

# FILARTIGA V. PENA-IRALA AFTER TEN YEARS: MAJOR BREAKTHROUGH OR LEGAL ODDITY?

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Whenever there is a landmark case, in any field, there is a tendency for scholars and would-be scholars to rush to interpret it, predict its effect, and conclude whether it is good or bad law from their perspective. In cases addressing issues on human rights, the United States case which has engendered the most attention is *Filartiga v. Pena-Irala*,<sup>1</sup> a 1980 decision of the Second Circuit Court of Appeals. After ten years, it is a good time to assess the impact of *Filartiga* and the interpretations and decisions which followed. In doing so, I will try to avoid the trap of concluding that *Filartiga* was a "good" or a "bad" decision, and will focus instead on identifying the issues and concerns which have been raised.

In Part I, I will discuss the *Filartiga* case itself, and follow with an examination of reaction to the case in Part II. Part III will discuss the two significant cases decided since *Filartiga* which have narrowed its application in other situations, and Part IV will examine cases relying on *Filartiga*. I conclude with a summary of what can be said about the continued reliance on *Filartiga* by persons seeking to redress alleged human rights violations.

## I. THE FILARTIGA DECISIONS

Dr. Joel Filartiga and his daughter, Dolly, were citizens of Paraguay during the administration of President Alfredo Stroessner, whose government Dr. Filartiga had long opposed.<sup>2</sup> On March 29, 1976, the Filartigas alleged that Dr. Filartiga's son, Joelito, was kidnapped and tortured to death by Americo Norberto Pena-Irala, then Inspector General of Police in Asuncion, Paraguay. Dolly was shown her brother's body at Pena-Irala's home, and told by him "[h]ere you have what you have been looking for for so long and what you

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<sup>1</sup> 630 F.2d 876 (2d Cir. 1980), *on remand*, 577 F.Supp. 860 (E.D.N.Y. 1984).

<sup>2</sup> 630 F.2d at 878.

deserve. Now shut up." It was the Filartiga's belief that Joelito was killed in retaliation for Dr. Filartiga's political activities.<sup>3</sup>

Dr. Filartiga initiated a criminal action against Pena-Irala in Paraguay, which resulted in the arrest of Filartiga's attorney and threats against the attorney by Pena-Irala. The attorney was subsequently disbarred. While the criminal action was pending, a member of Pena-Irala's household confessed to the crime, stating that it was a crime of passion. Despite his confession, he was not convicted or sentenced.<sup>4</sup>

The Filartigas and Pena-Irala separately came to the United States in 1978. Dolly subsequently learned that Pena-Irala had overstayed his visa and notified the Immigration and Naturalization Service (INS), who ordered him deported.<sup>5</sup> While Pena-Irala was being held pending deportation, the Filartigas filed suit against him for Joelito's death in the Federal Court for the Eastern District of New York. The Filartigas brought their action under wrongful death statutes, the UN Charter, the Universal Declaration on Human Rights, the UN Declaration Against Torture, the American Declaration of the Rights and Duties of Man, 28 U.S.C. § 1350 and the United States Constitution.<sup>6</sup> Section 1350, also known as the Alien Tort Statute, provides 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."<sup>7</sup>

Pena-Irala moved to dismiss the action for lack of subject matter jurisdiction and *forum non conveniens* (Paraguay being the more appropriate place for the action). The district court granted Pena-Irala's motion, dismissing for lack of jurisdiction. While the district court accepted the Filartigas' argument that torture violated the law of nations, it felt bound by two recent decisions of the Second Circuit which implied that a state's treatment of its own citizens could not amount to a violation of "the law of nations."<sup>8</sup>

In the belief that the Alien Tort Statute provided their best hope to establish federal jurisdiction, the Filartigas framed the issue on appeal as whether Pena-Irala's alleged conduct violated the law of

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 879.

<sup>6</sup> *Id.*

<sup>7</sup> Alien Tort Statute, Ch. 20, 1 Stat. 77 (1789) (codified as amended at 28 U.S.C. § 1350 (1948)).

<sup>8</sup> *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

nations.<sup>9</sup> Despite their attempts to stay Pena-Irala's deportation, he was deported prior to the appellate decision.<sup>10</sup>

The Second Circuit agreed with the Filartigas' position, stating that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."<sup>11</sup> In 1820, the United States Supreme Court had stated that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>12</sup> This principle was adopted and amplified by *The Paquete Habana*,<sup>13</sup> a 1900 case which held that examination of such works is not to determine what the law ought to be, "but for trustworthy evidence of what the law really is."<sup>14</sup>

The *Filartiga* court stated that its job was not to determine what was considered a violation of the law of nations in 1789, but to determine how that law has evolved and exists today.<sup>15</sup> In determining how torture is viewed, the court pointed to the universality of condemnation of torture, or at the least deprivation of basic human rights, in the UN Charter, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, and the American Convention on Human Rights and Fundamental Freedoms.<sup>16</sup> Further, the court noted that torture was prohibited (or a prohibition could be implied) by the constitutions of at least fifty-five countries, including Paraguay.<sup>17</sup> The court's conclusion was bolstered by the submission of a brief of the United States Departments of State and Justice, as *amicus curiae*, urging recognition of jurisdiction on the grounds that torture violates the law of nations.<sup>18</sup>

The court rejected Pena-Irala's argument that the court should not consider the claim because it would infringe on Congressional and executive authority for international affairs, and also because the tort

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<sup>9</sup> 630 F.2d at 880.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

<sup>13</sup> 175 U.S. 677 (1900).

<sup>14</sup> *Id.* at 700 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163, 214, 215 (1895)).

<sup>15</sup> 630 F.2d at 881.

<sup>16</sup> *Id.* at 881-84.

<sup>17</sup> *Id.* at 884.

<sup>18</sup> *Id.* The brief submitted by the United States is reprinted in 19 I.L.M. 585 (1980).

arose outside of the United States.<sup>19</sup> Under the clear language of the Alien Tort Statute, the court said it could consider any claim that met three conditions: an action by an alien, for a tort, committed in violation of the law of nations. Actions which could not normally be considered, the court said, would be ones for fraud, a plane crash, or child custody.<sup>20</sup>

While agreeing that the federal court had jurisdiction, the Second Circuit had to remand the case for a decision on which law to apply (probably Paraguayan), whether the claim would be barred by the act of state doctrine (the court said it doubted that Pena-Irala acted officially), and *forum non conveniens*.<sup>21</sup>

Judge Irving Kaufman, writing for a unanimous panel, concluded the opinion with a glimpse into his own hope for *Filartiga*:

Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.<sup>22</sup>

On remand (in which the deported Pena-Irala took no part), damages of \$5,175,000 were awarded to Dolly, and \$5,210,364 to Dr. Filartiga.<sup>23</sup> Of the amount awarded to each, \$5,000,000 was punitive damages, ironically not recognizable under Paraguayan law.<sup>24</sup>

## II. REACTION TO FILARTIGA

### A. *Favorable*

One of the most thorough reviews of the *Filartiga* case was also one of the earliest. Jeffrey Blum and Ralph Steinhardt came out with a lengthy analysis of *Filartiga* soon after its entry,<sup>25</sup> lauding

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<sup>19</sup> 630 F.2d 876, 885 (2d Cir. 1980), *on remand*, 577 F. Supp. 860 (E.D.N.Y. 1984).

<sup>20</sup> 630 F.2d at 888, n.23.

<sup>21</sup> *Id.* at 889-90.

<sup>22</sup> *Id.* at 890.

