Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?

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The Alien Tort Claims Act provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The statute was enacted as part of the first Judiciary Act of 1789[1] but has had little use during most of its almost 200 year history.[2] Recent attempts to bring international human rights violators within the jurisdiction of the federal district courts have drawn new attention to this obscure and poorly understood piece of legislation.[3] *Filartiga v. Pena-Irala*,[4] recently decided by

1. 28 U.S.C. § 1350 (1982) first appeared, in substantially the same form as it now exists, in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1848); *see infra* text accompanying notes 46-49.

2. Plaintiffs have successfully maintained federal subject matter jurisdiction under the Alien Tort Claims Act on only four occasions. In Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795), the statute was used as an alternate basis of jurisdiction. In *Bolchos*, a Spanish citizen mortgaged slaves to a British citizen who then placed them on a Spanish ship. The ship was seized by Bolchos, a French privateer, who brought the ship into South Carolina. A British agent of the mortgagee seized and sold the slaves. At that time, Britain and Spain were allied against France. Bolchos brought suit for restitution, claiming that all neutral property on board the captured vessel belonged to the captor under the provisions of the Treaty of Amity and Commerce between the United States and France. The court held that although the law of nations would have required that the property be returned to the neutral owner, the treaty superceded the law of nations by stipulating that the property of friendly nations, which was found on board an enemy vessel, was deemed forfeited. Section 1350 jurisdiction was also successfully maintained in Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), discussed *infra* in the text accompanying notes 50-52, and in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), discussed *infra* throughout the text of this Note.

In DeBlake v. The Republic of Argentina, (E.D. Calif. 1984) (No. CU82-1772-RMT (MCx), (filed Sept. 28, 1984), a federal district court in California found, by court order filed on March 14, 1984, that it had subject matter jurisdiction pursuant to section 1350 over claims for torture alleged against the Republic of Argentina and the Argentine Province of Tucuman. By the same order, the court found that the act of state doctrine (*see infra* text accompanying note 15) barred the plaintiff's claim for taking of property. *Id.* No opinion or memorandum accompanied the court's March 14th order, but it is probably safe to assume that the court followed the *Filartiga* rationale in determining that jurisdiction was proper under section 1350. With the proper application of section 1350 so widely debated, it is unfortunate that the California district court handled this important decision in such a cavalier manner, offering no explanation for the decision. A default judgment was entered against both the Republic of Argentina and the Province of Tucuman, and the DeBlake plaintiffs were awarded $2,707,515.63.

3. The obscure origin and purpose of section 1350 prompted Judge Friendly to refer to the statute as a "legal Lohengrin." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). Lohengrin is the hero of a medieval German Romance who champions the cause of a young maiden, falsely accused of murdering her brother. When the maiden seeks to learn his identity, Lohengrin disappears as mysteriously as he came. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934).

4. 630 F.2d 876 (2d Cir. 1980), *on remand*, 577 F. Supp. 860 (E.D.N.Y. 1984).

the Second Circuit and *Tel-Oren v. Libyan Arab Republic*,[5] decided by the District of Columbia Circuit, demonstrate the fundamental disagreement among the courts and legal scholars as to the meaning and application of section 1350.[6]

As a result of the *Filartiga* and *Tel-Oren* decisions, there are at least four different court-sanctioned approaches to federal subject matter jurisdiction under the Alien Tort Claims Act. The judicial confusion surrounding section 1350 suggests that its proper application is sorely in need of clarification by the Supreme Court[7] or, better yet, by Congress.

This Note examines the various interpretations federal courts have given to the Alien Tort Claims Act. Part I presents the facts of the *Filartiga* and *Tel-Oren* decisions. Part II offers a summary and analysis of each of the four constructions of the statute which have been proposed by the judges of the Second and D.C. Circuits in *Filartiga* and *Tel-Oren*. Finally, part III discusses which of the various interpretations of section 1350 most nearly serves the intentions of the original drafters of the statute while offering a workable solution to the problem of applying the statute in the context of present-day world problems and contemporary international law.

I. THE FACTS OF THE FILARTIGA AND TEL-OREN DECISIONS

A. Filartiga v. Pena-Irala

In *Filartiga*,[8] the Second Circuit held that section 1350 conferred subject matter jurisdiction on the federal district courts for a wrongful death action brought by two Paraguayan citizens residing in New York against a third Paraguayan who was present in New York on a visitor's visa. Dr. Joel Filartiga and his daughter alleged that the defendant, the former Inspector General of Police of Asuncion, Paraguay, had wrongfully caused the death by torture of Joelito Filartiga, the son and brother of the plaintiffs respectively, in retaliation for Dr. Filartiga's outspoken opposition to the

5. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985).

6. Although the proper construction of section 1350 has been widely discussed and debated in legal periodicals, the substance of those discussions is reflected in or has been incorporated into the *Filartiga* and *Tel-Oren* opinions. For that reason, this Note focuses primarily on those opinions. For further discussion, see 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); Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Hassan, *A Conflict of Philosophies: The* Filartiga *Jurisprudence*, 32 INT'L & COMP. L.Q. 250 (1983); Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, 5 HOUS. J. INT'L L. 131 (1982); Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13 (1981); Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81 (1981); Note, Hanoch Tel-Oren: *The Retreat from* Filartiga, 4 CARDOZO L. REV. 665 (1983); Note, *The Alien Tort Statute: International Law as the Rule of Decision*, 49 Fordham L. Rev. 874 (1981); Comment, *Torture as a Tort in Violation of International Law:* Filartiga v. Pena-Irala, 33 STAN. L. REV. 353 (1981); Note, *A Legal Lohengrin: Federal Jurisdiction Under The Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105 (1979); Note, *Enforcement of International Human Rights in The Federal Courts after* Filartiga v. Pena-Irala, 67 VA. L. REV. 1379 (1981); *Recent Cases*: Filartiga v. Pena-Irala, 49 U. CIN. L. REV. 880 (1980).

