pappalardo**

I. INTRODUCTION

The First United States Congress incorporated the Alien Tort Claims Act, 28 U.S.C. § 1350, into federal law through the passage of the First Judiciary Act in 1789. The Act states that "[t]he 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." The Second Circuit utilized this statute in its landmark decision, *Filartiga v. Peña Irala*,[1] which found within its language jurisdiction to adjudicate international human rights claims. Since the *Filartiga* decision, the issue of the validity of adjudicating international human rights claims in United States federal courts has become a topic of debate among the courts and commentators. A stiff rejection of the *Filartiga* rationale has come from those who argue that such adjudication violates the courts' duty to maintain the separation of powers among the three branches of the U.S. government. These opponents contend that adjudications like *Filartiga* necessarily touch on foreign policy matters reserved by the Constitution to the political branches of Government.

This Note examines the rationales behind *Filartiga* and other cases which have had the opportunity to pass upon its holding, notably the holdings in *Tel-Oren v. Libyan Arab Republic*[2] and *Forti v. Suarez-Mason*.[3] It then focuses on the validity of these rationales with respect to the constitutional separation of powers scheme. In so doing, it analyzes *Filartiga*'s conclusions in light of the act of state and political question doctrines, two closely interrelated doctrines which have been at the forefront of the separation of powers criticisms of *Filartiga*. This Note concludes by suggesting that a clear case exists for the claim that human rights adjudications under the Alien Tort Claims Act do not violate the constitutional mandates of separation of powers.

---

* University of Michigan Law School, Class of 1989.

1. 630 F.2d 876 (2d Cir. 1980).

2. 726 F.2d 774 (D.C. Cir. 1984).

3. 672 F.Supp. 1531 (9th Cir. 1987), *motion to reconsider granted in part, denied in part*, 694 F.Supp. 707 (N.D. Cal. 1988).

II. THE *FILARTIGA* RATIONALE IN THE COURTS

A. Filartiga v. Peña-Irala *and the International Law of Human Rights*

The *Filartiga* case arose out of the kidnapping and apparent torture-murder of the seventeen year old son of Dr. Joel Filartiga, an opponent of Paraguayan President Alfredo Stroessner's government. Dr. Filartiga and his daughter charged that the defendant, Americo Norberto Peña-Irala, the Inspector General of Police in Asuncion, Paraguay, wrongfully caused the death of Joelito Filartiga by kidnapping and torturing him to death in reprisal for his father's anti-government activities.[4] The Filartigas failed to get any sort of criminal conviction or redress against Peña through the Paraguayan justice system.[5] In 1978, however, Peña entered the United States on a visitor's visa and took up residence in Brooklyn, New York.[6] Dolly Filartiga, sister of the victim, learned of Peña's presence and, with her father, commenced this wrongful death action against him for the torture-murder of Joelito Filartiga.[7]

The plaintiffs' complaint stated the cause of action as arising under "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350, article II, section 2, and the Supremacy Clause of the U.S. Constitution.[8] The plaintiffs claimed jurisdiction under the general federal question provision, 28 U.S.C. § 1331, and the Alien Tort Claims Act, 28 U.S.C. § 1350.[9] The Second Circuit noted that the "threshold question" regarding jurisdiction under section 1350 was whether the alleged conduct violated the law of nations.[10] Therefore, discussion of the *Filartiga* holding cannot be undertaken without a cursory look at the validity of the international legal principles upon

4. *Filartiga*, 630 F.2d at 878.

5. *Id.* at 878. As a result of the Paraguayan judicial system's failure to allow the Filartigas redress for the alleged murder, the Second Circuit was not required to dismiss the case under the doctrine of *forum non conveniens.*

6. *Id.* at 878.

7. Upon learning of his presence in the United States Ms. Filartiga informed the Immigration and Naturalization Service of Peña's whereabouts, and they, in turn, arrested him and ordered him deported for overstaying his visa. At the time this action was filed, Peña was being held in Brooklyn pending deportation. The Filartigas sought to enjoin his deportation to ensure his availability for testimony at trial, but by the time of the Second Circuit's holding, Peña had been deported. *Id.* at 878-79.

8. *Id.* at 879.

9. On appeal to the Second Circuit, the plaintiffs focused their claim principally on 28 U.S.C. § 1350. *Id.*

10. *Id.* at 880.

which it was based.[11]

The modern international law of human rights can be traced most clearly to the years immediately following the Second World War, at which time the United Nations Charter, the Nürnberg Tribunals and several key U.N. declarations, including the Universal Declaration of Human Rights,[12] affirmed an international commitment to human rights. Prior to the time of the Nürnberg trials, the individual's responsibility for actions violative of international human rights norms was, arguably, unclear.[13] The guilty verdicts handed down against the defendants at Nürnberg, however, showed that the horrors of two world wars had changed the international assessment of an individual's responsibility to humanity.[14]

The human rights norms that grew out of Nürnberg and the United Nations at this time have achieved nearly universal acceptance. Although the Universal Declaration of Human Rights was specifically characterized as a "common standard of achievement"[15] not declaratory of any existing standard of law, its principles appear[16] to have

---

11. Numerous scholarly treatises and international conventions hold that torture and other egregious violations of human rights are now a part of the customary law of nations. *See, e.g., infra* notes 12-14 and accompanying text. Since the primary focus of this Note is the incorporation of international law into U.S. law, this Note does not examine this issue in as much depth as it deserves.

12. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc A/180 at 71 (1948), the U.N. Declaration on Civil and Political Rights; the Declaration on the Protection of All Persons from being Subjected to Torture, G.A. Res. 3542 (XXX) (1975); and the Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I) (1946). *See also* Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 370, who traces the origins of international law as far back as the traditional law governing State Responsibility for Injuries to Aliens which "required all states to adhere to an 'international minimum standard' of procedural and substantive justice in their treatment of aliens." He points out that when the United States signed the U.N. Charter in 1945, its acceptance of the human rights principles thus extended this "longstanding recognition of an 'international minimum standard' to include all human beings rather than just aliens." According to Lillich, the U.N. Covenant on Civil and Political Rights as well as the Universal Declaration of Human Rights were a mere reaffirmation of those longstanding values.

13. The question whether the Nürnberg judgments represented new law or a manifestation of existing law was highly controversial. *See* LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 42-47 (1950); *see also* Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20-37 (1947); Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38-72 (1947).

14. The individual has never been a nonentity in international law. There have traditionally been norms allowing any state to punish an individual for piracy, and during the nineteenth century a new norm arose allowing universal prosecution for those involved in the slave trade.

15. G.A. Res. 217 (III), U.N. Doc. A/180, at 72 (1948).

16. A notable contrary view, discussed at length later in this Note, was expressed by Judge Bork in his concurrence in *Tel-Oren*, 726 F.2d at 817-820; *see also* Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 3 U. ILL. L. FORUM 609 (1979); Lane, *Demanding Human Rights: A Change In World Legal Order*, 6 HOFSTRA L. REV. 269 (1978). The argument that these standards have evolved into international legal standards is, however, strengthened by the fact that the Universal Declaration of Human Rights was enunciated in 1948 when the the international law of human rights, at least as it regarded individuals acting on behalf of a state, was in its infancy.

achieved general acceptance as statements of customary international law.[17] Subsequent international declarations prohibiting torture and the nearly universal condemnation of the practice in the legal systems of the world have emphasized this development.[18] Recognition has also resulted from the belief that the widespread acceptance of certain human rights norms, most notably prohibitions against torture and genocide,[19] carries a stronger legal authority than the considerable contrary practice that still exists in the world today.[20] Thus, while it may be argued that international law once predominantly focused upon conduct between states, in the past forty years it has widened to encompass a variety of norms governing individual action. Though U.N. Declarations are often accorded only dubious legality, the universal acceptance of the U.N. Declaration on Human Rights indicates that such norms have achieved the status of customary international law.[21] As a result, the international community widely accepts individual responsibility under these norms.