<sup>23</sup> 577 F.Supp. 860, 867 (E.D.N.Y. 1984).

<sup>24</sup> *Id.* at 865.

<sup>25</sup> Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981).

*Filartiga* as a newer mode of international lawmaking, emphasizing conventions and declarations as opposed to relying on contrary state practice.<sup>26</sup> The *Filartiga* case also represented a shift from a pure examination of the binding treaty/non-binding treaty dichotomy, relying more on the language of the international proclamations.<sup>27</sup>

The *Filartiga* court was hailed as one "educated in modern international law, which recognized its constitutional authority and responsibility to apply that law in appropriate cases."<sup>28</sup> *Filartiga* was a recognition of international law as a part of domestic law,<sup>29</sup> and reflected the proper, activist role of courts. It was thought that the participation of the Justice and State Departments would undermine any future claim that courts should abstain from addressing issues affecting foreign relations because of policy concerns.<sup>30</sup> Quite the opposite was felt to be true—that, as the Department of Justice stated in its brief, "[a] refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."<sup>31</sup> Not only had the Administration been correct in its position, but human rights specialists within the Administration could act in no other fashion—they had a *duty* to advocate a "progressive response," especially in light of the reference by the United States to the Declaration Against Torture in the Iranian hostages case.<sup>32</sup>

In the literature, the strength of the holding was also discussed because an alternative basis for asserting jurisdiction existed—that a theory of federal policy could support federal jurisdiction in matters of international significance as a type of "protective jurisdiction," to prevent the states from considering sensitive, international ques-

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<sup>26</sup> *Id.* at 74.

<sup>27</sup> *Id.*

<sup>28</sup> Burke, Coliver, De la Vega, & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 321 (1983).

<sup>29</sup> Cf. Schneebaum, *Human Rights in the Federal Courts: A Review of Recent Cases*, 44 U. PITT. L. REV. 287 (1983). Schneebaum represented the International Human Rights Law Group, The Council on Hemispheric Affairs and the Washington Office on Latin America as *amici curiae* in the *Filartiga* case. 630 F.2d at 877.

<sup>30</sup> See Case Comment, *International Law and Human Rights - Alien Tort Claims Under 28 U.S.C. § 1350*, 66 MINN. L. REV. 357, 368 n. 71 (1982).

<sup>31</sup> United States: *Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala*, 19 I.L.M. 585, 604 (1980)(hereinafter *Filartiga* Brief).

<sup>32</sup> See Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, 74 AM. SOC. INT'L L. PROC. 20, 24-25 (1980).

tions.<sup>33</sup> Regardless of the outcome, bringing a case like *Filartiga* could be beneficial by preventing further human rights violations and encouraging complaints of violations through the generation of publicity and media attention.<sup>34</sup>

Judge Kaufman, the author of the *Filartiga* opinion, aired his own views of its significance, stating that "the articulations of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order."<sup>35</sup> He did not see that courts would be "transformed into some kind of roaming human rights commission,"<sup>36</sup> but that the courts would merely be asked to exercise their obligation to identify egregious violations of international law, a task "in many ways analogous to the courts' traditional role in redressing deprivations of civil liberties that occur at home."<sup>37</sup>

There were many predictions about the effect *Filartiga* would have on subsequent claims and behavior of victims and perpetrators. Naturally, one subject was what other claims might be construed to implicate the "laws of nations" under the Alien Tort Statute. Blum and Steinhardt discussed this thoroughly, concluding that the act alleged must be the object of concerted international attention; must be definable and identifiable as a tort committed by individuals (which would exclude apartheid); must be textually obligatory in instruments; and must be universally condemned.<sup>38</sup> Applying these criteria, Blum and Steinhardt believed that genocide, summary execution, and slavery could be construed to violate the laws of nations.<sup>39</sup> Some advocates, such as Jordan Paust, went so far as to predict that it "shouldn't be too much more difficult to prove that blatant racial discrimination is a violation of international law," and that foreign-state immunity was a myth.<sup>40</sup> Paust's predictions, in contrast to those of Blum and Steinhardt, illustrate the tendency to overstate *Filartiga*'s impact so as to bolster pet theories.

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<sup>33</sup> See Note, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN L. REV. 353, 360 (1981) (hereinafter *Stanford Note*).

<sup>34</sup> See Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, in NEW DIRECTIONS IN HUMAN RIGHTS 109, 124 (E. Lutz, H. Hannum & K. Burke eds. 1989).

<sup>35</sup> Kaufman, N.Y. Times, Nov. 9, 1980, § 6 (Magazine), 44.

<sup>36</sup> *Id.* at 52.

<sup>37</sup> *Id.*

<sup>38</sup> Blum & Steinhardt, *supra* note 25, at 87-89.

<sup>39</sup> *Id.* at 90.

<sup>40</sup> Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT'L L. 81, 83-89 (1981).

Predictions of behavior of alleged torturers showed a certain naivete towards the publicity a case like *Filartiga* would generate. It was said the *Filartiga* would affect the decision of torturers to enter the United States;<sup>41</sup> that dictators could no longer rely on a safe haven in the United States;<sup>42</sup> likewise, that the United States would no longer be considered a "rest home" for retired torturers;<sup>43</sup> that a foreign attorney would advise his client to follow an alleged violator to the United States;<sup>44</sup> and that *Filartiga* would show the lawyer how to frame a claim.<sup>45</sup> *Filartiga* was hailed as the most significant domestic case dealing with international law in this century,<sup>46</sup> and that it "did as much to assist the development of this body of international law as *Fujii* did to retard it."<sup>47</sup>

Most of those who applauded *Filartiga* recognized that there were some limitations in its holding. Those problems most commonly mentioned were applying the law of the situs when considering the merits of the claim,<sup>48</sup> the doctrine of *forum non conveniens*,<sup>49</sup> and the realization that consideration of such claims in domestic courts might not be viewed favorably by the country involved.<sup>50</sup> Despite these problems, many felt that after *Filartiga* the Alien Tort Statute "provides the best means by which to hold an individual or, perhaps, a nation responsible for violation of human rights committed abroad."<sup>51</sup>

### B. Unfavorable

Without even reaching the jurisdictional questions, some questioned whether it could be said that torture *does* violate the law of nations. While not questioning the content of the various conventions and

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<sup>41</sup> Blum & Steinhardt, *supra* note 25, at 113.

<sup>42</sup> *Developments in the Law, Filartiga v. Pena-Irala: Providing Federal Jurisdiction for Human Rights Violations Through the Alien Tort Statute*, 10 DENVER J. INT'L L. 355, 359 (1981).

<sup>43</sup> Bazylar, *Litigating the International Law of Human Rights: A "How-To" Approach*, 7 WHITTIER L. REV. 713, 724 (1985).

<sup>44</sup> Paust, *supra* note 40, at 82.

<sup>45</sup> Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 401 (1985).

<sup>46</sup> Note, *The Domestic Application of International Human Rights Law: Evolving the Species*, 5 HASTINGS INT'L & COMP. L. REV. 161, 177 (1981).

<sup>47</sup> Lillich, *supra* note 45, at 399.

<sup>48</sup> Blum & Steinhardt, *supra* note 25, at 98.

<sup>49</sup> *Id.* at 103.

<sup>50</sup> *Id.* at 84.

<sup>51</sup> Bazylar, *supra* note 43, at 721.

declarations, commentators focused on *Filartiga*'s reliance on policy rather than practice and the non-binding status of the cited declarations.