7. The petition for certiorari filed by the *Tel-Oren* plaintiffs was denied on February 25, 1985. 105 S. Ct. 1354. Justice Powell took no part in the decision.

8. 630 F.2d at 878. The facts of *Filartiga* are set forth *id.* at 878-80.

Paraguayan government. The district court dismissed the action for lack of subject matter jurisdiction,[9] relying on two earlier Second Circuit decisions which held that violations of international law do not occur when the plaintiffs are citizens of the acting state.[10] The Second Circuit reversed the district court and held that the torture alleged by the plaintiffs was a tort which violated international law and that the plaintiffs could properly assert federal subject matter jurisdiction under the Alien Tort Claims Act.[11] Following remand, the defendant, who had been deported, took no further part in the action and the district court granted default.[12] The court held that the plaintiffs were entitled to their claim of $10,364 for expenses incurred in connection with the action and granted an award for punitive damages of $5,000,000 to each plaintiff.[13] The court stated that this award was intended "to reflect adherence to the world community's proscription of torture and to attempt to deter its practice."[14] In reaching this decision, the court also held that the substantive principles it applied in the action were properly determined by international law and that the act of state doctrine—that doctrine which precludes U.S. courts from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory—did not require the court's abstention.[15]

B. Tel-Oren v. Libyan Arab Republic

In *Tel-Oren*,[16] the D.C. Circuit considered whether survivors and personal representatives of persons murdered in Israel in an attack on a civilian bus by members of the Palestine Liberation Organization could properly assert federal subject matter jurisdiction. The complaint alleged multiple tortious acts committed in violation of the law of nations, United States treaties, United States criminal laws and the common law. The named defendants were 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. The plaintiffs claimed jurisdiction based on federal question, diversity, the Foreign Sovereign Immuni-

9. *Id.* at 880; 577 F. Supp. at 861.

10. Judge Nickerson based his decision on dicta contained in Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976) and IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975). 630 F.2d at 880.

11. After considering numerous international treaties and accords, the court concluded that "international law confers fundamental rights upon all people vis-a-vis their own governments." 630 F.2d at 881-84. The court held that the right to be free from torture is now among those fundamental rights. *Id.* at 885.

12. 577 F. Supp. at 861.

13. *Id.* at 867. The question of damages was referred to a magistrate who recommended that the plaintiffs' claim for punitive damages be denied on the ground that they were not recoverable under the Paraguayan Civil Code. *Id.* at 864. The magistrate also recommended denial of the expense claim for $10,364. He recommended an award of $150,000 to each plaintiff as compensation for emotional pain and suffering, along with $25,000 to Ms. Filartiga for medical expenses and $50,000 to Dr. Filartiga for funeral and medical expenses and compensation for lost income. The plaintiffs filed an objection to the magistrate's recommendation. *Id.* at 862, 865.

14. *Id.* at 867.

15. *Id.* at 862. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (act of state doctrine).

16. 726 F.2d 774 (D.C. Cir. 1984). The facts of *Tel-Oren* are set forth *id.* at 774-75.

ties Act of 1976, and the Alien Tort Claims Act.[17] The district court dismissed the action for lack of subject matter jurisdiction and as barred by the statute of limitations.[18] The plaintiffs appealed on the jurisdiction and statute of limitations issues.[19] The court of appeals affirmed the dismissal in a per curiam opinion.[20] Remarkably, however, all three judges—Edwards, Robb, and Bork—filed separate concurring opinions expressing widely divergent viewpoints concerning the rationale supporting the dismissal. The controversy centered on the interpretation to be given to the Alien Tort Claims Act.

Although Judge Edwards distinguished *Tel-Oren* on its facts,[21] he endorsed the Second Circuit's construction of the Act in *Filartiga*, which held that jurisdiction was proper where the claimed tort constituted a violation of international law.[22] In the alternative, he proposed the statutory interpretation rendered in *Adra v. Clift*,[23] a 1961 federal district court decision. *Adra* permitted the assertion of jurisdiction where international law was violated during commission of the tort, even though the substantive tort itself was not an international violation.[24] Senior Circuit Judge Robb argued that the

17. *Id.* The *Tel-Oren* plaintiffs based their assertion of federal jurisdiction on the following statutes: 28 U.S.C. § 1331 (1982) (federal question jurisdiction), 28 U.S.C. § 1332 (1982) (diversity jurisdiction), 28 U.S.C. §§ 1330, 1602-1611 (1982) (The Foreign Sovereign Immunities Act of 1976) and 28 U.S.C. § 1350 (1982) (The Alien Tort Claims Act).

18. 726 F.2d at 775.

19. *Id.* On appeal, plaintiffs claimed jurisdiction under 28 U.S.C. § 1331 (1982) (federal question jurisdiction) and 28 U.S.C. § 1350 (1982) (The Alien Tort Claims Act).

20. 726 F.2d at 775.