In *Filartiga*, the Second Circuit took careful note of the widespread acceptance of these norms in holding that the charges against Peña, if proven, constituted a violation of customary international law.[22] The U.S. Government also submitted both an *amicus* brief supporting this contention[23] as well as a 1979 State Department report which acknowledged that "[t]here now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens . . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity."[24] The Second Circuit's holding that "the law of nations," as uti-

17. *See* O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 339 (1985).

18. Lillich, *Part II: Global Protection of Human Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 116-117 (Theodor Meron ed. 1984); *see also* Henkin, *International Human Rights and Rights in the United States*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 25-26; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

19. For an argument that torture, genocide, slave trade and piracy constitute the universally accepted "core norms" of international law, see Blum and Steinhardt, *The Alien Tort Claims Act after Filartiga v. Peña Irala*, 22 HARV. INT'L L. J. 53, 87-97 (1981).

20. For arguments that contrary state practice does not abrogate from the status of prohibitions against torture as a norm of customary international law, see O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 335-37; Sohn, *The International Law of Human Rights*, 9 HOFSTRA L. REV. 347 (1981); Schechter, *The Views of Chartists and Skeptics on Human Rights*, 9 HOFSTRA L. REV. 357 (1981).

21. This acceptance is in word though clearly not in deed. But many, notably the positivists, argue that "law" denotes not just something that is followed but a principle accepted as a cornerstone or key to a legal system. H.L.A. HART, THE CONCEPT OF LAW (1961). Professor Falk argues for an "even wider conception . . . of the nature of law in world affairs" than that accepted by the positivists. Falk sees "international law as embracing all normative phenomena that create stable expectations in the life of international relations." R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 3 (1964).

22. *Filartiga*, 630 F.2d at 880.

23. *Id.* at 884.

24. *Filartiga*, 630 F.2d at 884, quoting DEP'T OF STATE, COUNTRY REPORTS ON HUMAN

lized in 28 U.S.C. § 1350, included prohibitions against torture was therefore not only well-grounded in the declarations and legal codes of nearly all nations, but also in the principles that the U.S. Government had explicitly accepted as customary international law. Nevertheless, the *Filartiga* decision was controversial because it marked a shift in judicial thinking about the modern international law of human rights. This controversy manifested itself in the second major case to address these kinds of issues, *Tel-Oren v. Libyan Arab Republic*.[25]

B. Tel-Oren v. Libyan Arab Republic

Tel-Oren arose out of a suit filed by a group consisting of injured victims and survivors of deceased victims of an armed attack on an Israeli civilian bus. The defendants included the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[26] The plaintiffs charged them with torts[27] committed in violation of international law.[28] Plaintiffs claimed jurisdiction under both 28 U.S.C § 1331, which gives the district courts jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States," and 28 U.S.C. § 1350, the Alien Tort Claims Act.[29]

The District Court dismissed the plaintiffs' case both for lack of subject matter jurisdiction and as barred by the applicable statute of limitations.[30] On appeal to the Circuit Court of Appeals for the District of Columbia, none of the three sitting judges could agree on a rationale for affirming the dismissal of this case. Two opinions, those of Judges Edwards and Bork, reflect in great detail on the propriety of the *Filartiga* holding. Judge Edwards' detailed and lengthy opinion supported the *Filartiga* decision, while Judge Bork's equally lengthy attack on *Filartiga*'s rationale strongly asserted that it violated the constitutional separation of powers scheme.[31] Much of this part of Bork's opinion was joined by the third member of the *Tel-Oren* court, Judge Robb.[32]

RIGHTS FOR 1979, published by HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG. 2D SESS. 1 (Joint Comm. Print 1980).

25. 726 F.2d 774 (D.C. Cir. 1984).

26. *Id.* at 775 (Edwards, J., concurring).

27. Defendants also faced charges that included violations of treaties and the criminal laws of the United States, as well as violations of the common law. *Id.*

28. *Id.* at 776.

29. *Id.* at 800 (Bork, J., concurring).

30. Tel-Oren v. Libyan Arab Republic, 517 F.Supp 542 (D.D.C. 1981).

31. Judge Robb in the third concurrence found the case nonjusticiable based on the political question doctrine and stated that both Bork and Edwards failed "to reflect on the inherent inability of federal courts to deal with cases such as this one." *Id.* at 823 (Robb, J., concurring).

32. *See Tel-Oren*, 771 F.2d at 823-27 (Robb, J., concurring).

Edwards' opinion is significant because it developed several clear and well-articulated defenses of the *Filartiga* decision[33]. Notably, Edwards' defense of *Filartiga* argued that its rationale was consistent with current international law, with the statutory language of the Alien Tort Claims Act, and with the constitutional separation of powers scheme. He contended that those who, like Judge Bork, interpreted 28 U.S.C. § 1350 as providing jurisdiction but no cause of action, effectively nullified the statute, violating "a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it 'inoperative or superfluous, void or insignificant.' "[34]

Judge Edwards, however, supported dismissal of the case on the grounds that the defendants in *Tel-Oren*, unlike the defendant in *Filartiga*, had not acted in an official capacity as agents of a state. He argued that the "law of nations does not impose the same responsibility on non-state actors, such as the PLO, as it does on states and persons acting under color of state law."[35] In making this argument, Edwards exhibited an unwillingness to construe section 1350 as a *carte blanche* to prosecute all international evils. Instead, Edwards found limitations placed on section 1350 in the same international legal principles the *Filartiga* construction sought to enforce.

Bork's analysis represents an equally clear and well articulated attack on *Filartiga*. Significantly, Bork's opinion in *Tel-Oren* focused on the relevance of the separation of powers to claims arising under the Alien Tort Claims Act. He contended that emerging norms of human rights cannot be redressed through the Alien Tort Claims Act because such adjudication violates the constitutional mandates of the separation of powers.[36] He further argued that the Alien Tort Claims Act did not expressly grant a cause of action for torts committed in violation of international law, and that "separation of powers principles . . . counsel courts, in a case like this, not to infer any cause of action not expressly granted."[37] In response to Judge Edwards' explicit support for *Filartiga*, Bork directly attacked *Filartiga*'s construction and use of

33. Not all of these defenses, however, are relevant to this Note.

34. *Id.* at 778 (Edwards, J., concurring), quoting 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973).

35. *Id.* at 776 (Edwards, J., concurring).

36. Judge Edwards and others have attacked Bork's analysis in terms of its interpretation of both international law and in its interpretation of the intent of the Alien Tort Claims Act. *See Id.* at 780-798 (Edwards, J., concurring); *see also* Paust, *On Human Rights: The Use of Human Right Precepts In U.S. History and The Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 640-51 (1989).

37. *Tel-Oren*, 726 F.2d at 801. Bork opined that lacking a clear mandate of jurisdiction from Congress, that plaintiffs would have to prove, in a section 1350 case, that international law or a relevant treaty provided a cause of action. In this case he found no such cause of action. *Id.* at 812 (Bork, J., concurring). *But see* Adra v. Clift, 195 F.Supp. 857 (1961); 726 F.2d at 786-788; *see also infra* note 150.

the Alien Tort Claims Act.[38]

Bork used the act of state doctrine as support for his argument that *Filartiga* violated the constitutional separation of powers scheme. He argued that the doctrine was based "predominantly, if not exclusively, on separation of powers concerns."[39] He further maintained that extending the act of state doctrine to cases where adjudication "would present problems of judicial competence and of judicial interference with foreign relations" would bring it "closer, especially in its flexibility, to the political question doctrine."[40] Instead of attempting to merge the doctrines and apply them to the *Tel-Oren* case,[41] however, he relied on the separation of powers principles inherent in *both* of those doctrines to reject the claims presented in *Tel-Oren* and the "broad" reading given 28 U.S.C. § 1350 by Judge Edwards and the *Filartiga* court.[42]

Tel-Oren marked the first major judicial test of the validity of *Filartiga*'s reasoning. The D.C. Circuit's wide divergence of opinion highlighted not only the misconceptions surrounding *Filartiga*'s approach to the Alien Tort Claims Act[43] but the importance of separation of powers concepts to the viability of that approach. In the wake of *Tel-Oren*, a number of cases cited *Filartiga*.[44] Few cases, however,

38. *Tel-Oren*, 726 F.2d at 811-16 (Bork, J., concurring).

