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Case Comment

**Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act**

On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (PLO) landed on the northern coast of Israel, commandeered a bus, and began a rampage of hostage taking and summary executions until the Israeli police were finally able to stop them. The incident resulted in the deaths of thirty-four persons and serious injuries to eighty-seven others.¹ On March 10, 1981, the Israeli survivors and representatives of the deceased brought an action in the United States against the PLO,² alleging multiple tortious acts in violation of international law. The plaintiffs asserted jurisdiction

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¹ The plaintiffs alleged that 13 PLO terrorists, acting in conspiracy with the Libyan Arab Republic, landed near the civilian highway between Haifa and Tel Aviv with the goal of taking and executing civilian hostages in order to secure the release of certain PLO terrorists held in Israeli jails. Upon landing on a beach, the terrorists shot and killed an American photographer for no apparent reason. They then stopped a taxi and killed its passengers, after which they seized an unarmed bus carrying families home from a company outing and randomly killed some of the passengers. While shooting at passing automobiles, they killed and wounded many other people. Next, the terrorists seized another unarmed civilian bus and forced its passengers aboard the first bus. The bus finally stopped after crashing through a blockade set up by the Israeli police. In an effort to escape, the terrorists threw grenades at the bus and fled, using a girl as a shield. The bus ignited in flames, which consumed those passengers tied to their seats. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 105 S. Ct. 1354 (1985); 726 F.2d at 799 (Bork, J., concurring); see also N.Y. Times, Mar. 13, 1978, at A10, col. 4; N.Y. Times, Mar. 13, 1978, at A11, col. 1; N.Y. Times, Mar. 12, 1978, at A1, col. 6.

² The defendants in the original action included the PLO, the Libyan Arab Republic, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. See Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 544-45 (D.D.C. 1981), aff’d, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), cert. denied, 105 S. Ct. 1354 (1985). The district court dismissed the claims against the latter three groups because of an insufficient nexus to the alleged tort. See 517 F. Supp. at 549. The court also concluded that the claim against Libya was barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982), which preserves sovereign immunity for tort claims unless the injury or death occurs in the United States. See 517 F. Supp. at 549 n.3.

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pursuant to the Alien Tort Claims Act ("section 1350" or the "Act"), which grants federal district courts original jurisdiction over aliens' tort actions that allege a violation of international law. The United States District Court for the District of Columbia dismissed the lawsuit, finding that section 1350 did not provide subject matter jurisdiction. On appeal, a three-judge panel of the Court of Appeals for the District of Columbia affirmed the dismissal. Although agreeing on the result, the analysis of each judge differed dramatically. The panel could not reach a consensus on whether the PLO's acts of terrorism, summary execution, and hostage taking constituted violations of international law within the meaning of the Alien Tort Claims Act; whether the statute provides a private cause of action; or whether the case presented a nonjusticiable political question.

Underlying each judge's analysis seems to be a fear that prior interpretations of the Alien Tort Claims Act would lead to an overabundance of alien claims in the federal courts for torts occurring outside the territory of the United States. This Comment attempts to allay such fears. It first examines past applications of the Alien Tort Claims Act and compares Tel-Oren's reinterpretation of the Act with prior interpretations of the Act. Then, postjurisdictional limitations not raised in the earlier cases are explored in light of Tel-Oren. Finally, the Comment addresses the impact of the Tel-Oren court's misunderstanding of precedent on the resolution of future section 1350 cases.

Originally promulgated as part of the Judiciary Act of 1789, the Alien Tort Claims Act 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." The lack of contemporaneous legislative discussion has left subsequent judges and

6. Ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1982)).
8. Judge Bork noted in Tel-Oren that the House debates regarding the
scholarly commentators to speculate about the purpose of the Act.\textsuperscript{9} Some judges and scholars, for example, believe that Congress sought only to prevent biased judgments by providing alien plaintiffs suing in the United States access to the federal courts.\textsuperscript{10} Others believe that the original purpose of section 1350 was to provide a private cause of action for violations of international law.\textsuperscript{11}

The infrequent use of the statute provides courts with little judicial guidance. Over the past two hundred years, courts have conferred jurisdiction under the Alien Tort Claims Act in

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Judiciary Act did not mention the alien tort claims provision; the Senate debates were not recorded. See Tel-Oren, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (citing 1 ANNALS OF CONGRESS 782-833 (J. Gales ed. 1789)).