21. Although the actions of the defendants in both *Filartiga* and *Tel-Oren* were similar in many respects, Judge Edwards identified a significant distinction which required dismissal of the *Tel-Oren* claim. The torture alleged in *Filartiga* was "official torture," committed by a state official under color of Paraguayan law. 726 F.2d at 791. The tort alleged in *Tel-Oren* was an act of terrorism committed by members of the Palestine Liberation Organization (PLO), who landed by boat in Israel, captured two civilian buses, a car and a taxi, and made hostages of the civilian passengers, many of whom the PLO then tortured and killed or severely wounded. *Id.* at 776 (Edwards, J., concurring). The PLO is not a sovereign entity capable of "official" conduct because the PLO is not a "recognized member of the community of nations." *Id.* at 791. Judge Edwards noted that whereas there is general consensus among nations that official torture violates international law, there is far less agreement on whether an individual who is not acting in official state capacity may be held to have committed an international violation. *Id.* at 792. Although there is widespread support for individual liability (*see, e.g.*, Lopes v. Reederei Richard Shroder, 225 F. Supp. 292 (E.D. Pa. 1963); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); The Nuremberg Trial 1946, 6 F.R.D. 69, at 110-11 (1947)), Judge Edwards did not feel that there was the necessary degree of "codification or consensus" among nations to warrant extension of international law to encompass the unofficial acts of individuals. 726 F.2d at 792; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

22. Judge Edwards concluded that there was insufficient consensus to declare that the law of nations had outlawed politically motivated terrorism. 726 F.2d at 795 (Edwards, J., concurring). In many instances, actions that are considered acts of terrorism by some states are considered legitimate acts of aggression by others. Judge Edwards found evidence of the lack of consensus for terrorism as a violation of international law by considering United Nations documents. United Nations General Assembly Resolution 3103 provides: "The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law." G.A. Res. 3103, 28 U.N. GAOR at 512, U.N. Doc. A/9102 (1973), *quoted in Tel-Oren*, 726 F.2d at 795. Despite whatever personal repugnance he felt for the acts committed by the PLO against the *Tel-Oren* plaintiffs, Judge Edwards was unwilling to hold that such acts were universally condemned so as to constitute violations of international law. 726 F.2d at 796.

23. 195 F. Supp. 857 (D. Md. 1961).

24. *See infra* notes 50-59 and accompanying text. Judge Edwards' alternative approach appears at 726 F.2d at 783-88.

political question doctrine—that doctrine which applies to determining whether a question is a political one and therefore nonjusticiable—controlled in *Tel-Oren*.[25] Accordingly, dismissal was required because the issues presented by the case were nonjusticiable.[26] Judge Bork supported the *Tel-Oren* district court's position that section 1350 does not provide a private cause of action for violations of international law.[27]

II. JUDICIAL INTERPRETATION OF SECTION 1350

A. *The* Filartiga *Approach: Jurisdiction is Proper Where the Claimed Tort Constitutes a Violation of International Law*

Under *Filartiga*, the key to proper assertion of jurisdiction under section 1350 is a court's determination that the tort, which forms the basis of the plaintiff's cause of action, is itself a violation of international law.[28] The Second Circuit noted that plaintiffs had successfully maintained federal jurisdiction under section 1350 on only two previous occasions.[29] The court attributed this to the statutory requirement of an alleged "violation of the law of nations."[30]

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25. 726 F.2d at 823 (Robb, J., concurring). *See infra* notes 60-69 and accompanying text. In explaining the political question doctrine, the Supreme Court has said, "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the actions of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-55 (1939). The Court has further stated that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962).

26. 726 F.2d at 823 (Robb, J., concurring).

27. *Id.* at 799 (Bork, J., concurring). *See infra* notes 70-84 and accompanying text.

28. The *Filartiga* approach might be considered the majority view in that it is presently the controlling interpretation in the Second Circuit and has been approved by Judge Edwards of the D.C. Circuit as well. The *Filartiga* approach was probably applied in DeBlake v. Republic of Argentina (C.D. Calif. 1984), *see supra* note 2.

29. *Filartiga*, 630 F.2d at 887. Plaintiffs had asserted jurisdiction under section 1350 successfully only in Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1, 607) and Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). *See infra* notes 50-65 and accompanying text. *See supra* note 2.

30. The majority of the earlier cases in which section 1350 jurisdiction was not upheld "did not involve such well-established, universally recognized norms of international law that are here at issue." *Filartiga*, 630 F.2d at 888. To illustrate an example of a tort that did not constitute a violation of international law, the *Filartiga* court discussed the Second Circuit's 1975 ruling in IIT v. Vencap, 519 F.2d 1001 (2d Cir. 1975). In that case, the court held that a claim by a Luxemburg international investment trust for fraud, conversion, and corporate waste did not allege a violation of international law. *Id.* at 1015; *see Filartiga*, 630 F.2d at 888. In *IIT*, Judge Friendly stated that the Eighth Commandment, "Thou shalt not steal," has not been incorporated into the law of nations. 519 F.2d at 1015.

The *Filartiga* court cited several other examples of torts which did not qualify as international violations at 630 F.2d 888 n.23. *See* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978) (court declined jurisdiction under section 1350 on the ground that an airplane crash did not constitute a violation of international law even if caused by willful negligence), *cert. denied*, 439 U.S. 1114 (1979); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (in a case arising out of "operation Babylift" in which the U.S. airlifted South Vietnamese children to the United States, the court refused jurisdiction under section 1350 over a grandmother's suit to have her children returned to her custody; the court discerned no "universal or generally accepted substantive rule or principle" governing child custody); Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976) (expropriation of property belonging to a citizen of Switzerland by West German citizens in Nazi Germany in 1938, and later repudiation of a settlement, did not violate international law), *cert. denied*, 429 U.S. 835 (1976); Khedivial Line, S.A.E. v. Seafarer's Int'l Union, 278 F.2d 49 (2d Cir. 1960) (picketing of a foreign vessel by U.S. seamen was not an international tort and plaintiffs had no vested right under international law to have the picketing enjoined); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) (unseaworthiness of a vessel was not a tort in violation of international law).