39. *Id.* at 804 (Bork, J., concurring).

40. *Id.*

41. Bork continued:

> [w]hether the two doctrines should be merged and how, if merged, they would apply to the allegations of appellants complaint are issues beyond the scope of our inquiry. Instead, those doctrines are drawn upon for what they say about the separation of powers principles that must inform a determination of the appropriateness of appellants' litigating their claims in federal court.

Id.

42. *See id.* at 774-98 (Edwards, J., concurring).

43. *See* Paust, *supra* note 36, at 629-51.

44. Other cases that tangentially made reference to *Filartiga*'s reasoning included Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985), which held that the Foreign Sovereign Immunities Act barred suit against the Soviet Union for mental anguish, physical distress and loss of consortium caused by that nation's refusal to let a Russian husband emigrate to the United States to live with his American-born wife. Von Dardel v. U.S.S.R. 623 F.Supp. 246 (D.D.C. 1985), held that the Foreign Sovereign Immunities Act could not be read to extend immunity to a foreign sovereign's clear violations of diplomatic immunity. This rationale was reversed in Amerada Hess v. Argentine Republic, 109 S.Ct. 683 (1989), when the Supreme Court addressed its first section 1350 claim since *Filartiga*. In *Amerada Hess*, Liberian corporations brought an action under the Alien Tort Claims Act claiming that the government of Argentina violated international law when it destroyed an unarmed, non-belligerent oil tanker on the high seas during the 1982 Falklands/Malvinas war. The plaintiffs argued that the Alien Tort Claims Act afforded them redress against Argentina for an "unlawful taking of prize during wartime." *Id.* at 689. The Second Circuit held for the plaintiffs, reasoning that Congress' failure to enact a *pro tanto* repealer of the Alien Tort Claims Act at the time it enacted the Foreign Sovereign Immunities Act signaled an intent not to eliminate " 'existing remedies in United States Courts for violations of international law' by foreign states under the Alien Tort Statute." *Id.* at 687 (citing Argentine Republic v. Amerada Hess Shipping Corp, 830 F.2d 421, 431 (2d Cir. 1987)). The Supreme Court denied this claim, stating that "Congress had violations of international law in mind when it enacted the FSIA." *Id.* at 688. The Court argued Congress' failure to enact a *pro tanto* repealer of the Alien

have addressed the viability of an Alien Tort Claims Act suit against an individual for torture committed in violation of the law of nations.[45] Of these cases, the most relevant was *Forti v. Suarez-Mason*, in which the District Court for the Northern District of California addressed facts similar to those addressed in *Filartiga*.

C. Forti v. Suarez-Mason

Forti constituted a strong endorsement of *Filartiga*'s conclusions with regard both to contemporary international law and the jurisdictional reach of section 1350.[46] The case arose when Argentine citizens residing in the United States brought an action under section 1350 for damages resulting *inter alia*, from torture, murder, disappearance[47] and prolonged arbitrary detention allegedly ordered by the defendant, Carlos Guillermo Suarez-Mason.[48] Suarez-Mason was accused of ordering these actions in his role as a military commander during Argentina's brutal "dirty war" against leftist subversion in the late 1970s.[49] The court upheld the cause of action in the strongest reaffirmation of the *Filartiga* rationale to date.

The defendant urged the court to adopt interpretations of both section 1350 and customary international law similar to those espoused by Judge Bork in *Tel-Oren*. He argued that section 1350 is a purely jurisdictional statute which required the plaintiffs to establish an in-

---

Tort Statute when it passed the FSIA may be explained at least in part by the lack of certainty as to whether the Alien Tort Statute conferred jurisdiction in suits against foreign states." *Id.* at 689. In so doing the Court reversed the logic of *Von Dardel*, making it clear that a foreign *state* could *not* be the target of a § 1350 action.

Amerada Hess thus brought into question the holding of another case that addressed the justiciability of torture claims in U.S. Courts, Siderman v. Republic of Argentina, No. CV 82-1772-RMT (McX) slip op. (D. Cal., Sept. 28, 1984). Unlike *Filartiga*, which upheld a claim under § 1350 for violation by an *agent* of a government, *Siderman* held a government (and one of its provinces) responsible for the torture of one of its citizens. Principles expounded in *Amerada Hess*, however, appear to bring *Siderman*'s viability into question since *Amerada Hess* appears to preclude torture claims against a sovereign (as opposed to claims against a government agent) under § 1350.

45. A series of cases brought against former Philippine President Ferdinand Marcos alleging torture were dismissed on act of state grounds. *See* Trajano v. Marcos, No. 86-0207 (D. Haw. July 18, 1986); Sison v. Marcos, No. 86-0225 (D. Haw. July 18, 1986); Hilao v. Marcos (D. Hawaii July 8, 1986); Ortigas v. Marcos, No. C 86-0975 SW (N.D. Cal. Jan. 22, 1987); Clemente v. Marcos, No. C 86-1449 SW (N.D. Cal. Jan. 22, 1987). These cases are distinguishable from *Filartiga* and *Forti* in that they present allegations against a former head of state as opposed to allegations against an agent of state. For a strong argument refuting the act of state rationale as grounds for dismissal of these cases see, Comment, *ALIEN TORT CLAIMS ACT — Act of State Doctrine — Act of State Doctrine Requires Dismissal of Human Rights Claims Brought against Former Philippine President Residing in the United States*, 27 VA. J. INT'L L. 433 (1987).

46. 672 F.Supp. at 1539-43; 694 F.Supp. at 710-12.

47. Disappearance, or "causing the disappearance of individuals," referred to the allegations that under Suarez-Mason's command people were ordered arrested and never heard from again. Forti v. Suarez-Mason, 672 F.Supp. at 1538.

48. *Id.* at 1537-38.

49. *Id.*

dependent, private right of action in international law. Suarez-Mason further argued that the law of nations did not provide a cause of action for the torts charged in the plaintiffs' complaint.[50]

The court rejected the defendant's contentions with a strong endorsement of both *Filartiga* and Judge Edwards' concurrence in *Tel-Oren*. It held that it was "persuaded . . . that the interpretation of Section 1350 adopted by the Second Circuit in *Filartiga* and largely adopted by Judge Edwards in *Tel-Oren* is better reasoned and more consistent with principles of international law" than the contrary opinions adopted by Judges Bork and Robb in *Tel-Oren*.[51] In addition, the court noted that "[t]here appears to be a growing consensus, that Section 1350 provides a cause of action for certain 'international common law torts.' "[52] The court thus interpreted the Alien Tort Claims Act as providing "not merely jurisdiction but a cause of action, with the federal cause of action arising by recognition of certain 'international torts' through the vehicle of Section 1350."[53] Echoing the Second Circuit's holding in *Filartiga*, the district court in *Forti* stated that it had "no doubt that official torture constitutes a cognizable violation of the law of nations under Section 1350."[54] It further found that prolonged arbitrary detention, summary execution[55] and causing a person's disappearance[56] violated the law of nations.

III. The Act of State and Political Question Doctrines

As evidenced by the above cases, questions about *Filartiga* have not ended with inquiries into the status of torture under international law. More vehemently contested[57] is the constitutionality of allowing a federal court to adjudicate a matter, even if clearly in violation of customary international law, that may implicate the U.S. foreign policy.[58] Unfortunately, in the past quarter of a century, beginning with

50. *Id.* at 1538.

51. *Id.* at 1539.

52. *Id.*

53. *Id.* at 1540.

54. *Id.* at 1541.

55. *Id.* at 1541-42.

56. The court in the original case did not find disappearance to be a violation of the law of nations, and dismissed this count with prejudice. *Id.* at 1542-43. On rehearing the court was convinced that this too was now an accepted international crime. Forti v. Suarez-Mason, 694 F.2d 707, 710-11 (N.D. Cal. 1988).