The fact that torture exists in any country (especially one which has ostensibly spoken out against torture) "discredits the notion that torture has become a violation of international law because of the usage and practice of nations."<sup>52</sup> The doubt that practice would be ignored by other fora, such as the International Court of Justice ("ICJ"), was raised by some,<sup>53</sup> based in part on an interpretation of ICJ procedure that "it is only the actions of states that build up practice, just as it is only practice . . . that constitutes a usage or custom, and builds up eventually a rule of customary international law."<sup>54</sup> Ironically, this view seems to ignore its corollary—that abstention from a practice is proof of law, which is clearly *not* a valid argument since there are reasons not to torture other than because it violates a law.<sup>55</sup>

The apparent elevation of non-binding treaties and declarations into authoritative statements of law was another basis for criticism of the *Filartiga* ruling.<sup>56</sup> To sustain an argument that a provision of human rights law is law in a domestic court, some suggested it must be shown that this effect was intended by national lawmakers.<sup>57</sup> The *Filartiga* judges were criticized "for going farther than they had to in applying, with great assurance, a consuetudinarian law of human rights that in world terms may not be so assured."<sup>58</sup> In fact, the

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<sup>52</sup> Case Comment, *Torture is a Tort in Violation of the Laws of Nations, Giving Rise to Federal Jurisdiction Pursuant to 28 U.S.C. § 1350 Whenever an Alleged Torturer, Regardless of Nationality, is Served with Process by an Alien Within the Border of the United States. Filartiga v. Pena-Irala*, 49 U. CIN. L. REV. 880, 890 (1980).

<sup>53</sup> See, e.g., Oliver, *A Brief Replication: The Big Picture and Mr. Schneebaum's Reply*, 5 HOUS. J. INT'L L. 151, 154 (1982); Case Comment, 28 U.S.C. 1350: *A Legal Remedy for Torture in Paraguay?*, 69 GEO. L.J. 833, 845 (1981) (hereinafter *A Legal Remedy*).

<sup>54</sup> Fitzmaurice, *General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 68 (1953).

<sup>55</sup> Johnson, *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law By a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 338 (1981).

<sup>56</sup> See, e.g., *A Legal Remedy*, *supra* note 53, at 841; Johnson, *supra* note 55, at 365, 372.

<sup>57</sup> Comment, *Symposium on International Human Rights Law in State Courts*, 18 INT'L L. 77 (1984).

<sup>58</sup> Oliver, *supra* note 53, at 152.



adopting Declaration Against Torture refers to it as a "guideline," not a binding statement.<sup>59</sup>

Aside from questioning the *Filartiga* conclusion about the law of nations, some were concerned about the propriety of United States courts considering this type of action, as an infringement on the powers of the legislative and executive branches,<sup>60</sup> and the risk of insulting the country where the act allegedly occurred. It was contended that not only should the court have considered whether it had the authority to hear the case, but that it should have considered "the potential impact that exercising this authority might have on the international community, especially given this country's questionable record as a genuine supporter of human rights."<sup>61</sup> Just how the court could consider this issue while being mindful of not running afoul of the separation of powers was not addressed by that author.

Other countries could view this exercise of jurisdiction as a form of "moral imperialism" by the United States,<sup>62</sup> with the acceptance of international norms on one hand, but with jurisprudence in American courts.<sup>63</sup> "[I]f other countries passed similar domestic statutes giving rise to local adjudication for international torts or wrongs committed outside those countries, the results might be that many foreign visitors to such countries would be liable to the kind of action which neither the visitors nor their home states might like."<sup>64</sup>

While those supporting *Filartiga* viewed it as a natural step in the progression of recognition of human rights, critics thought it was "manifestly contrary to the trend of the philosophy of international protection of human rights."<sup>65</sup> There is clear disagreement over whether an individual should and does have the right to seek redress for human rights violations, or whether that is an undesirable extension of existing law.<sup>66</sup> There is the further question of whether an individual can be held responsible for a human rights violation, to which a

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<sup>59</sup> D'Zurilla, *Individual Responsibility for Torture Under International Law*, 56 TUL. L. REV. 186, 207 (1981).

<sup>60</sup> *A Legal Remedy*, *supra* note 53, at 846.

<sup>61</sup> Note, *Enforcement of International Human Rights in the Federal Courts after Filartiga v. Pena-Irala*, 67 VA. L. REV. 1379, 1380 (1981)(hereinafter *Enforcement*).

<sup>62</sup> Johnson, *supra* note 55, at 340.

<sup>63</sup> Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT. & COMP. L. Q. 250, 256 (1983).

<sup>64</sup> *Id.* at 257.

<sup>65</sup> *Id.* at 256.

<sup>66</sup> Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, 5 HOUS. J. INT'L L. 131, 137 (1982).

classicist would answer "no" but "modern international law" would indicate yes.<sup>67</sup> While international law was said to contain a prohibition against torture, the *Filartiga* court failed to examine whether that same law would recognize an individual right of action against an individual actor.<sup>68</sup> This argument, however, ignores the issues which actually had to be considered by the *Filartiga* court in construing a statute which clearly gives an individual the right to sue another individual. It was not necessary, nor appropriate, for the *Filartiga* court to look to international law for any guidance other than to answer the question of what constitutes a violation of the law of nations.

The critics of *Filartiga* did not engage in the same sort of far-flung predictions as did its proponents, other than raising an occasional statement such as "the United States may begin to decline as a center of commerce if prominent concerns become reluctant to store assets or venture into the country."<sup>69</sup> Most opponents either argued for restrictions on the application of *Filartiga*, or pointed out that it could actually harm efforts to draw attention to human rights violations.

The suggestions to limit *Filartiga* were usually along the line of requiring a more specific directive from Congress before courts should exercise jurisdiction. One author proposed a three-part framework before jurisdiction should be granted:

1. The jurisdiction has been authorized by Congress and conforms with the principles of international law;
2. There is a substantial international consensus that the alleged wrongdoing is proscribed by international law; and
3. A preferable forum is not available.<sup>70</sup>

It is clear that this framework is not that much different from the analysis made in *Filartiga*, and would not avoid the discussions which followed the decision.

Not only were the problems of enforcing any judgment duly noted by friend and foe of *Filartiga*,<sup>71</sup> but it was argued that "such well-

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<sup>67</sup> D'Zurilla, *supra* note 59, at 188-89.

<sup>68</sup> *Id.* at 202-07.

<sup>69</sup> Case Comment, *Internal Deed of Foreign Official Actionable in United States Court, Filartiga v. Pena-Irala*, 5 SUFFOLK TRANSNT'L L. J. 297, 306 (1981).

<sup>70</sup> *Enforcement*, *supra* note 61, at 1390.

<sup>71</sup> Johnson, *supra* note 55, at 335; Hassan, *supra* note 66, at 257; Burke, et al., *supra* note 28, at 322.

motivated actions can do more harm than good”<sup>72</sup> in providing the illusion of a remedy, (“a mirage—a glimpse of an oasis in a desert,”<sup>73</sup>) delaying and detracting attention from more rewarding means of redress. Even the Department of Justice, in its brief urging jurisdiction, admitted “[w]hen the parties and the conduct alleged in the complaint have as little contact with the United States as they have here, abstention is generally appropriate.”<sup>74</sup>

A prescient caveat focused on the weight of authority given to the position of the Administration in *Filartiga*,<sup>75</sup> and the likelihood that the executive departments “may well be less supportive of the court’s decision the next time this statute is interpreted, particularly in view of the Reagan Administration’s shift in foreign policy away from an emphasis on human rights.”<sup>76</sup>

The discussion concerning remedies available to the plaintiff may overlook a primary reason for bringing such claims. “[W]hat is the primary object of the exercise—to win freedom for the victim by the most effective and certain means at hand or to seize an opportunity to propagandize human rights as international law?”<sup>77</sup> As illustrated by Judge Kaufman’s own participation in the publicity surrounding *Filartiga*,<sup>78</sup> judges must be “cautious not to become human rights activists themselves” for this may result in a backlash against human rights.<sup>79</sup> This warning was to be prophetic of subsequent decisions addressing the Alien Tort Statute.