In deciding that the plaintiffs could properly assert jurisdiction under section 1350, the *Filartiga* court considered the critical issue to be whether torture constitutes a violation of international law.[31] The court therefore examined the substance of the "law of nations," or "international law" as it is now called, its history and evolution, and its incorporation into domestic law. Because international law is a form of common law, there is no precise definition or codification.[32] International law has evolved according to the changes and developments in international affairs and, for purposes of section 1350, it is clearly defined only where there exists a valid treaty that applies specifically to the area of the claimed tort.[33]

The Supreme Court has stated that international law "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."[34] For instance, in *The Paquete Habana*,[35] the Supreme Court held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations."[36] Relying on this reasoning, the *Filartiga* court concluded that it must interpret international law, not as it was in 1789 when the Alien Tort Claims Act was adopted, "but as it has evolved and exists among the nations of the world today."[37] The court, citing the United Nations Charter,[38] several General Assembly Resolutions,[39] and international treaties,[40] found that the general consensus among civilized nations is that freedom from torture is a fundamental right. The court therefore concluded that international law now prohibits official torture[41] and held that jurisdic-

31. 630 F.2d at 880. The appellee argued that the court should not apply international law as the rule of decision in this case because the treaties and declarations, which reflect international law, are not self-executing—i.e., they do not provide the individual with a private cause of action. *Id.* at 889. The court stated that this issue was not directed toward federal jurisdiction but rather toward choice of law, which a court would not address until after it resolved the issue of jurisdiction. Subject matter jurisdiction determines only that Congress intended to confer judicial power over the subject matter on the federal courts. Choice of law, on the other hand, is primarily concerned with fairness and arises at a later stage in the judicial proceedings. *Id.* On remand, the *Filartiga* district court decided that international law was the proper law to be applied as the rule of decision. 577 F. Supp. at 863.

32. *Filartiga*, 630 F.2d at 886.

33. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *Filartiga*, 630 F.2d at 880-81. *See also infra* notes 35-36 and accompanying text.

34. *Filartiga*, 630 F.2d at 880, *quoting* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *see also Lopes*, 225 F. Supp. at 295.

35. 175 U.S. 677 (1900).

36. *Id.* at 694.

37. 630 F.2d at 881.

38. *Id. See* Charter of the United Nations, 59 Stat. 1033 (1945).

39. 630 F.2d at 882, *citing* the Universal Declaration of Human Rights, G.A. Res. 217 (III)(A) (Dec. 10, 1948) ("no one shall be subjected to torture") and the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

40. 630 F.2d at 883-84. The court cited the following treaties and accords: American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 (1975); International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211.

41. 630 F.2d at 884. The court stated that the dictum in Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976), an earlier Second Circuit decision relied on by the

tion under section 1350 was proper.[42]

B. *The Edwards/*Adra *Alternative: Jurisdiction is Proper Where International Law Was Violated in the Course of Committing the Substantive Tort*

Although Judge Edwards endorsed *Filartiga* in his *Tel-Oren* concurrence, he found one major weakness: the *Filartiga* analysis was consistent with the language of section 1350, but it required federal district courts to "derive from an amorphous entity—i.e., the 'law of nations'—standards of liability applicable in concrete situations."[43] Judge Edwards believed this was a manageable burden; nevertheless, he proposed "a quite plausible alternative construction" of section 1350.[44] Under this alternative, aliens may bring actions for common law torts in federal court without regard for diversity or jurisdictional amount so long as aliens also allege a violation of international law. The alternative differs from the *Filartiga* approach in that the substantive tort itself need not constitute a violation of international law if international law was violated in the course of committing the tort.[45]

There is support for this construction of the statute in the history of section 1350. The Judiciary Act of 1789, chapter 20, section 11 granted to the circuit courts, concurrent with state courts, original jurisdiction over all

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district court in dismissing the *Filartiga* claim, that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," did not represent the current practice of international law. 630 F.2d at 884.

The court dismissed as without merit the appellee's claim that even if a violation of international law had been committed, federal jurisdiction was nevertheless improper because its assertion did not comport with the requirements of Article III of the Constitution. Article III, section 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. . . ." The constitutionality of federal jurisdiction under section 1350 rests upon the so-called "incorporation doctrine"—that the law of nations has been incorporated into the federal common law. 630 F.2d at 886. A suit which is based upon federal common law "aris[es] under the . . . laws of the United States" and therefore complies with the dictates of Article III. *Id.*; *see also* Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); Ivy Broadcasting Co. Inc. v. American Tel. and Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968). The *Filartiga* court noted that common law courts of general jurisdiction regularly adjudicated transitory tort claims where personal jurisdiction has been secured. 630 F.2d at 885. It is well settled that plaintiffs can bring personal injury or wrongful death actions in state courts, provided that the state has personal jurisdiction over the defendant and that the act constituting the tort was unlawful in the place where it was committed. *Id.* In the first Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1848), which encompassed the Alien Tort Claims Act, Congress expressly provided for federal subject matter jurisdiction over civil suits brought by aliens where international law was involved. The claim for wrongful death by torture brought by the Filartigas was, therefore, properly within the jurisdiction of the federal courts: wrongful death is a transitory tort and the means by which it was committed constituted a violation of international law. 630 F.2d at 878. Furthermore, the alleged torture violated not only the laws of the United States but those of Paraguay as well. *Id.* at 884, 889. The significance of the fact that wrongful death has been labeled a "transitory tort" is emphasized by the holding in a later case, Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir., 1983), which concerned United States military operations in Honduras and the training of Salvadoran soldiers on the plaintiff's property. There, the court held that neither an action seeking ejectment nor an action seeking money damages for trespass could qualify for section 1350 jurisdiction because both were local rather than transitory actions.

42. 630 F.2d at 884. In his concurring opinion in *Tel-Oren*, Judge Edwards endorsed the *Filartiga* court's interpretation of federal jurisdiction under section 1350. 726 F.2d at 776.

43. 726 F.2d at 781 (Edwards, J., concurring).

44. *Id.* at 782.