57. For further evidence that an action against an individual is acceptable under norms of customary international law, see Paust's well documented rejection of Bork's claims regarding the state of international law with respect to the status of the individual under international law. Paust, *supra* note 36, at 647-50.

58. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 796-98 (Edwards, J., concurring), 801-05 (Bork, J., concurring), 825-26 (Robb, J., concurring); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208, 210 (D.C. Cir. 1985); Republic of the Philippines v. Marcos, 818 F.2d 1473, 1481-82 (9th Cir. 1987).

its holding in *Banco Nacional de Cuba v. Sabbatino*,[59] the Supreme Court has sent rather confusing signals regarding the adjudicatory limits of the federal courts in cases involving acts by officials of foreign governments. As a result, lower courts have disagreed sharply on the act of state doctrine's relevance to the *Filartiga* holding.[60] This section looks at the of act of state and the political question doctrines[61] and focuses on their relationship to the constitutional doctrine of separation of powers as implicated by the *Filartiga* holding.

A. *The Act of State Doctrine*

Simply stated, the act of state doctrine is a judicially created doctrine which prohibits U.S. courts from determining the legality of certain acts attributable to and committed within the territory of a foreign sovereign. Courts have further construed the doctrine as commanding that courts afford either affirmative relief or an affirmative defense to effectuate these sovereign acts.[62] It is widely accepted that the act of state doctrine achieves this effect by modifying accepted choice of law rules normally used in U.S. courts.[63] In essence, the doctrine requires U.S. courts to allow a foreign law[64] to govern in certain instances, regardless of any choice of law principles that might militate against applying that law.[65] In terms of *Filartiga*-style adjudication, the doctrine forces courts to face the question of whether the alleged international crime was an "act of state" or merely an act of an individual committed under the color of state authority.

---

59. 376 U.S. 398 (1964).

60. Such differences can most clearly be recognized in the concurring opinions of Judges Edwards and Bork in *Tel-Oren*, 726 F.2d at 775-823. For a thorough discussion of the wide divergence of opinion in the lower courts regarding the act of state doctrine, see Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 344-65 (1986).

61. There has been some commentary to the effect that these doctrines have evolved into essentially the same thing. *See* First National Citibank v. Banco Nacional de Cuba,(hereinafter *Citibank*) 406 U.S. 759, 777-788 (1972) (Brennan, J., dissenting); *see also* Bazyler, *supra* note 60, at 341.

62. In other words, if a government acts lawfully within its borders, the act of state doctrine mandates that courts uphold the nation's decree in any dispute that might arise within their jurisdiction. Thus, for example, when Cuba expropriated goods from U.S. nationals within its borders, the Court in *Sabbatino* was forced to uphold Cuba's right to the proceeds from a sale of those goods that took place within the United States. *Sabbatino*, 376 U.S. at 400-12; *see also* RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), Tent. Draft No. 6 § 469 (1985).

63. *See* Henkin, *Act of State Today: Reflections in Tranquility*, 6 COLUM J. TRANSNAT'L L. 175 (1967); Kirgis, *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58 (1988).

64. For purposes of the doctrine almost any state action will be considered a foreign law, thus the name "act of state" is attached to the doctrine.

65. *See* Henkin, *supra* note 63, at 178-82 (1967).

1. *History of the Act of State Doctrine*

The roots of the act of state doctrine can be traced to seventeenth century England, where the doctrine arose as a corollary to the doctrine of sovereign immunity.[66] The United States Supreme Court first recognized the act of state doctrine in the 1812 case, *The Schooner Exchange v. M'Faddon*[67] but did not treat the doctrine as an independent source of immunity[68] until the 1897 case, *Underhill v. Hernandez*.[69] There the court made the often quoted comment that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[70] In the wake of *Underhill*, however, the doctrine began to assume a broader, and more vague, meaning in contrast to its original guarantee of personal immunity to individuals acting on behalf of a government.[71] By the time the Supreme Court attempted to modernize the doctrine in *Sabbatino*, it had already begun to lose some of its clarity.

The modern act of state doctrine developed in the analyses of the three Supreme Court cases that have addressed the issue in the past quarter century, beginning with the 1964 holding in *Banco Nacional de Cuba v. Sabbatino*. Although eight justices joined the *Sabbatino* holding[72], neither of the succeeding cases, *First National City Bank v. Banco Nacional de Cuba*[73] and *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[74] produced majority opinions. Consequently, the doctrine as presently applied in lower federal courts is far from clear.[75]

2. *The* Sabbatino, Citibank *and* Dunhill *Holdings*

A strong majority in *Sabbatino* agreed on a viable rationale underlying the act of state doctrine. They based this rationale on the constitutional separation of powers scheme. Justice Harlan, who authored the majority opinion, noted that "[t]he act of state doctrine does . . . have 'constitutional' underpinnings. It arises out of the basic relation-

66. *Sabbatino*, 376 U.S. at 416; Bazyler, *supra* note 60, at 330-31 (1986).

67. 11 U.S. (7 Cranch) 116 (1812).

68. Bazyler, *supra* note 60, at 331.

69. 168 U.S. 250 (1897).

70. *Id.* at 252.

71. Bazyler, *supra* note 60, at 332-33, notes that the doctrine "was soon used in connection with the territorial principle of choice of law, which in the past accorded final authority to sovereigns over disputes occurring within their domains . . . ." He further points out that this was the rationale for the next three significant cases decided on act of state doctrine principles: American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); and Ricaud v. American Metal Co., 246 U.S. 304 (1918).

72. The only justice who dissented in *Sabbatino* was Justice White. *Sabbatino*, 376 U.S. at 439 (White, J., dissenting).

73. 406 U.S. 759 (1972).

74. 425 U.S. 682 (1976).

75. *See* Bazyler, *supra* note 60, at 344-61 (1986).

ships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[76] Justice Harlan emphasized, however, that the act of state doctrine was "compelled by neither international law nor the Constitution."[77] According to Justice Harlan, the act of state doctrine was a judicially created doctrine that "reflect[ed] the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[78] In justifying the Court's reaffirmation of this judicially created doctrine, he expressed concern that the judicial branch might infringe upon the foreign policy functions of the executive and legislative branches.[79] The Court's concern in this situation reflected its desire not to allow judicial review of issues entrusted to the "political" branches of government.

Sabbatino, however, stressed that its reiteration of the act of state doctrine did not represent judicial abandonment of issues involving foreign affairs. While deferring to the political branches in the case before it, the *Sabbatino* opinion nevertheless made clear that some issues involving foreign affairs "touch more sharply on national nerves than do others . . . ."[80] Thus, where widespread acceptance of a norm of international law mandated a principled adjudication, or where the United States had no overarching "political interest" in the outcome of a case, the Court determined that the act of state doctrine should not apply.[81]

Though the *Sabbatino* analysis seemed fairly clear, subsequent attempts to expand upon it in *Citibank* and *Dunhill* confused the precise contours of the act of state doctrine. The authors of each opinion strenuously disagreed as to how separation of powers concerns should affect its application. This disagreement was due, in part, to conflicting notions about the executive's proper role in its invocation.[82] Despite these conflicting viewpoints, however, the authors of the various opinions in these two cases emphasized the centrality of separation of powers principles to the doctrine.

The justices had great difficulty delineating the actual effects of separation of powers considerations in the application of the doctrine. The opinions in *Citibank* illustrated this problem. Justice Rehnquist's plurality opinion in that case adopted the so-called "Bernstein" excep-

76. *Sabbatino*, 376 U.S. at 423.

77. *Id.* at 427.

78. *Id.* at 427-28.

79. *Id.* at 427-33.

80. *Id.* at 428.