One of the most interesting commentaries on *Filartiga*, and one gently negative, was that written by Dean Rusk,<sup>80</sup> former Secretary of State under Kennedy and Johnson, in which he characterized *Filartiga* as “a legal oddity, not a landmark case with far-reaching implications for the development of international law.”<sup>81</sup> Rusk was

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<sup>72</sup> Hassan, *supra* note 66, at 257.

<sup>73</sup> Hassan, *Panacea or Olivage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 Hous. J. INT’L L. 13, 14 (1981).

<sup>74</sup> *Filartiga* Brief, *supra* note 31, at 606 n. 48.

<sup>75</sup> Note, *Filartiga v. Pena-Irala: A New Forum for Violations of International Human Rights*, 30 AM. UNIV. L. REV. 807, 829 (1981).

<sup>76</sup> Johnson, *supra* note 55, at 341.

<sup>77</sup> Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 Hous. J. INT’L L. 59, 63 (1981).

<sup>78</sup> See *supra* notes 41-43 and accompanying text.

<sup>79</sup> Oliver, *supra* note 77.

<sup>80</sup> Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT’L & COMP. L. 311 (1981).

<sup>81</sup> *Id.*

especially concerned with relying on the Universal Declaration to support the conclusion that torture violates the law of nations:

There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter . . . . There may be those who think that the promotion of General Assembly Resolutions to the status of international law would be a major step forward in the development of international law; they must keep in mind, however, that any such assumed role would lead to the breakup of the United Nations.<sup>82</sup>

Rusk attributed the *Filartiga* ruling to an activist role by the court, stating "[i]t is entirely understandable that common law judges might feel that if such an act is not a violation of the law of nations, it jolly well ought to be."<sup>83</sup> Ironically, for a commentator well-versed in the political arena of foreign relations, Rusk failed to acknowledge the impact of the recommendation by the Justice and State Departments on the "common law judges' " ruling.

### III. NARROWING *FILARTIGA*

Two major cases since *Filartiga* clarified the view of prominent judiciary toward the holding and cast doubt on its continued validity as precedent in all but the narrowest of circumstances. The first case, *Tel-Oren v. Libyan Arab Republic*,<sup>84</sup> was decided by the influential Court of Appeals of the District of Columbia, a far more conservative panel than the Second Circuit. Adding to the weight of *Tel-Oren*, the Supreme Court denied its petition for certiorari.

The second case, *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>85</sup> was decided by the Supreme Court in 1989. While it involved a commercial tort, the holding in *Amerada Hess* directly limits the situations in which a *Filartiga*-type claim could be brought.

#### A. *Tel-Oren v. Libyan Arab Republic*<sup>86</sup>

This case involved a claim by the survivors and personal representatives of the casualties of a terrorist attack on a bus in Israel on March 11, 1978. The suit was brought against the Libyan Arab

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<sup>82</sup> *Id.* at 314.

<sup>83</sup> *Id.* at 311.

<sup>84</sup> 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

<sup>85</sup> 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

<sup>86</sup> *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 544 (D.D.C. 1981).

Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. The plaintiffs alleged that the acts of the defendants violated the law of nations, and that the court therefore had jurisdiction under the Alien Tort Statute.<sup>87</sup>

The district court dismissed the case for lack of jurisdiction and failure to comply with the District of Columbia's one year statute of limitations. The basic premise of the court's holding was that the Alien Tort Statute is relevant for jurisdiction only, and that it does not provide a cause of action.<sup>88</sup> In other words, the plaintiffs must show that a law has been violated and that the law envisions a specific right to a private claim for the Alien Tort Statute to be the jurisdictional basis.<sup>89</sup> The court also expressed doubt as to whether the "vague, conclusory allegations of conspiracy" would constitute a violation of the law of nations.<sup>90</sup> The court was cognizant of and relied upon some of the post-*Filartiga* scholarly writings.<sup>91</sup>

The plaintiffs appealed the dismissal to the Court of Appeals, which issued a terse, four paragraph *per curiam* decision affirming the dismissal.<sup>92</sup> What followed, however, was anything but terse - fifty-two pages of concurring opinions from three Circuit judges, each of whom had different reasons for upholding the dismissal.

Judge Edwards supported the *Filartiga* holding, but felt the law of nations could not be extended to apply to acts of non-state actors like the PLO, as opposed to those acting under color of state law, like Pena-Irala.<sup>93</sup> He said that *Filartiga* stood for four propositions:

1. The "law of nations" is not stagnant and should be construed as it exists today among the nations of the world.
2. One source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators.
3. International law today places limits on a state's power to torture persons held in custody, and confers "fundamental rights upon all people" to be free from torture.
4. Section 1350 opens the federal courts for adjudication of the rights already recognized by international law.<sup>94</sup>

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<sup>87</sup> *Id.* at 544-45.

<sup>88</sup> *Id.* at 549.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, citing Blum & Steinhardt, *supra* note 25; Stanford Note, *supra* note 33.

<sup>92</sup> 726 F.2d at 775.

<sup>93</sup> *Id.* at 776.

<sup>94</sup> *Id.* at 777.

Because Justice Edwards agreed with these principles, and Judges Bork and Robb did not, he wrote separately.

Justice Edwards stated that the Alien Tort Statute provides its own cause of action. It would be incongruous to look to international law for a cause of action, as that would in effect require that international law provide domestic remedies. "[T]o require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350," a result not permitted by standard rules of statutory construction.<sup>95</sup>

Edwards pointed out that Judge Bork would read into the Alien Tort Statute three offenses which would have violated the law of nations in 1789—violation of safe-conducts, infringement of the rights of ambassadors, and piracy. The recognition of these causes of action implied by the Alien Tort Statute is inconsistent with the argument that it does not create a private cause of action.<sup>96</sup>

Additionally, Edwards noted that the Alien Tort Statute addresses a "violation" of the law of nations, not an action "arising under" the laws as is stated in 28 U.S.C. § 1331, another jurisdictional statute which has been held to require an independent cause of action.<sup>97</sup> The paucity of case law interpreting the statute makes finding precedent difficult, but Edwards' view was consistent with a 1907 opinion of the United States Attorney General that the Alien Tort Statute provides both a right to sue and a forum.<sup>98</sup>

Edwards would also permit jurisdiction under an alternative interpretation of the Alien Tort Statute—that it provides federal court jurisdiction over claims by aliens for common law torts.<sup>99</sup> Edwards position had been adopted by one pre-*Filartiga* case<sup>100</sup> and is similar to the proposal made in at least one post-*Filartiga* commentary.<sup>101</sup> Such an approach would lessen the burden of determining what constitutes a violation of the law of nations.<sup>102</sup> Edwards would limit these cases to claims for torts that occur in United States territory

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<sup>95</sup> *Id.* at 778.

<sup>96</sup> *Id.* at 778-79.

<sup>97</sup> *Id.* at 779.

<sup>98</sup> See 26 Op. Att'y Gen. 250, 251-53 (1907).