45. *Id.*

civil suits, either at common law or in equity, in which an alien was a party and the amount in controversy exceeded five hundred dollars.[46] At the time the Judiciary Act was drafted, it was well settled that the law of nations had been incorporated into the common law.[47] Section 9 of the same chapter gave original jurisdiction to the federal district courts, "concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[48] The drafters of the Judiciary Act apparently intended this section, which later became section 1350, to provide for federal jurisdiction over claims brought by aliens for torts which involved a violation of the law of nations but which did not meet the jurisdictional amount required under section 11. Congress' purpose in enacting section 9 may have been to prevent a wrong committed against a foreigner, whose claim fell short of the jurisdictional amount, from escalating into an international crisis as a result of mishandling of the alien's claim in a state court.[49]

A Maryland district court had, in fact, applied this alternative approach to determining federal subject matter jurisdiction under section 1350. *Adra v. Clift*[50] involved a child custody suit brought by a Lebanese citizen against his former wife, a Turkish-born Iraqi national residing in the United States, and her American husband.[51] The plaintiff contended that his daughter was

46. Section 11 provides, in pertinent part:

> That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1848).

47. *Tel-Oren*, 726 F.2d at 782 n.10 (Edwards, J., concurring). In support of this statement, Judge Edwards cites Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U.PA. L. REV. 26, 27 (1952); 4 BLACKSTONE'S COMMENTARIES 66-67 (Welsby ed. 1854).

48. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1848).

49. *Tel-Oren*, 726 F.2d at 784-85 (Edwards, J., concurring). The concern of the drafters of the Judiciary Act for the rights of aliens was well-founded. The law of nations requires that the civil courts of a country must be available to adjudicate claims brought by aliens against individuals within that nation's territory. 1 L. OPPENHEIM, INTERNATIONAL LAW § 165a, at 366 (H. Lauterpacht 8th ed., 1955); *Tel-Oren*, 726 F.2d at 783 (Edwards, J., concurring). Should United States courts be accused of having denied justice to an alien's claim, the United States would be responsible for the alleged injustice under the law of nations and must answer, not to the individual alien, but to his home state. *See* J. BRIERLY, THE LAW OF NATIONS 284-91 (6th ed. 1963); *Tel-Oren*, 726 F.2d at 783 (Edwards, J., concurring). The drafters were therefore justifiably concerned that an alien's unredressed claim might develop into an international confrontation. The five hundred dollar jurisdictional limit established by section 11 left open the possibility that an alien's claim that fell below that amount might be improperly handled in a state court. Thus, it would not have been unreasonable for the drafters to have extended federal jurisdiction over those actions that had the potential for creating international tension. Any tort involving a violation of the law of nations or a treaty of the United States might be a proper candidate for federal jurisdiction, regardless of the amount in controversy and regardless of whether the tort itself constituted a violation of international law or whether international law was merely violated during commission of the tort.

50. 195 F. Supp. 857 (D. Md. 1961). The facts of *Adra* are set forth *id.* at 860-62.

51. In order for *Adra* to become a paradigm for Judge Edward's alternative approach, he would require that both defendants be American citizens. *Tel-Oren*, 726 F.2d at 786. In a suit between two aliens, the United States might have less reason for extending federal jurisdiction because international law requires that the state of the tort-feasor provide a forum. 1 L. OPPENHEIM, INTERNATIONAL LAW §§ 145, 165*a* (H. Lauterpacht 8th ed. 1955). The alien plaintiff would therefore have an alternative forum available and there is less likelihood that an unfavorable decision in a state court would reflect poorly on the United States. *See Tel-Oren*, 726 F.2d at 784 n.13 (Edwards, J., concurring).

being wrongfully withheld from his custody, and that the defendants had violated international law by concealing the child's identity and falsifying her passport in order to bring her to the United States. The district court found that jurisdiction was proper under section 1350 because the plaintiff had alleged a violation of international law, even though the substantive tort itself was strictly a domestic claim.[52]

The problem Judge Edwards identifies with the *Adra* approach is that if jurisdiction can be triggered by an international law violation as minor as a passport offense, jurisdiction might also be triggered by much less serious offenses.[53] Judge Edwards therefore believes that the *Adra* approach is workable only if applied to the following types of cases: (1) actions by aliens for domestic torts that occur within the United States and injure "substantial rights" under international law; (2) universal crimes such as were contemplated by *Filartiga*, no matter where committed; or (3) offenses committed abroad by Americans against aliens.[54] Judge Edwards suggests that *Adra* requires a "but for" causation test to determine whether jurisdiction is proper: that "but for" the alleged international law violation, the defendants could not have committed the alleged substantive tort.[55]

Applying the *Adra* test to the facts in *Tel-Oren* suggests that the plaintiffs might have brought the claim within section 1350 jurisdiction had they alleged that the Palestine Liberation Organization terrorists violated international law when they landed in Israel without passports. Although such a formulation satifies the "but for" test, the nexus between the alleged tort and the international law violation seems insignificant. Moreover, a pure "but for" test opens the courts to a potential deluge of actions in which the alleged international violation may be much less severe than a passport violation. In order to resolve this problem, Judge Edwards would look to the purpose of the statute—the avoidance or mitigation of international conflict—and decide whether the convergence of the domestic and the international torts is sufficient to warrant section 1350 jurisdiction in furtherance of that purpose.[56]

Judge Edwards' proposed alternative construction of section 1350 has been criticized for the judicially invented limitations that are required for workability.[57] Such limitations are neither prescribed nor suggested by the statute. Rather, they represent the kind of legislative decisions that are generally beyond the scope of the judicial function.[58] The necessity for such limitations, so the criticism goes, merely serves to highlight the error in con-

52. 195 F. Supp. at 865.

53. *Tel-Oren*, 726 F.2d at 787.

54. *Id.* at 788.