81. *Id.*

82. *See infra*, notes 83-93 and accompanying text.

tion,[83] which would exempt a case from the act of state doctrine if the executive indicated to the courts that adjudication of the issue at hand would not be inimical to the executive's handling of foreign affairs.[84] A majority of the Court, however, in concurring opinions by Justices Douglas[85] and Powell,[86] and in a dissent written by Justice Brennan joined by three other justices, explicitly rejected this exception.[87] The justices, unanimously agreed that the act of state doctrine remained a viable and important tool in maintaining the constitutional separation of powers scheme.[88]

The Supreme Court's next examination of the act of state doctrine in *Alfred Dunhill of London v. Republic of Cuba* addressed a situation where the petitioners were Cuban "interventors" named by the Cuban Government to "possess and occupy" expropriated businesses in Cuba. The *Dunhill* plurality, per Justice White, found that the interventors' actions did not arise from "a foreign state's public or governmental actions,"[89] but rather from a state's behavior as an

83. This exemption originally arose in the case of Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954), where the Second Circuit allowed a cause of action by a victim of Nazi expropriations as the result of a letter from the Acting Legal Adviser of the Department of State, which stated that the executive had adopted a "policy" to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 376. The only successful application of this doctrine up until this time had been in the *Bernstein* case.

84. *Citibank*, 406 U.S. at 764-70.

85. *Id.* at 770-73 (Douglas, J., concurring).

86. *Id.* at 773-76 (Powell, J., concurring).

87. *Id.* at 776-85 (Brennan, J., dissenting).

88. The plurality per Rehnquist made clear its belief that separation of powers was served best by allowing the Executive Branch, "charged as it is with primary responsibility for the conduct of foreign affairs," to determine whether a case already within the adjudicatory powers of the court should be exempt by the act of state doctrine from a decision on the merits. Rehnquist was obviously concerned with the attack made upon his holding in Brennan's dissent that accused the Court of abdicating its powers to define jurisdiction to another branch of government and concluded that:

> Our holding confines the courts to adjudication of the case before them, and leaves to the Executive Branch the conduct of foreign relations. In so doing, it is both faithful to the principle of separation of powers and consistent with earlier cases applying the act of state doctrine where we lacked the sort of representation from the Executive Branch that we have in this case.

Citibank, 406 U.S. at 772. Both concurrences explicitly rejected the plurality's holding that the executive could determine the jurisdiction of the courts in these cases. Justice Powell most clearly grounded his rejection of the "Bernstein exemption" in separation of powers, stating that he "would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction." According to Powell, "[s]uch a notion, in the name of separation of powers, seems to . . . conflict with that very doctrine." *Id.* at 773 (Powell, J., concurring).

Brennan's dissent equated the act of state doctrine with the political question doctrine, discussed *infra*. It held that the plurality's analysis, by allowing executive determination of the contours of a political question "countenances an exchange of roles between the judiciary and the Executive, contrary to the firm insistence in *Sabbatino* on the separation of powers." *Id.* at 791-92 (Brennan, J., dissenting).

89. *Dunhill*, 425 U.S. at 698.

international commercial entity.[90] According to Justice White "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due the foreign importers."[91] The plurality concluded that these actions did not constitute an act of state and were therefore not entitled to deference under the act of state doctrine.[92]

Three members of the *Dunhill* plurality accepted the Bernstein exemption,[93] justifying it with the paradigmatic separation of powers argument that it prevents "embarrassment" to the executive.[94] The range of dissenting views among the members of the *Dunhill* Court, however, once again indicated that a large degree of uncertainty had crept into application of the act of state doctrine in the decade following *Sabbatino*. *Dunhill* made clear that the Court was unable to fashion a coherent approach to the modern act of state doctrine.

Even while application of the act of state doctrine lost its coherence, however, a majority of justices in both *Citibank* and *Dunhill* continued to proclaim that their approaches were faithful to the strictures of *Sabbatino*.[95] Though the opinions in *Citibank* and *Dunhill* disagreed sharply on the contours of the doctrine, each continued to stress the the "consitutional underpinnings" of comity between the political and judicial branches of government in the handling of foreign affairs.[96] Adjudication of a human rights claim in a U.S. federal court must therefore incorporate this thematic base, which remains one of the few common grounds upon which the Court continues to base the act of state doctrine.

B. *The Political Question Doctrine*

The relationship between the political and judicial branches of gov-

90. *Id.* at 698-99. Quoting the 1934 case of *Ohio v. Helvering*, the plurality stated "[i]f a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function . . . .' " Ohio v. Helvering, 292 U.S. 360, 369, *quoted in Dunhill*, 425 U.S. at 696.

91. *Id.* at 695.

92. *Id.* at 694-95.

93. Justice Stevens did not join this part of the opinion. Thus, Justices White and Rehnquist and Chief Justice Burger, the three justices who recognized the Bernstein exemption in *Citibank*, were the only three who recognized it in *Dunhill*.

94. *Dunhill*, 425 U.S. at 697-98.

95. Justice White, who dissented in *Sabbatino*, and former Justice Powell were notable exceptions to this trend. Powell even claimed in *Citibank* that if he had been a member of the *Sabbatino* Court he would have probably dissented. *Citibank*, 406 U.S. at 774 (Powell, J., concurring).

96. *Dunhill*, 425 U.S. at 697-98, (opinion of White., J.), 715 (Powell, J., concurring), 724-25 (Marshall, J., dissenting); *Citibank*, 406 U.S. at 765-70 (opinion of Rehnquist, J.), 772 (Douglas, J., concurring), 774-76 (Powell, J., concurring), 785-90 (Brennan, J., dissenting); *Sabbatino*, 376 U.S. at 423 (opinion of Harlan, J.), 461-67 (White, J., dissenting).

ernment also lies at the heart of the political question doctrine, a doctrine with a long, and some might say infamous, history in U.S. jurisprudence. The doctrine's basic tenet holds that there are certain constitutional issues best left to the "political" branches of government and thus inappropriate for judicial resolution.[97] It has been especially prominent in cases concerning U.S. foreign relations, since "many such questions uniquely demand single-voiced statement of the Government's views."[98]

The political question doctrine can be traced as far back as the 1849 case of *Luther v. Borden*,[99] where the Supreme Court refused to inquire into a congressional judgment as to the lawful government of Rhode Island.[100] Despite its long history, its underlying rationale continues to be a major source of debate. Recent discussion of this rationale tends to begin with two divergent strains of thought: the "classical" theory associated with Professor Wechsler,[101] and the "prudential" theory associated with Professor Bickel.[102] According to the so called "classical" theory, the political question doctrine requires the judiciary to determine "whether the Constitution has committed to another agency of government the autonomous determination of the issue raised."[103] The "prudential" theory, on the other hand, looks not only to whether the Constitution has committed resolution of a particular issue to the judiciary, but also to the political desirability of judicial resolution of that issue as well.[104] According to this "prudential" doctrine, "political" necessity might require the Court to abstain from pronouncing its "ultimate Constitutional judgment,"[105] even

97. *See* Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031 (1985).

98. Baker v. Carr, 369 U.S. 186, 211 (1961).

99. 48 U.S. (7 How.) 1 (1849).

100. *Luther v. Borden* arose out of the Dorr Rebellion, an 1842 rebellion that pitted supporters of a new state constitution against supporters of the charter government who accepted neither the new constitution nor the leadership of Dorr, the governor elected under its authority. Dorr made an abortive attempt to take power by force and, during this time, officers of the charter government broke into Luther's house. Luther sued for trespass, claiming that the charter government had been displaced in 1842 and therefore the defendant's entry was unauthorized and unlawful. In essence, he sought to litigate the existence and authority of the government during this upheaval. Both the lower court and the Supreme Court refused to second-guess the congressional determination as to the lawfulness of the charter government of Rhode Island at this time.

101. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

102. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

103. Wechsler, *supra* note 101, at 1-6.

104. According to Professor Bickel, under this prudential doctrine:

> [T]he role of the Court and its *raison d'être* are to evolve 'to preserve, protect and defend' principle. If the political institutions at last insist upon a course of action that cannot be accommodated to principle, it is no part of the function of the court to bless it, however double-negatively.