<sup>99</sup> *Id.* at 782.

<sup>100</sup> *Adra v. Clift*, 195 F.Supp. 857 (D. Md. 1961).

<sup>101</sup> *Stanford Note*, *supra* note 33 and accompanying text.

<sup>102</sup> 726 F.2d at 787.

and injure "substantial rights,"<sup>103</sup> or involve "universal crimes," or "torts committed by Americans abroad."<sup>104</sup>

As for whether courts should, for policy reasons, abstain from considering such claims, Edwards believed that permitting jurisdiction under a statute is less intrusive on congressional authority than declining to exercise jurisdiction for fear of exacerbating tensions.<sup>105</sup> "I am the first to admit that section 1350 presents difficulties in implementation, but to construe it out of existence on that ground is to usurp Congress' role and contravene its will."<sup>106</sup> Edwards noted that state courts have the power to hear tort claims brought by aliens, regardless of the interpretation of the Alien Tort Statute, and to deny federal jurisdiction would not eliminate the power of a state court to adjudicate, which could be more intrusive on foreign relations than federal court action.<sup>107</sup>

Despite his agreement with *Filartiga*, Edwards felt the Tel-Oren claim was non-cognizable as it alleged acts by persons operating outside the dictates of international law.<sup>108</sup> The degree of international consensus on official torture is not present when faced with individual action not taken under color of state law.<sup>109</sup> "[F]or each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go."<sup>110</sup>

Edwards looked for and failed to find consensus on whether terrorism can be a violation of the law of nations,<sup>111</sup> thus providing another basis for declining to exercise jurisdiction. He disagreed, however, with Judge Robb's conclusion that jurisdiction should be withheld because the case raised a "nonjusticiable political question."<sup>112</sup> Edwards believed that ambiguity in a statute does not entitle

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<sup>103</sup> *Id.* at 788; see also 26 Op. Att'y Gen. 250, 252-53 (1907).

<sup>104</sup> 726 F.2d at 788.

<sup>105</sup> *Id.* at 789.

<sup>106</sup> *Id.* at 790.

<sup>107</sup> *Id.* Edwards points out that section 1350 has twice been recognized by the Supreme Court as "a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal courts." *Id.* at 790-91, citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Ex parte Quirin*, 317 U.S. 1, 27-30 n.6 (1942).

<sup>108</sup> 726 F.2d at 792.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 794.

<sup>111</sup> *Id.* at 795-96.

<sup>112</sup> *Id.* at 796-98.

a court to retreat from hard questions under such "facile labels" as nonjusticiability, since the political question doctrine precludes review only of acts of recognized governments within their own territory.<sup>113</sup>

Judge Bork's primary objection to granting jurisdiction was that the statute provided no cause of action. Bork said "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal,"<sup>114</sup> because of the effect this would have on the conduct of foreign relations—a power committed to the executive and legislative branches.<sup>115</sup> Bork supported his position that the claim was essentially political by pointing to a statement by plaintiffs that one of the primary purposes of the attack had been to sabotage the foreign relations of the United States by affecting the positive efforts made in the Camp David accords.<sup>116</sup>

Bork echoed Edwards' points concerning international law imposing duties only on states and the lack of consensus on terrorism, but criticized Edwards for finding support for a cause of action in treaties which are not self-executing.<sup>117</sup> By taking such a position, Bork said the effect was to make the treaties self-executing.

Bork then applied his typical approach of using "original intent" to determine what causes of action *could* be asserted under the Alien Tort Statute.<sup>118</sup> As discussed previously,<sup>119</sup> Bork said only those alien tort actions recognized by Blackstone, "a writer certainly familiar with colonial lawyers,"<sup>120</sup> could be brought under the Alien Tort Statute. To permit human rights claims, a concept unknown in 1789,<sup>121</sup> would "conflict with the primary purpose of the adoption of the law of nations by federal law—to promote American's peaceful relations with other nations."<sup>122</sup> It would be "breathtaking folly" to conclude that the United States of 1789, a "young, weak nation" would "undertake casually and without debate to regulate the conduct of

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 801.

<sup>115</sup> *Id.* Bork based his argument in large part on *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), a case applying the act of state doctrine.

<sup>116</sup> 726 F.2d at 805.

<sup>117</sup> *Id.* at 812.

<sup>118</sup> *Id.* at 812-13.

<sup>119</sup> *Supra* notes 96-97 and accompanying text.

<sup>120</sup> 726 F.2d at 813.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 816.



other nations and individuals abroad.”<sup>123</sup> Bork said that permitting jurisdiction would cause the United States to be perceived “as an officious interloper and an international busybody.”<sup>124</sup>

Judge Robb declined jurisdiction on the basis of the political question doctrine, a basis also cited favorably by Bork.<sup>125</sup> Robb felt that the case involved standards beyond the purview of a court, such as whether terrorism is a tort and who bears individual responsibility.<sup>126</sup> Further, he felt that any discussion as to the status of a group such as the PLO should be made only by the political branch, not a court, and that even Bork went too far in addressing the status of the PLO.<sup>127</sup> Robb envisioned the courts becoming overwhelmed by unanswerable questions and the “transformation of trials into forums for the exposition of political propaganda.”<sup>128</sup> He said courts would become “debating clubs for professors” with plaintiffs “trooping” to court, marshalling their experts behind them.<sup>129</sup> “It is too glib to assert simply that courts are used to dealing with difficult questions. They are not used to this kind of question.”<sup>130</sup>

*Tel-Oren* thus provided a forum for three judges with three different opinions on why *Filartiga* could not be extended. Of the three, Judge Robb took perhaps the harshest step by calling for abstention in all cases of this sort on the basis of nonjusticiability and the political question doctrine. While attracted by the easy out of the political question doctrine, Bork relied primarily on the lack of a cause of action in the Alien Tort Statute, and the need for a clear statement due to the sensitivity of foreign relations. Edwards was the only judge who showed any affinity for *Filartiga*, but he would limit it to claims against states or those acting under color of state law and alleging acts of universal repugnance.

#### B. *Argentine Republic v. Amerada Hess Shipping Corporation*<sup>131</sup>

This case, while seemingly distinguishable from *Filartiga* due to its commercial nature, stands for yet another limitation on *Filartiga*'s

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<sup>123</sup> *Id.* at 821.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 823.

<sup>126</sup> *Id.* at 823-24.

<sup>127</sup> *See id.* at 824.

<sup>128</sup> *Id.* at 826.

<sup>129</sup> *See id.* at 827.

<sup>130</sup> *Id.*

<sup>131</sup> 488 U.S. at 428.

continued use. This action arose out of a claim by the owner of a Liberian oil tanker for damage sustained when the tanker was bombed during the Falkland Islands war. Among other things, the action was brought under the Alien Tort Statute for an alleged violation of the right of a neutral ship to free passage on the high seas.

The Second Circuit (with two of the three *Filartiga* judges) held that jurisdiction should be upheld as the allegations involved clear violations of international law<sup>132</sup> and the Alien Tort Statute provides jurisdiction over sovereign states.<sup>133</sup> One of the original *Filartiga* judges dissented, stating that he was now skeptical of tying jurisdiction to the "ebb and flow [of] the vicissitudes of 'evolving standards of international law.'"<sup>134</sup>

The Supreme Court reversed, holding that the Foreign Sovereign Immunities Act<sup>135</sup> takes precedence over the Alien Tort Statute and does not permit jurisdiction over a sovereign state.<sup>136</sup> While not directly affecting the continued validity of *Filartiga*, *Amerada Hess* precludes acts against a sovereign under the Alien Tort Statute. Further, the Court in *dicta* stated that certain conventions cited by the appellants "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts."<sup>137</sup> This language seems to support Bork's *Tel-Oren* argument about the need for a cause of action in addition to the jurisdictional statute.