55. "But for" the passport violation, the *Adra* defendants could not have retained custody of the child. *Id.*

56. *Id.* In comparing the two approaches which he has endorsed, Judge Edwards notes that whereas *Filartiga* satifies the requirements of the Edwards/*Adra* alternative, the tort alleged in *Adra* would not have qualified for federal subject matter jurisdiction under *Filartiga*. Although he believes that the *Adra* analysis is a reasonable interpretation of section 1350, Judge Edwards believes *Filartiga* to be the proper approach to jurisdictional analysis. *Tel-Oren*, 726 F.2d at 775.

57. Judge Bork expressed this criticism in his *Tel-Oren* concurrence. 726 F.2d at 820-21. *See supra* notes 53-55 and accompanying text.

58. 726 F.2d at 821 (Bork, J., concurring).

struing section 1350 according to the Edwards/*Adra* alternative.[59]

C. *Judge Robb's Approach: International Human Rights Claims are Nonjusticiable*

Judge Robb's concurrence in the dismissal of *Tel-Oren* rests primarily on his belief that the issues presented are nonjusticiable. In his opinion, "[f]ederal courts are not in a position to determine the international status of terrorist acts."[60] He believes that because the political question doctrine controls, the assertion of jurisdiction under section 1350 is improper. Judge Robb argues that granting initial access to the courts despite the overwhelming probability of frustration of the trial process would be unwise.[61] The frustration he foresees stems from the courts' lack of power to compel the defendants to attend the judicial proceedings and to engage in the judicial process in a meaningful way. He believes it is therefore better to avoid the situation altogether.

Judge Robb is concerned that *Tel-Oren* touches on sensitive matters of diplomacy which are better left to the executive and legislative branches.[62] Foreign affairs issues are beyond the traditional limits of judicial concern and courts should handle them only in rare instances where the question raised is very precisely defined and the facts are clear.[63] *Tel-Oren*, with international terrorism as its central issue, is not such a case.

Judge Robb argues for judicial restraint in this area because he believes anything less constitutes interference with the proper administration of foreign policy.[64] He fears that meddling by the courts may even produce consequences that are harmful or embarrassing to the national interest.[65] As a result of *Filartiga*, Judge Robb foresees the federal district courts being corrupted into "forums for the exposition of political propaganda."[66] He believes that issues such as those presented in *Filartiga* and *Tel-Oren* are simply not susceptible to judicial resolution.

Judge Robb notes that although the intent of the drafters of the Alien Tort Claims act may be uncertain, it is nevertheless clear that the statute was not enacted for the purpose of permitting the federal courts to resolve international human rights claims.[67] Absent guidelines from the executive and legislative branches, Judge Robb argues that the courts should not create a

59. *Id.*
60. *Id.* at 823.
61. *Id.* at 824.
62. *Id.*
63. *Id.* at 825.
64. *Id.*
65. *Id.* at 826.
66. *Id.* Judge Robb points out that *Filartiga* and *Tel-Oren* may be difficult cases to resist, due to the outrageous nature of the defendants' alleged conduct. *Id.* Other cases, however, might raise similar issues, yet might be far less attractive. It is not implausible, in Judge Robb's mind, that under the *Filartiga* approach, the federal courts could be used by victims of violence throughout the world as forums to air political grievances. He notes that the victims of counter-revolutionaries in such countries as Nicaragua and Afghanistan might argue, just as compellingly as the *Tel-Oren* and *Filartiga* plaintiffs did, that they are entitled to their day in the United States federal courts. *Id.* Judge Robb believes that the courts are not capable of effectively adjudicating these claims.
67. *Tel-Oren*, 726 F.2d at 827.

new mission for section 1350.[68] He believes that the political question doctrine requires that the courts await new instructions from those branches of government properly concerned with shaping foreign policy.[69]

D. *Judge Bork's Approach: Section 1350 Does Not Provide a Private Cause of Action for Violations of International Law*

The district court dismissed *Tel-Oren* on the ground that the plaintiffs failed to state a cause of action.[70] The court found that it lacked federal subject matter jurisdiction under section 1350 because neither international law nor any of the relevant treaties provided a private cause of action which could be brought in a federal district court.[71] In his concurring opinion affirming dismissal by the trial court, Judge Bork adopted the district court's reasoning.[72]

Section 1350 provides for federal jurisdiction for torts committed in violation of international law or treaties of the United States.[73] The district court's examination of the treaties relied on by the plaintiffs revealed that only five of them were currently binding on the United States and none of the five treaties were self-executing.[74] Three of them called for implementing legislation. The other two imposed obligations on nations but not on individuals.

The *Tel-Oren* plaintiffs asserted that because international law has been incorporated into federal common law, they had a right to a cause of action as they would with any other common law violation. Judge Bork, however, distinguished between two very different definitions of common law.[75] The federal common law, which encompasses international law, is not the common law of contract or tort. To say that international law has been incorporated into federal common law means only that it is not of statutory or constitutional origin and is to be applied by the courts in appropriate cases.[76] It does not mean that the plaintiffs have an automatic right to a cause of action as they would with a common law tort.

Judge Bork found no grant of a private cause of action in the section 1350 language or elsewhere. Furthermore, because of the principle of separation of powers, he concluded that it would be improper to infer a private

68. In Judge Robb's words, "Law may evolve, but statutes ought not to mutate." *Id.*

69. *Id.* It might be argued that the executive branch has already given its approval to the *Filartiga* interpretation. At the invitation of the court of appeals, the Department of State and the Department of Justice filed a joint amicus curiae memorandum, which urged reversal of the district court's dismissal of the *Filartiga* claim. The memorandum stated that "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." Memorandum for the United States as Amicus Curiae at 22-23, Filartiga v. Pena-Irala, 630 F.2d at 876 (2d Cir. 1980), as quoted in Blum and 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, 112 (1981).

70. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 548 (D.D.C. 1981).

71. *Id.*

72. 726 F.2d at 799.

73. *Id.* at 808, 817 (Bork, J., concurring).

74. *Id.* at 809.

75. *Id.* at 811.

76. *Id.*

cause of action where one has not been expressly granted by statute.[77] The critical issue, in Judge Bork's view, turns on the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."[78] Courts apply the separation of powers principle to questions concerning international law through the act of state and political question doctrines.[79] Judge Bork based his decision on both of these doctrines, concluding that it would be unwise to infer a cause of action for the *Tel-Oren* plaintiffs.[80]

The principle criticism of Judge Bork's approach is based upon the argument that, although international law does not grant a cause of action to individuals, Congress has granted the cause of action in its enactment of section 1350.[81] International law permits each state to meet its obligations to its citizens in the manner that the state itself chooses.[82] International law does not, therefore, concern itself with individual causes of action. To require that a cause of action be granted under international law is to construe section 1350 in such a way as to effectively nullify the "law of nations" section of the statute.[83] A fundamental principle of statutory construction prohibits interpretation of a statute in such a way as to render any part of the statute inoperative.[84]

III. THE EDWARDS/*ADRA* APPROACH PROVIDES THE MOST WORKABLE SOLUTION

Judge Edwards' proposed alternate construction, as applied in *Adra v. Clift*,[85] provides the most workable solution to federal jurisdiction under section 1350 while serving what is generally presumed to be the legislative purpose behind the statute. This nation's founders were acutely aware of the need for assuring that the claims of foreigners receive proper dispensation in

77. *Id.* at 799.

78. *Id.* at 801, quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

79. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring). *See supra* notes 15 and 25 and accompanying text.

80. 726 F.2d at 799. Although Judge Bork generally agreed with Judge Robb's objectives in dismissing *Tel-Oren* under the political question doctrine, Judge Bork noted that it was perhaps best not to dismiss on that basis because the Supreme Court has not clearly defined the doctrine. 726 F.2d at 803 n.8. According to Judge Bork, Judge Robb could have achieved the same result, yet avoided complete reliance on the political question doctrine by using the doctrine merely to support the argument that a cause of action should not be inferred where it has not been granted by statute.

In applying his analysis to the facts of *Filartiga*, Judge Bork noted the differences between that case and *Tel-Oren*: first, the *Filartiga* defendant was a state official; second, his actions violated not only international law but the laws of his own country; and third, *Filartiga* involved "official torture" which is clearly a violation of the law of nations. *Id.* at 819. Judge Bork conceded that the application of the act of state and political question doctrines to *Filartiga* might yield a different result than in *Tel-Oren*. He disagreed with *Filartiga*, however, because that court did not address whether the *Filartiga* plaintiffs had a right to a private cause of action. *Id.* at 820.

81. *See Id.* at 777-79, (Edwards, J., concurring).

82. *Id.* at 778; *see* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); cf. 1 C. HYDE, INTERNATIONAL LAW 729 n.5 (2d rev. ed. 1945).

83. *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

84. *Id.* Judge Edwards cites 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973); *see also* Federal Trade Comm'n v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994 (D.C. Cir. 1975).

85. *See supra* notes 43-59 and accompanying text.

United States courts.[86] Evidence suggests that section 1350 was intended to remove the obstacle of the jurisdictional amount, required by the diversity statute, for those claims considered most likely to generate international tension if poorly handled in state courts.[87] Both *Filartiga* and *Adra* involve international law, albeit to vastly different degrees, and both claims could probably have been brought in state courts.[88] Thus, the argument that Congress enacted section 1350 with the intention that such cases be brought within the jurisdiction of the federal courts is not unreasonable. The chief

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86. Alexander Hamilton wrote:

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

THE FEDERALIST No. 80, at 536 (J. Cooke ed. 1961).

Similarly, in reference to state courts, James Madison said, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 ELLIOT'S DEBATES 583 (1888), *quoted in Tel-Oren*, 726 F.2d at 783 n.12. Madison complained that the problem with the Confederation was that it was unable to "cause infractions of treaties, or of the law of nations to be punished. . .[and thus]. . .particular states might by their conduct provoke war without control." J. Madison, *Journal of the Federal Convention* 60 (E.H. Scott ed. 1893); *see also* Comment, *A Legal Lohengrin: Federal Jurisdiction Under The Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105, 114 (1979). *Cf.* THE FEDERALIST No. 3 (J.Jay) and No. 42 (J. Madison).

87. *See supra* notes 46-49 and accompanying text; *Tel-Oren*, 726 F.2d 774, 782-85 (Edwards, J., concurring).

88. In Claflin v. Houseman, 93 U.S. 130, 136 (1876), the Supreme Court enunciated the presumption of concurrent jurisdiction:

> The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . [and] the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction [of state courts], where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

See Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962); Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942); St. Louis, B & M. Ry. Co. v. Taylor, 266 U.S. 200 (1924); Second Employers' Liability Cases, 223 U.S. 1, 56-59 (1912); Robb v. Connolly, 111 U.S. 624 (1884).

Judge Edwards, in criticizing Judge Bork's opinion because it "*completely* overlooks the existence of state courts," said:

> Subject to the same constraints that face federal courts, such as personal jurisdiction, and perhaps in some instances to other limitations, such as preemption, state courts could hear many of the common law civil cases, brought by aliens, that Judge Bork believes should not be heard at all. As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist—as Judge Bork assumes—but to provide an *alternative* forum to state courts.