A. BICKEL, *supra* note 102, at 188; *see also* Bickel, *Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 47-51 (1961); *see also* L. HAND, THE BILL OF RIGHTS (1958).

105. A. Bickel, *supra* note 102, at 183.

in situations where such a judgment would not violate the Constitution.[106]

These theories, however, no longer stand alone in the modern academic discussion of the political question doctrine. Recently, commentators have limited or questioned the need for the doctrine altogether.[107] This discussion has even included the suggestion that the "so called" political question doctrine does not exist, and that traditional political question abstention represents no more than "the ordinary respect by courts for the political domain."[108]

Despite this rather uncertain philosophical footing, the political question doctrine is an ever-present factor in the analysis of federal cases affecting international relations. Like the act of state doctrine, its influence in this area is often justified by the desire that there be "a single voiced statement of the Government's views"[109] in foreign affairs and for preventing "embarrassment" to the political departments of the U.S. Government in their international dealings.[110] As a result, analysis of *Filartiga*'s validity must incorporate issues raised by the political question doctrine.

In cases involving foreign relations, courts have employed the political question doctrine to justify a number of instances of judicial deference to executive decisions. Classic examples of areas in which the judiciary normally defers to executive judgment include: recognition of foreign governments,[111] recognition of sovereignty over territories, interpretation of treaties, determination of a person's status as a representative of a foreign government, and dates and duration of hostilities.[112] The Supreme Court, however, has rejected the contention that "all questions touching foreign relations are political questions."[113] In *Baker v. Carr*[114], the Court's most explicit modern delineation of the doctrine, the court stated that:

---

106. *See* Redish, *supra* note 97, at 1032; *see also* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 520-23 (1966), discussing Professor Bickel's "prudential estimate of the desirability of deciding a given issue under particular circumstances."

107. *See* Scharpf, *supra* note 106; Redish, *supra* note 97.

108. Henkin, *Is There a Political Question Doctrine*, 85 YALE L.J. 597, 600-01 (1976); *see also* Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1166-67 (1970).

109. *Baker*, 369 U.S. at 211.

110. Justice White aptly characterized this prevailing philosophy in his *Sabbatino* dissent when he stated that "political matters in the realm of foreign affairs are within the exclusive domain of the executive branch as, for example, issues for which there are no available standards or which are textually committed by the Consitiution to the executive." *Sabbatino*, 376 U.S. at 461 (White, J., dissenting).

111. *See, e.g.*, United States v. Klintock, 18 U.S. 144, 149 (1820); *see also* United States v. Palmer, 16 U.S. 610, 634-635 (1818).

112. *Baker*, 369 U.S. at 212-13.

113. *Id.* at 211.

114. 369 U.S. 186 (1961).

> It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[115]

Thus, while the political question doctrine may stand as a hurdle to adjudication of issues "touching on" foreign policy, it clearly does not represent an absolute bar to their judicial resolution.

It is also possible to credit *Baker v. Carr* with setting forth a set of specific criteria representing a clear delineation of the standards by which to discern the types of issues that may be consigned to "political" branches of government. In *Baker*, the Supreme Court rejected a lower court ruling that the political question doctrine barred an equal protection challenge to a state's voting apportionment scheme. In defining the circumstances that present "political questions" the Court found that:

> [P]rominent 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 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 the question.[116]

These standards have come to represent the modern criteria by which federal courts abstain from judging the merits of a case on the ground that it presents a political question.[117] Any judicial action that might impinge on the ability of the executive to conduct foreign affairs will be judged against these considerations. Like the act of state doctrine, the political question doctrine thus seems to be a result of the judiciary's concern that it not tread into areas, whether as the result of Constitutional commands or prudential concerns, properly the domain of the "political" branches of government.

---

115. *Id.* at 211-12.

116. *Id.* at 217.

117. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); Gilligan v. Morgan, 413 U.S. 1 (1973); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1984).

IV. SEPARATION OF POWERS PRINCIPLES IN *FILARTIGA*'S INTERPRETATION OF THE ALIEN TORTS CLAIMS ACT

The similarity of the language used to justify both the act of state and political question doctrines highlights their common philosophical underpinnings. In *Sabbatino*, the Court stated that the act of state doctrine "arises out of the basic relationship between branches of government in a system of separation of powers;"[118] in *Baker* the Court stated that the political question doctrine arises out of "the relationship between the judiciary and the coordinate branches of the Federal Government . . . [and was] primarily a function of the separation of powers."[119] In its use of this nearly identical language, the Court has indicated that both the political question and act of state doctrines serve separation of powers concerns by enforcing the constitutional delineation of authority among the branches of government. This language makes clear that cases like *Filartiga*, that might "touch" on foreign affairs, must not impinge on the executive's constitutional mandate to carry out the foreign relations of the United States.[120]

This similarity between the act of state doctrine's "constitutional underpinnings," and the political question doctrine's contention that a matter may be "committed by the Constitution to another branch of government,"[121] has created a large arsenal of conceptual weapons with which to frame a separation of powers attack on *Filartiga*.[122] Separation of powers concerns have correspondingly been at the forefront of criticisms of that decision. Not surprisingly, it has been argued that the issues implicated by actions brought under the Alien Tort Claims Act for torture inherently impinge on the executive's ability to conduct foreign affairs. It has also been argued that, because there is no record of the legislative intent behind section 1350,[123] *Filartiga*'s modern reinterpretation of its language amounts to extreme, and even improper, judicial activism.[124]

This section examines these separation of powers attacks on *Filar-*

---

118. *Sabbatino*, 376 U.S. at 423.

119. *Baker*, 369 U.S. at 210.

120. *See* Scharpf, *supra* note 106, at 538 (1966); *see also* Judge Bork's opinion in *Tel-Oren*, 756 F.2d at 801-802, where he stated:

> The crucial element of the doctrine of separation of powers in this case is the principle that "the conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). That principle has been translated into a limitation on judicial power in the international law area principally through the act of state and political question doctrines. Whether or not this case falls within one of these categories, the concerns that underlie them are present and demand recognition here.

121. *Baker*, 369 U.S. at 211.

122. *See Tel-Oren*, 726 F.2d at 798-827 (opinions of Bork and Robb, JJ., concurring).

123. *Id.* at 816.

124. *Id.* at 815 (Bork, J., concurring).

tiga. It assumes, for the sake of argument, that these attacks are viable, but nevertheless argues that use of the Alien Tort Claims Act to adjudicate claims alleging torture committed in violation of international law does not violate the Constitutional separation of powers mandate. This section further attempts to show that the *Filartiga* decision is more compatible with the separation of powers scheme than the position advocated by its critics. Most notably, it contends that *Filartiga*'s critics overestimate the political "embarrassment" to the executive that might result from allowing legal redress against an ex-government official residing in this country.

A. *The Alien Tort Claims Act and U.S. Foreign Policy*

Even as it reaffirmed the existence of the political question doctrine in *Baker v. Carr*, the Supreme Court warned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[125] The court noted that judicial disposition of an issue relies on "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action."[126] Without such "discriminating analysis," the political question doctrine will not defeat a human rights claim on the mere possibility that it might "touch" foreign affairs.[127]

In applying the act of state docrine in *Sabbatino*, the Supreme Court employed a type of analysis that might be required in political question cases. The *Sabbatino* Court noted that both the degree of codification in international law and the importance of an issue's implications on U.S. foreign affairs were relevant factors in determining whether the act of state doctrine applies in a given situation.[128] According to *Sabbatino*, "the less important the implications of an issue to U.S. foreign relations, the weaker the justification for exclusivity in the political branches."[129] Notably, both cases expressed concern that adjudication of such issues might hinder the executive's ability to manage U.S. foreign affairs, a concern that emphasizes the centrality of separation of powers concerns to both doctrines.

The concern for the executive's ability to manage foreign affairs has often been expressed as concern that judicial resolution of an issue

125. *Baker*, 369 U.S. at 211.

126. *Id.* at 211-12.