### C. Reaction

While *Amerada Hess* is too recent to have much published analysis, *Tel-Oren* has been roundly criticized by those who praised *Filartiga*. Unlike the Second Circuit, the D.C. Circuit acted in "abdication of the responsibility assigned to the courts by Congress"<sup>138</sup> "which will slam shut the door opened by *Filartiga*."<sup>139</sup> Judge Bork's opinion

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<sup>132</sup> 830 F.2d at 423.

<sup>133</sup> *Id.* at 425.

<sup>134</sup> *Id.* at 429 (Kearse, J., dissenting).

<sup>135</sup> 28 U.S.C. § 1330 *et seq.*

<sup>136</sup> 488 U.S. at 428.

<sup>137</sup> *Id.*

<sup>138</sup> Recent Development, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697, 715 (1985).

<sup>139</sup> Wellbaum, *International Human Rights Claims After Tel-Oren v. Libyan Arab Republic: Swan Song for the Legal Lohengrin?*, 9 HASTINGS INT'L & COMP. L. REV. 107, 147 (1985).

was scrutinized most, perhaps because it seemed "most scholarly,"<sup>140</sup> but also because it was seen to effectively preclude an alien from raising *any* claim of international law.<sup>141</sup> The basis for Bork's decision was seen to be his "hostility or resistance to the notion of domestically enforceable rights arising under customary international human rights law."<sup>142</sup>

Not only was Bork criticized, but so were the *Tel-Oren* plaintiffs. *Tel-Oren* was "a judicial disaster that might have been avoided had minimal research been undertaken prior to the commencement of suit."<sup>143</sup> It was a "misguided attempt to establish that acts of 'international terrorism' violate customary international law and hence are actionable under the Alien Tort Statute . . . . [E]ven cursory research by counsel would have revealed that customary international law as yet contains no general prohibition of terrorism."<sup>144</sup> Lillich's assertion on this point is undermined by Edwards' citation to several authorities for the proposition that terrorism *could* be said to violate international law,<sup>145</sup> and other commentators who say the court could have concluded terrorism is a violation of the law of nations.<sup>146</sup>

Perhaps because Judge Edwards did such a thorough job of rebutting Judge Bork, few analysts did more than just disagree with Bork. One did note the early (1820) recognition of the evolving nature of international law as calling into question Bork's reliance on original intent;<sup>147</sup> that Bork's position would require an element of proof which the statute does not, violating a basic law of statutory construction;<sup>148</sup> and would render the Alien Tort Statute superfluous

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<sup>140</sup> D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985).

<sup>141</sup> *Id.* at 100; Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 179 (1985).

<sup>142</sup> Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741, 749 (1985). Hartman was one of the drafters of the Government's Brief in *Filartiga*.

<sup>143</sup> Lillich, *supra* note 45, at 414-15 n. 227.

<sup>144</sup> *Id.* at 401 n. 161.

<sup>145</sup> 726 F.2d at 795-96.

<sup>146</sup> See, e.g., Wellbaum, *supra* note 139, at 125; Comment, *International Terrorism: Beyond the Scope of International Law: Tel-Oren v. Libyan Arab Republic*, 12 BROOKLYN J. INT'L L. 505, 549 (1986).

<sup>147</sup> See, Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U.J. INT'L L. & POL. 1, 40-46 (1985), citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

<sup>148</sup> Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U.J. INT'L L. & POL. 473, 479-80 (1986).

because federal question jurisdiction could be used where an explicit cause of action was present.<sup>149</sup> Another commentator observed that the historical background of the statute was inconsistent with a narrow application, noting that in a 1781 resolution the Continental Congress recognized that Blackstone's three violations of the law of nations were not exclusive.<sup>150</sup> These points cast doubt on the academic bases for Bork's opinion, scholarly though it may appear.

As of yet, there is little criticism of the *Amerada Hess* holding, although there have been many calls to amend the Foreign Sovereign Immunities Act so as to permit jurisdiction when a foreign sovereign violates international law.<sup>151</sup> There is an argument to be made, as was stated by Justices Blackmun and Marshall in their concurring opinion, that an exception to immunity could be implied in the case of violations of international law.<sup>152</sup>

#### IV. CASE LAW SINCE *FILARTIGA*

Although a number of claims have been brought in reliance on *Filartiga*, their results and those of non-Alien Tort Statute cases interpreting *Filartiga* show mainly what will not be considered by United States courts. The Alien Tort Statute will not confer jurisdiction over the following claims: An action by a Colombian winner of the New York lottery for lump-sum payment of lottery winnings;<sup>153</sup> breach of contract;<sup>154</sup> fraud;<sup>155</sup> conversion;<sup>156</sup> damage caused by the

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<sup>149</sup> *Id.* at 481.

<sup>150</sup> Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 499 (1986).

<sup>151</sup> See, e.g., Comment, *Must the Foreign Sovereign Immunities Act Bar International Human Rights Claims?*, 23 SAN DIEGO L. REV. 741, 759-60 (1986); Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109 (1988).

<sup>152</sup> — U.S. —, 109 S.Ct. at 692-93. See also, Belsky, Merva & Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Laws*, 77 CALIF. L. REV. 365, 394 (1989).

<sup>153</sup> *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983). The Alien Tort Statute "applies only to shockingly egregious violations of universally recognized principles of international law." *Id.* at 692.

<sup>154</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

<sup>155</sup> *Trans-Continental Inv. Corp. v. Bank of Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980).

<sup>156</sup> *Security Pacific National Bank v. Derderian*, 872 F.2d 281, 285 n.8 (9th Cir. 1989).

1986 United States airstrike on Libya;<sup>157</sup> purely local actions;<sup>158</sup> suits arising out of public acts of the sovereign;<sup>159</sup> employment-related torts;<sup>160</sup> wrongful death;<sup>161</sup> embezzlement;<sup>162</sup> eavesdropping by the state;<sup>163</sup> first amendment violations;<sup>164</sup> expropriation of property by a state;<sup>165</sup> and suits against foreign states.<sup>166</sup>

The Alien Tort Statute also could not be used to support a claim by Nicaraguan citizens that the actions of executives of the United States in supporting the Nicaraguan contras violated any treaty or customary international law.<sup>167</sup> That opinion, written by present Supreme Court Justice Scalia, relies on the same original intent argument favored by Judge Bork in *Tel-Oren*.<sup>168</sup>

A number of cases rely on *Filartiga* as a basis for determining what international law is, including at least one which relied on the UN Charter to prove that Connecticut state prison conditions were unconstitutional.<sup>169</sup> As in that case, most of these cases are efforts

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<sup>157</sup> *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2172 (1990). This action, also brought against the United Kingdom and Prime Minister Margaret Thatcher, was considered by the court to be so groundless that sanctions were imposed against the plaintiffs.

<sup>158</sup> *Ramirez de Arellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983), *reh'g en banc*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985).

<sup>159</sup> *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1369-70 (9th Cir. 1988) (Schroeder, J., concurring in part and dissenting in part), *cert. denied*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1933 (1989); *Republic of Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986), *cert. denied*, *New York Land Co. v. Republic of Philippines*, 481 U.S. 1048 (1987). Review of such cases is precluded under the act of state doctrine.

<sup>160</sup> *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983).

<sup>161</sup> *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989).