Tel-Oren, 726 F.2d 774 at 790 (Edwards, J., concurring) (emphasis in original).

concern of the drafters of section 1350 was probably directed toward claims arising from torts committed against aliens on American soil or by American citizens abroad.[89] *Adra v. Clift* perhaps represents the kind of case which the drafters of the statute had originally contemplated.[90]

Clearly the courts are better prepared to effectively adjudicate cases such as *Adra*, a child custody dispute, than one like *Filartiga*, with its complex implications of foreign policy and political considerations. The drafters of section 1350 were almost certainly not contemplating the adjudication of international torture cases when they enacted the Alien Tort Statute.[91] There is, nevertheless, little reason to doubt that, had these legislators envisioned such suits, they would surely have preferred that federal courts, as opposed to state courts only, be given subject matter jurisdiction.[92] The fact that such cases touch on sensitive matters of national concern only serves to emphasize the importance of extending federal jurisdiction to include cases like *Filartiga*.

To argue that under the Edwards/*Adra* formulation federal jurisdiction under section 1350 is proper in both *Filartiga* and *Adra* is not to ignore the concerns expressed by Judges Bork and Robb in *Tel-Oren*.[93] It is undeniable that adjudication of the type of claims raised in *Filartiga* and *Tel-Oren* has the potential for affecting the relations between this nation and foreign countries. It is at least foreseeable that another country might take offense at the assumption of jurisdiction by United States courts over matters more properly, if not necessarily more satisfactorily, resolved in the country where the offense occurred. The problem with Judge Bork's approach, which argues that international law does not provide a cause of action to support jurisdiction under section 1350, is that the approach effectively construes the statute out of existence.[94] The flaw in Judge Robb's argument for the court's abstention under the political question doctrine is that it addresses an issue more properly raised after the question of jurisdiction under section 1350 has been answered.[95]

Proper invocation of the political question doctrine or other abstention doctrines may, after subject matter jurisdiction under section 1350 has been established, provide the solution to the concerns voiced by Judges Bork and Robb. Applying the doctrine of stare decisis to abstention would eliminate

89. *Id.* at 783; *see also supra* note 87.

90. Judge Edwards suggests that in order for *Adra v. Clift* to become a perfect paradigm for his alternate construction, the facts must be altered slightly so that all of the defendants in that case were American citizens. *Tel-Oren*, 726 F.2d at 786 n.18 and accompanying text.

91. Judge Bork said, "It is important to remember that in 1789 there was no concept of international human rights. . . ." *Tel-Oren*, 726 F.2d at 813. *See also* Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, 5 HOUS. J. INT'L L. 131, 139 (1982).

92. *Tel-Oren*, 726 F.2d at 782-85 (Edwards, J., concurring); *see supra* notes 46-49 and accompanying text.

93. *See supra* notes 70-85 and accompanying text (discussion of Judge Bork's opinion), notes 50-69 and accompanying text (discussion of Judge Robb's opinion).

94. *Tel-Oren*, 726 F.2d at 778, 789 (Edwards, J., concurring); *see supra* notes 82-85 and accompanying text.

95. Under judge-made abstention doctrines, such as the political question doctrine and the act of state doctrine, courts are required to abstain from deciding the merits of certain issues in certain circumstances, even though there has been a statutory grant of jurisdiction. *See Tel-Oren*, 726 F.2d at 789 (Edwards, J., concurring). The abstention doctrines are not jurisdictional. *Id.*

the problem of inconsistency among decisions rendered in cases that rely on section 1350 for jurisdiction. Although the legislative purpose in granting jurisdiction to the federal courts may have been to ward off potential international conflicts, the effect of adjudication of a case like *Filartiga* in federal courts may be to generate tension between the United States and foreign nations. Moreover, the final result of *Filartiga* lends support to Judge Robb's argument that cases like *Filartiga* and *Tel-Oren* are simply nonjusticiable. On remand, the district court in *Filartiga* awarded more than $5,000,000 to each plaintiff against a defendant who is completely judgment-proof.[96] Although the decision broadcasts the message that America has a low tolerance for human rights violators, that same decision does little to compensate the Filartigas for their loss and suffering. Only if the Paraguayan government can be made to put some kind of pressure on the defendant is there a chance for any recovery whatsoever. Considering Paraguay's dismal record on defending human rights,[97] such cooperation seems highly unlikely.

IV. CONCLUSION

The solution to determining federal subject matter jurisdiction under the Alien Tort Claims Act may be to extend jurisdiction, according to the Edwards/*Adra* approach, to alien tort claims in which it is alleged that international law was violated in the course of committing the tort, regardless of whether the tort itself constitutes an international violation. Then, where appropriate, the courts should apply the abstention doctrines relating to political questions or nonjusticiability. Such a construction permits the statute to serve what is generally perceived as its intended purpose: to permit the federal courts to hear those claims that may be more properly considered at the federal level because they involve international affairs. The problem with this approach is that it places important foreign policy concerns within judicial discretion. Proper application of the doctrine of stare decisis to the use of the abstention doctrines, however, may at least promote consistency in the adjudication of cases brought under section 1350.

Satisfactory resolution of the problems with federal jurisdiction under the Alien Tort Claims Act can probably be achieved only through a reconsideration of section 1350 by Congress. A new pronouncement of legislative intent is needed to enable the courts to apply the statute in a manner consistent with its purpose. If the disparity of opinion among the federal circuits on the interpretation to be given this controversial statute is insufficient to arouse legislative interest in section 1350, it may, at least, prompt the Supreme Court to prescribe for it a single interpretation.

96. The *Filartiga* defendant was deported following the district court's initial dismissal of the Filartiga's claim. 630 F.2d 876, 880. The defendant took no further part in the action after the case was remanded to the district court by the Second Circuit Court. 577 F. Supp. at 860, 861.

97. *See* Amnesty International, REPORT ON TORTURE, 214-16 (2d ed. 1975).