127. *See* Tigar, *supra* note 108, at 1169-70, discussing two cases where the Court actually decided cases intimately involving foreign affairs: Korematsu v. United States, 323 U.S. 214 (1944), and Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). In their disposition of war powers claims, these cases were clearly more compelling than a case against an ex-government official for torture.

128. *Sabbatino*, 376 U.S. at 428.

129. *Id.*

might "embarrass" the executive in the handling of U.S. foreign relations. Judge Robb made a clear, if somewhat hysterical, statement of this position in his *Tel-Oren* concurrence. According to Robb, "[t]he certain results of judicial recognition of jurisdiction over cases such as this one are embarassment to the nation, the transformation of trials into forums for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct."[130] In light of the present international realities, however, this concern appears misplaced. It can be argued peruasively that the executive's "embarrassment" would actually increase if it were forced to take affirmative action every time a universally accepted norm of customary international law was presented to a federal court.[131] Indeed, the state department may be much more embarrassed by the need to take a political stand on questions of this nature than by the need to explain neutral and principled judicial decisions to foreign governments.[132]

---

130. *Tel-Oren*, 726 F.2d at 826 (Robb, J., concurring).

131. The Foreign Sovereign Immunities Act (FSIA) was meant to achieve the same kind of result. Under the FSIA, courts, rather than the State Department, determine questions of sovereign immunity. A Congressional report explaining the FSIA stated that:

> A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

Note, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act — Hanoch Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert denied, 105 S.Ct. 1354 (1985)*, quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976), 60 WASH. L. REV. 697, 711 n.106 (1985), For a good discussion of the parallels between the FSIA and the Alien Tort Claims Act see *id.* at 710-11.

Falk argues for similar deference in all matters in which international law allows for principled adjudication. According to Falk, "whether the United States is hostile or friendly to the state involved in the litigation should not be allowed to influence the judicial outcome. Internal deference should be based on functional principles of allocation and not upon *ad hoc* subordinations to executive policy." R. FALK, *supra* note 21, at 10-11.

132. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 436, where in discussing its nonacceptance of the Bernstein principle the Court noted that forcing the executive branch to take an official position might embarrass the executive more than allowing it to stay out of the process. The Court noted that:

> [O]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically . . . It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries.

See also Scharpf, *supra* note 106, at 582 (1966), discussing Justice Harlan's suggestion in *Sabbatino* "that the State Department may be much more embarrassed by the necessity to take a stand on questions of this nature than by the need to explain decisions of American courts to a foreign government." *Id.*; *see also* Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79, 91 (1948).

The attempt by former President Carter to formulate a coherent human rights policy also supports this argument. Despite its best intentions, his human rights policy was plagued with recrimination and accusation of hypocrisy, since the political reality of the time mandated that

This is especially true in cases like *Filartiga* and *Forti* where the issues implicate universally accepted international legal principles, and greater "embarrassment" to the United States would likely come from a "political" rather than a principled decision. The situations presented in *Filartiga* and, more recently, in *Forti* show that while there might be some effect on U.S. foreign relations from such adjudication, the implications arising from these cases are minimal.[133] The defendants in either case were neither current government officials, nor did they claim any sort of diplomatic immunity.[134] Peña, for example, had entered the United States on a visitor's visa and had stayed illegally with his girlfriend long after that visa had run out.[135]

As noted by the State Department[136] and international scholars,[137] no nation is likely to admit that torture is an officially sanctioned act of state, even if the alleged torturer committed his crimes in his capacity as an agent of that state. Adjudication of an action in tort for torture thus does not constitute an explicit condemnation of an official government policy, since the alleged torturer's individual actions, as opposed to his government's policies, are at issue in the adjudication. This further lessens the chance of executive "embarrassment" resulting from a section 1350 action for torture.[138]

Insult to a country's judicial system is also a possible result of redressing claims under section 1350.[139] Under the doctrine of *forum*

---

nations with less importance to U.S. geopolitical interests, like Argentina and Chile, received its full censure, while important allies, like South Korea and Iran, received only minimal censure.

133. The minimal implications for the executive are illustrated most clearly by the actions taken by the executive in these cases. Instructive in these situations is the fact that the U.S. government in *Forti* did not intervene in the case and in *Filartiga* intervened in behalf of the plaintiffs. *See United States: Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Peña-Irala*, 19 INT'L LEGAL MATS. 585 (1980). To his credit, Judge Bork recognized that *Filartiga* presented a fact situation where "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." *Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring).

134. *Filartiga*, 630 F.2d at 878; *Forti*, 694 F.Supp. at 708.

135. *See Filartiga*, 630 F.2d, at 878-79.

136. *See Memorandum For the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Peña-Irala*, *supra* note 132, at 598 n.34 noting that:

> [I]t has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.

137. For a good discussion of the evolution of the international law of human rights to its present state see Blum and Steinhardt, *The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. J. INT'L L. 53, 64-87 (1981).

138. The State Department's support for the Filartigas' action in this case and its continued pressure on the Paraguayan Government to improve its human rights record, attests to the fact that the Executive's handling of these relations was not impeded, and might have actually been strengthened by judicial action in this matter. *See Filartiga*, 630 F.2d at 884.

139. Judge Bork was quick to point this out in his *Tel-Oren* concurrence, stating that "[t]he United States would be perceived, and justly so, not as a nation magnanimously refereeing inter-

non conveniens the plaintiff has a choice of forum, but the court may choose not to exercise jurisdiction if it decides that the case may proceed justly and more conveniently in another court. If there are doubts about whether a case can be tried justly in the other forum, the proper procedure is for the court to take the case.[140] Thus, the adjudication of a torture claim may implicitly indicate a lack of faith in the judicial system of another nation. Insult is, however, by no means inevitable in such actions. First, convenience of the parties may indicate that the U.S. forum would be the most suitable. Secondly, adjudication in a U.S. forum does not preclude, and may actually complement, the judicial process in the defendant's state. The *Forti* case is illustrative.

In *Forti*, the defendant, Suarez-Mason, simultaneously faced criminal indictment in Argentina for many of the same actions being litigated in the U.S. civil action. While the Argentine government argued before the district court that Suarez-Mason should be extradited to Argentina to face the criminal charges pending against him, it never challenged the section 1350 action pending against him in that same district court.[141] It may be argued that rather than complicating U.S.-Argentine relations, the adjudication actually strengthened them since the *Forti* outcome complemented rather than hindered the Argentine justice system.[142]

Although the above argument may be seen as conjectural, it nevertheless underscores the conjectural nature of arguments that "certain" embarrassment will befall the executive branch when the judiciary decides these issues. The inevitability that such adjudication will do harm to our foreign relations, or cause "embarrassment" to the executive is largely illusory. The Supreme Court stressed in *Baker v. Carr* that it will abstain from deciding a case on its merits only after applying a three step "discriminating analysis." This analysis considers a

national disputes but as an officious interloper and an international busybody." *Tel-Oren*, 726 F.2d at 821 (Bork, J., concurring).

140. *See* 15 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, 33 n.13 (Supp 1980); *see also* SOHN AND BURGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 103 (1973).

141. *In re* Requested Extradition of Carlos Guillermo Suarez-Mason, 694 F.Supp. 676 (N.D. Cal. 1988).

142. A further benefit of this trial is that it may have served to decrease the inevitable suspicion that the U.S. actually supported the anti-communist terror committed by the military regimes. The United States is especially susceptible to this suspicion since it has developed a reputation (whether deserved or not) as a supporter of any anti-communist movement in Latin America. In its "dirty war" the Argentine military continuously justified these atrocities under the guise that they constituted a war on communist subversion. In the words of the Army representative, and President of the first junta, Jorge Rafael Videla (now serving a life sentence in Argentina for his part in these human rights abuses), the objective of this "dirty war" was to put an end to "subversive thought." 694 F. Supp. at 680, quoting NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED. Thus, there exists a degree of popular suspicion of the United States' complicity in these crimes. (The author also bases the statements in this footnote on his personal experiences living in post-junta Argentina).

case's importance in terms of its consequences to U.S. foreign relations, its susceptibility to judicial handling, and the history of its management by a particular branch.[143] *Filartiga* and *Forti* demonstrate that adjudication of universally recognized crimes under international law can be both judicially manageable and not detrimental to the overall diplomatic posture of the United States.