<sup>162</sup> *Cohen v. Hartman*, 490 F. Supp. 517 (S.D. Fla. 1980), *aff'd*, 634 F.2d 318 (5th Cir. 1981).

<sup>163</sup> *United States v. Covos*, 872 F.2d 805 (8th Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 124 (1989) (warrantless use of a pen register does not violate customary principles of international law).

<sup>164</sup> *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986); *Akbar v. New York Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1980).

<sup>165</sup> *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385 (5th Cir. 1985); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982).

<sup>166</sup> *Siderman v. Argentina*, No. CV82-1772-RMT (D. Cent. Cal. Mar. 7, 1985) (1984 WL 9080).

<sup>167</sup> *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

<sup>168</sup> *Id.* at 206-07.

<sup>169</sup> *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981).

to show that some domestic activity is a violation of international law.<sup>170</sup>

Only two cases since *Filartiga* could be said to rely directly upon it as precedent and even expand its application. In *Von Dardel v. Union of Soviet Socialist Republics*,<sup>171</sup> a claim was brought under the Alien Tort Statute by the half brother of Raoul Wallenberg, a Swedish diplomat allegedly arrested, imprisoned and possibly killed by representatives of the Soviet Union in 1945. Although the Soviet Union did not respond to the suit, and raised no defenses, the district court carefully addressed all of the arguments raised by the D.C. Circuit Court in *Tel-Oren*, and distinguished *Tel-Oren* on every point.<sup>172</sup> The detention of a diplomat by a state would clearly violate the law of nations, satisfying the concerns of Judge Edwards.<sup>173</sup> Such an act would have been in violation of the law of nations even in 1789, which was the thrust of Judge Bork's concern in *Tel-Oren*.<sup>174</sup> Further, given the universality of condemnation for interference with diplomats, the court reasoned that adherence to clear international law would not interfere in a politically sensitive area, Judge Robb's basis for dismissing *Tel-Oren*.<sup>175</sup> The court was not concerned about the running of the statute of limitations as plaintiffs alleged Wallenberg was still alive, making his detention a continuing violation.<sup>176</sup> The

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<sup>170</sup> See, e.g., *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (D. Ga. 1985) and *Fernandez v. Wilkinson*, 505 F. Supp. 787 (1980)(Mariel Cuban cases); *United States v. Buck*, 690 F. Supp. 1291 (S.D.N.Y. 1988)(motion to dismiss indictments against persons of African ancestry who committed allegedly criminal acts in their efforts to establish "Republic of New Afrika," a country consisting of Mississippi, Alabama, Louisiana, Georgia and South Carolina); *Ishtyaq v. Nelson*, 627 F. Supp. 13 (E.D.N.Y. 1983)(claim that detention by INS of Afghan and Iranian refugees was not invalid as violative of UN Protocol Relating to the Status of Refugees). In *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985), a claim was brought by U.S. citizens (formerly Yugoslavian citizens) against Andrija Artukovic for acts he allegedly committed against Yugoslav Jews in World War II. The case was not brought under the Alien Tort Statute and did not directly rely on *Filartiga*, but did conclude that the alleged acts would constitute a violation against the laws of humanity at the time they were committed. *Id.* at 1429. The case was dismissed, however, as it was not brought within the applicable *municipal* one year statute of limitations.

<sup>171</sup> 623 F. Supp. 246 (D.D.C. 1985).

<sup>172</sup> The lead attorney, at least on appeal, was Anthony D'Amato, the author of an article (*supra* note 140) critical of Justice Bork's opinion in *Tel-Oren*.

<sup>173</sup> 623 F. Supp. at 257.

<sup>174</sup> *Id.* at 258.

<sup>175</sup> *Id.* at 258-29.

<sup>176</sup> *Id.* at 260-61.

*Von Dardel* court entered a default judgment for the plaintiffs, but a damage amount was not stated. Although *Von Dardel* was not appealed, it is of no precedential value in light of the Supreme Court's subsequent decision in *Amerada Hess* that the Alien Tort Statute does not provide jurisdiction over a foreign state.<sup>177</sup>

Despite the predictions after *Filartiga* and the efforts to apply it, there is only one case of record which reached a similar, even broader, result. *Forti v. Suarez-Mason*<sup>178</sup> was an action under the Alien Tort Statute by Argentine citizens against former Argentine General Suarez-Mason for damages arising out of alleged torture, murder and prolonged arbitrary detention by military and police personnel under Suarez-Mason's authority and control. The court adopted Judge Edwards' reasoning in *Tel-Oren*, holding that it was not necessary for the plaintiffs to establish an independent cause of action.<sup>179</sup> The court further agreed with Edwards that for the purpose of determining whether international law was violated, the court would consider the law as it existed at the time the acts were allegedly committed, not as of 1789.<sup>180</sup>

The court held that allegations of official torture constituted a violation of the law of nations,<sup>181</sup> as did prolonged arbitrary detention,<sup>182</sup> summary execution,<sup>183</sup> and "causing disappearance."<sup>184</sup> The

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<sup>177</sup> *Supra* notes 131-37 and accompanying text. The Supreme Court singled out *Von Dardel* as a unique example of a court exercising jurisdiction over a foreign state. —U.S. —, 109 S.Ct. 689 n.4.

<sup>178</sup> 672 F. Supp. 1531 (N.D. Cal. 1987), *motion to reconsider granted in part*, 694 F. Supp. 707 (N.D. Cal. 1988).

<sup>179</sup> 672 F. Supp. at 1539.

<sup>180</sup> *Id.* at 1539-40.

<sup>181</sup> *Id.* at 1541 (citing *Filartiga*).

<sup>182</sup> 672 F. Supp. at 1541-42, [citing *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-98 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981)]; *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975); and RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (Tent. Draft No. 6, 1985)(hereinafter RESTATEMENT).

<sup>183</sup> 672 F. Supp. at 1542, [citing the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the American Convention on Human Rights; *Tel-Oren*; and the RESTATEMENT].

<sup>184</sup> *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, at 710 (N.D. Cal. 1988), [citing United Nations General Assembly Resolution 33/173; the International Covenant on Civil and Political Rights; 22 U.S.C. § 2304(d)(1); and the RESTATEMENT]. The court had originally held that there was not sufficient proof to show that "customary international law creates a presumption of causing disappearance upon a showing of prolonged absence after initial custody." 672 F. Supp. at 1543.

court refused to extend law of nations status to a claim for "cruel, inhuman and degrading treatment," stating that as a tort it was not a "universal, definable, and obligatory international norm . . . ."<sup>185</sup> As in the *Filartiga* case, there could be no real satisfaction of any judgment against Suarez-Mason as he was extradited to Argentina prior to the court's last opinion.<sup>186</sup>

#### V. THE FUTURE OF LITIGATION UNDER THE ALIEN TORT STATUTE

The Restatement of Foreign Relations (Third), drafted by the American Law Institute, is a highly respected, widely cited compilation of maxims about foreign relations. In defining what constitutes a violation of the law of nations, the Restatement provides that there should be a cause of action where a state practices, encourages or condones genocide, slavery or slave trade, murder or causing disappearance, torture or cruel and inhuman punishment, prolonged arbitrary detention, systematic racial discrimination, or consistent patterns of gross violations of internationally protected human rights.<sup>187</sup> The listing of violations in this domestic treatise gives strong support to anyone attempting to prove universality and consensus sufficient to a claim of violation of the law of nations for purposes of the Alien Tort Statute.<sup>188</sup>

On the other hand, the Justice Department, which so strongly supported jurisdiction in *Filartiga*, has radically altered its interpretation of the Alien Tort Statute. In *Trajano v. Marcos*,<sup>189</sup> not only did the Justice Department fail to join an *amici* brief drafted by some of the same attorneys who were involved in the Justice De-

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<sup>185</sup> 672 F. Supp. at 1540-41.

<sup>186</sup> 694 F. Supp. 676.

<sup>187</sup> RESTATEMENT, *supra* note 182, at § 702, pp. 161-75. § 703, at pp. 175-83, discusses remedies for these violations.

<sup>188</sup> A domestic source of law may be more acceptable than a foreign one. "A United States court may be reluctant to expressly find that United States domestic law protecting human rights has significant 'gaps' which it can fill only by drawing on international law sources, or that the United States has something to learn in this regard from other nations." Bilder, *Integrating International Human Rights Law Into Domestic Law - U.S. Experience*, 4 Hous. J. INT'L L. 1, 9 (1981).

<sup>189</sup> No. 86-2448 (9th Cir. 1989). The Ninth Circuit has not yet addressed the question of jurisdiction under the Alien Tort Statute in this matter, but reversed the district court's dismissal under the act of state doctrine, 878 F.2d 1439 (9th Cir. 1989) (table). The case was remanded to the district court for consideration of "the difficult question of jurisdiction under 28 U.S.C. § 1350." (WESTLAW, 9th Cir. database).



partment's *Filartiga* brief, but it argued that the Alien Tort Statute is "simply frivolous" and should apply only where the tort was committed by a United States citizen or someone under the jurisdiction of the United States; where the United States might be held accountable; where Congress has specifically passed a criminal statute; or where the plaintiffs can demonstrate a private right of action.<sup>190</sup> This shift in attitude, coupled with *Tel-Oren*, *Amerada Hess* and the appointment of Judge Scalia to the Supreme Court, suggests that an expansive reading of the Alien Tort Statute may be a thing of the past or a relic of district court opinions.

One proposal to remedy the problems of interpreting the Alien Tort Statute is to enact a new law. In 1986, a Congressional bill was introduced to amend the UN Participation Act of 1945 in order to make provisions against torture and extrajudicial killings applicable to federal courts, and to give individuals a private right of action in federal district courts against persons who acted under color of law.<sup>191</sup> Although the bill was favorably reported out of the House Committee on Foreign Affairs,<sup>192</sup> no action was taken. There has been some discussion of amending the Alien Tort Statute itself,<sup>193</sup> but this too has not been done.

## VI. WHAT DOES *FILARTIGA* STAND FOR IN 1990?

It is easy to identify the problems inherent in prosecuting a *Filartiga*-type claim. The defendant must be amenable to service of process in the United States. The only clearly cognizable claims, assuming the court does not require an explicit cause of action as Judge Bork

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<sup>190</sup> Cole, Lobel & Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT'L & COMP. L. REV. 1, 9 (1988).

<sup>191</sup> H.R. 4756, 99th Cong., 2d Sess. (1986); H.R. 1417, 100th Cong., 1st Sess. (1987); S. 824, 100th Cong., 1st Sess. (1987). For a discussion of the bill, see Note, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673 (1987)(hereinafter cited as *TVPA*); and Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RTS. L. REV. 223 (1987).

<sup>192</sup> H.R. REP. NO. 693, 100th Cong., 2d Sess. (1988).

<sup>193</sup> *TVPA*, *supra* note 191, at 714 n. 167, states that Sens. Metzenbaum (D-Ohio) and Leahy (D-Vt.) have considered a clarifying amendment that would state that the Alien Tort Statute provides a cause of action and identifies certain human rights violations as actionable offenses. Such an amendment was proposed and drafted by Randall, *supra* note 148, at 511-32.

would, are for torture, Blackstone's original violations of the law of nations, and perhaps a few *Forti*-based allegations. There are also problems with complying with the statute of limitations; proving that the defendant, not a state, was acting under color of state law, not individually; showing that the court is the proper forum to consider the case (i.e., that the doctrine of *forum non conveniens* does not apply); that all indispensable parties are available; that the applicable law, usually that of the locus of the tort, provides a remedy; and that the claim is not nonjusticiable because of the political question or act of state doctrines. If a favorable judgment is rendered, it is likely to be by default or unenforceable due to the extradition or deportation of the defendant (how likely is it that someone who has committed acts in violation of the law of nations is *not* deportable or extraditable?).

Many question whether United States courts *should* seek to exercise jurisdiction in such matters. Could this, as Hassan believes, stymie prospects for the development of international tribunals to consider such claims?<sup>194</sup> Is it an undesirable example of nationalism which runs afoul of the sovereignty of other states?

While there has been much written about these points, little has been said about the psychological and academic value of *Filartiga*, aside from its value as an individual remedy.<sup>195</sup> Unquestionably, such an action can result in a moral and even political victory for plaintiffs, both domestically and internationally. Perhaps because of the failure of *Filartiga* to result in widespread, successful litigation, some commentators are now focusing on its value outside of providing a remedy:

One of the most successful uses of international human rights law has been to generate publicity. The novelty of the international perspective, particularly where a case has been raised in an international forum, is appealing to the media. The impact of the media on resolving a case must not be underestimated.<sup>196</sup>

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<sup>194</sup> "[T]here is something fundamentally wrong with a United States domestic court becoming a forum for litigation between citizens of foreign governments and their governments." Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, 5 Hous. J. INT'L. L. 131, 150 (1982).

<sup>195</sup> For typical examples of this kind of critique, see Recent Decisions, *Federal Jurisdiction of Alleged Torturer Under the Alien Tort Statute*, 6 INT'L TRADE L. J. 289 (1981); George, *Defining Filartiga: Characterizing International Torture Claims in United States Courts*, 3 DICK. J. INT'L L. 1 (1984).

<sup>196</sup> Rosenbaum, *supra* note 34.

This publicity can also promulgate novel theories, fresh approaches, promote human rights, and convince colleagues.<sup>197</sup> Likewise, one effect of *Filartiga* has been to "bridg[e] the traditional gap between international human rights activists and domestic civil liberties practitioners" and "stimulat[e] . . . continuing efforts in the United States to use domestic courts to defend and enforce international human rights."<sup>198</sup>

This type of analysis and examination of *Filartiga* seems more appropriate now than mere expressions of support or disagreement, or grandiose predictions and dire warnings of events to come. There is also fertile ground for examination of the political aspects of judicial interpretation and abstention in this area, focusing especially on the shift in the Department of Justice's position and the deference given by the courts to expressions by the Executive Branch; the basis for the lengthy and somewhat acrimonious opinions in *Tel-Oren*; and the political effect of judicial abstention based on the "political question" doctrine— does abstention have as much political impact as consideration of the claim would have?

The holdings and impact of *Filartiga* and its progeny are far more complex than would appear from the usual treatment in human rights texts, which generally run along the lines of "*Filartiga* was a recognition by a United States court that torture is a violation of the law of nations, but [sometimes admitted] *Tel-Oren* may limit this holding." It is naive and unrealistic to conclude that *Filartiga* helped or hurt the cause of international human rights enforcement, for such a conclusion depends so much on what is sought to be accomplished. *Filartiga* did begin a dialogue, and for that it informs the field. The caveat in analyzing its impact is to view it not in a vacuum, or as an end in itself, but as a significant point in the continuing process of defining and interpreting human rights.

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<sup>197</sup> *Id.* at 124-28.

<sup>198</sup> L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 242 (1989).