Although human rights issues are relatively new to the law, it has been nearly a century since the Supreme Court's *Paquette Habana* stressed that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as long as questions of depending on it are duly presented for determination."[144] Total judicial abdication of human rights issues to the "political branches" of government on the mere conjectural possibility of "embarrassment" would thus constitute an extraordinary step.[145] This step would place the executive in the uncomfortable position of making a political decision every time a suspected torturer came before U.S. courts. It would also send a signal to many of those very torturers that the United States represents safe haven if they should ever need a new home. Finally, it would also hinder the strong U.S. interest in strengthening international law[146] and protecting human rights globally.

B. *Who are the Judicial Activists?*

The debate over the propriety of judicial abdication (or resolution) of these issues has implicated another dimension of the separation of powers question. No discussion of *Filartiga* is complete without an attack or defense of the propriety of *Filartiga*'s reinterpretation of the Alien Tort Claims Act. Those who have reviewed Alien Tort Claims cases have had some difficulty understanding the context in which it was drafted.[147] Despite this fact, the law stands on the books with both language[148] and history[149] that do not preclude coherent

143. *See supra* note 119 and accompanying text.

144. *The Paquette Habana*, 175 U.S. 677, 700 (1900).

145. *See* Justice Powell's concurrence in *Citibank* in which Powell argued that allowing the executive to make a justiciability determination "in the name of the separation of powers seems to . . . conflict with that very doctrine." *Citibank*, 406 U.S. at 773. *See also supra* note 88.

Judicial abdication of such issues would not even seem consistent with the history of human rights in U.S. law. *See* Paust, *supra* note 36, at 543-629.

146. *See* R. FALK, *supra* note 21, at 12-13, where he states:

> The United States is the dominant law-oriented state. As a result, it possesses a special responsibility that can only be discharged by a self-conscious realization of its long-term interests in the development of a more stable world order. The use of domestic courts provides a symbolic means for the promotion of these interests.

147. *See Filartiga*, 630 F.2d at 886; *Tel-Oren*, 726 F.2d at 775, 811-16 (Bork, J., concurring); *see also* ITT v. Vencap, LTD, 519 F.2d 1001, 1015 (2d Cir. 1975), where Judge Friendly referred to the Alien Tort Claims Act as "a kind of legal Lohengrin . . . no one seems to know whence it came."

148. *See Tel-Oren*, 726 F.2d at 779 (opinion of Edwards, J., concurring). Judge Edwards

application.[150]

This was pointed out by Judge Edwards in his concurrence in *Tel-Oren* where he suggested that separation of powers concerns are better served by allowing suits such as *Filartiga*.[151] In an attack on Judge Bork's construction of the statute, Judge Edwards argued that by constructing section 1350 as granting no independent cause of action, Bork essentially regarded it as a statute "that had no meaning when passed by Congress and none today."[152] Judge Edwards noted that "to enforce a construction that yields that result is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature."[153] Essentially, Judge Edwards argued that Judge Bork engaged in the same sort of judicial activism of which Judge Bork accused both the Second Circuit and Judge Edwards himself.[154] While Bork spoke of separation of powers principles, he pur-

---

found that "[t]he language of the statute is explicit on the issue: by its express terms, nothing more than a violation of the law of nations is required to invoke section 1350."

149. For an extremely thorough discussion of the long history of human right precepts in U.S. jurisprudence, see Paust, *supra* note 36, at 543-629.

150. *See Filartiga*, 630 F.2d at 887-88, where the Second Circuit stated that:

> Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history, in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court . . . the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.

It is also worth noting that the Alien Tort Claims Act has been construed at least once in modern times as providing jurisdiction over an international tort of less severe gravity and international condemnation. Adra v. Clift, 195 F.Supp. 857 (D.Md. 1961), found jurisdiction under section 1350 for the international tort of fraudulent use of a passport.

Adra involved suit between a divorced couple (both aliens) over custody of their only child. After the divorce, a Lebanese court granted the father custody over the child, but the mother refused to relinquish custody and eventually moved to the United States. It was alleged that the defendant had falsified her passport in order to bring her daughter into the United States. *Adra* first found jurisdiction over the defendant in municipal law, since "the unlawful taking or witholding of a minor child from the custody of the parent or parents entitled to such custody is a tort." *Id.* at 862. Second, *Adra* found that the falsification of a passport (in order to spirit a child to the United states in order to violate the custody order) constituted a violation of international law. Though *Adra* can be distinguished from *Filartiga* in that it found jurisdication in both municipal and international law, it significantly did not require plaintiffs to plead a specific right to sue granted by the law of nations. *See supra* note 37 and accompanying text. Further, the court never broached the question of the separation of powers implications of a suit under section 1350. According to the *Adra* opinion "[t]he wrongful acts were . . . committed in violation of the law of nations. And since they caused direct and special injury to the plaintiff, he may bring an action in tort therefore." *Id.* at 865; *see also Tel-Oren*, 726 F.2d at 786-788 (Edwards, J., concurring).

151. *See Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring), stating that "[t]here is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it 'inoperative or superfluous, void or insignificant' ", quoting, C. SANDS, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973).

152. *Id.*

153. *Id.*

154. Judge Edwards eloquently described Judge Bork's position this way: "Vigorously waving in one hand a separation of powers banner, ironically, with the other he rewrites Congress' words and renounces the task that Congress has placed before him." *Id.* at 790.

posely ignored the statute's plain language that gave district courts jurisdiction over civil suits "by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."[155]

It can be forcefully argued that Judge Bork thus shirked his constitutional duty to "say what the law is." In waiting for further congressional direction, Bork relied on an incomplete history at the expense of following language that is facially possible to construe. Further, the history of this statute does not appear to be as incomplete as Bork contended. Human rights precepts certainly existed at the time of the First Judiciary Act.[156] His analysis appears to be based more on his own views of a proper judicial role in such disputes than on the language of the statute, its history, or canons of statutory construction. If we follow the dictates of language, history, and construction it would appear that the separation of powers argument is better served by *Filartiga*'s affirmative construction of section 1350, than by one which, as Judge Bork put it, "await[s] clarification elsewhere."[157]

CONCLUSION

In many respects the *Filartiga* decision exposed U.S. courts to a new reality in the international sphere. The rights of man, headily affirmed in the aftermath of Nazi brutality, no longer stand as mere pious proclamations; they have become international norms of behavior. United States law will not fully accept that new reality, however, until the torturer is viewed in our courts "like the pirate and the slave trader before him . . . an enemy of all mankind."[158]

The Alien Tort Claims Act appears to be a vehicle by which the First U.S. Congress allowed international law into our courts. Now in a new and very different era, these words, like so many others in the U.S. Constitution and laws, have taken on new meaning, raising familiar arguments about judicial usurpation of power. In a sense these arguments illustrate a much broader argument over the proper role for the courts in the U.S. separation of powers scheme. But in the continuing debate over the *Filartiga* rationale, those most loudly decrying judicial activism seem to be most active in ignoring the statute's language and history, as well as the world in which it operates.

In numerous decisions the Supreme Court has emphatically stressed that separation of powers concerns do not exclude the judiciary from matters touching upon the foreign relations of the United States. As this Note has shown, issues implicated in *Filartiga* and similar cases are not those which the Court has found consigned *solely* to

155. 28 U.S.C § 1350.

156. *See* Paust, *supra* note 36, at 650-51.

157. *Tel-Oren*, 727 F.2d at 823.

158. *Filartiga*, 630 F.2d at 890.

the political branches of government by the separation of powers doctrine. A reversal of *Filartiga*'s rationale by the Supreme Court would thus not only seriously retard the development of the international law of human rights, but also signal a fundamental change in the current separation of powers scheme.