\footnote{10. See, e.g., Tel-Oren, 726 F.2d at 790 (Edwards, J., concurring) ("As best as we can tell, the aim of section 1350 was to place in federal courts actions potentially implicating foreign affairs."); Dickinson, \textit{The Law of Nations as Part of the National Law of the United States}, 101 U. PA. L. REV. 26, 48 (1952). \textit{But cf.} Blum & Steinhardt, supra note 9, at 54 n.3 ("It could be argued that § 1350 was originally intended principally to give aliens access to federal court to sue the United States government or United States state governments or their agents for torts committed in violation of 'the law of nations or a treaty to which the United States is a party,' but there were other vehicles by which aliens might sue the United States for its intentional delicts, making § 1350 superfluous."). The Second Circuit, in holding that the foreign relations implications of the issues raised in a § 1350 case would have to be adjudicated on remand, asserted that its decision to remand "underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts . . . . Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states." See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

\footnote{11. For example, Judge Robert Bork, a member of the three-judge panel in \textit{Tel-Oren}, speculates that § 1350's original purpose was to provide a private cause of action to individuals for the historic offenses against the law of nations—piracy, violations of safe conducts, and infringement of the rights of ambassadors. See \textit{Tel-Oren}, 726 F.2d at 813 (Bork, J., concurring) (citing 4 W. BLACKSTONE, \textit{Commentaries} *68, 72, quoted in 1 W. CROSSKEY, \textit{POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES} 459 (1953)); see also Note, \textit{Terrorism as a Tort in Violation of the Law of Nations}, 6 FORDHAM INT'L L.J. 236, 256 (1982-1983) (suggesting that the Alien Tort Claims Act provides a private right of action for violations of the law of nations or of treaties).}
only four\textsuperscript{12} of nearly a dozen cases that raised the issue.\textsuperscript{13} In deciding whether to grant section 1350 jurisdiction, courts must first determine whether the tort alleged constitutes a violation of international law.\textsuperscript{14} Thus, those cases in which the plaintiffs have failed to obtain section 1350 jurisdiction apparently did not involve either a violation of a universally recognized principle of international law or conduct considered wrong by international agreement.\textsuperscript{15}

One of the few cases granting jurisdiction under the Act arose only six years after the Act’s passage. In 	extit{Bolchos v. Darrel},\textsuperscript{16} a federal district court in South Carolina recognized section 1350 jurisdiction as an alternative to admiralty jurisdiction. During a war between France and Spain, Bolchos, a French citizen, seized a Spanish-registered enemy ship and brought its neutral cargo to an American port. The district court found


\textsuperscript{13} See, e.g., Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) (holding that there is no right under the law of nations granting custody of children to grandparents over foster parents); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) (holding that the Alien Tort Claims Act does not provide a jurisdictional basis for a tort action against an airline, even though the Warsaw Convention provides a cause of action, because airline crashes do not violate the law of nations); Dreyfus v. von Finck, 534 F.2d 24, 30-31 (2d Cir.) (finding that a forced sale of property did not violate the law of nations when the aggrieved parties are nationals of the acting state and that the law of nations is primarily concerned with the relationship among nations), cert denied, 429 U.S. 835 (1976); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (holding that, in a Luxemburg trust’s action for fraud, conversion, and corporate waste, the Eighth Commandment, “Thou shalt not steal,” is not part of the law of nations); Khedivial Lines, S.A.E. v. Seafarers’ Int’l Union, 278 F.2d 49 (2d Cir. 1980) (holding that the Act provides no basis for enjoining picketing by United States seafarers because the law of nations accords no universal right to unimpeded access to harbors); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) (holding that unseaworthiness of a vessel is a tort, but not one that violates international law); Moxon v. The Fanny, 17 F. Cas. 942, 947-48 (D. Pa. 1793) (No. 9895) (holding that a suit for restitution of property and for damages is not a suit for a “tort only” within the meaning of the Alien Tort Claims Act).

\textsuperscript{14} The Second Circuit has specified when a wrong will be deemed a violation of international law: “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.” See Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980).

\textsuperscript{15} See \textit{supra} note 13.

\textsuperscript{16} 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).
that international law guaranteed the restoration of property seized in those circumstances to its neutral owner. Because seizure of property is a tortious act, which in this case also violated the international principle of neutrality, the court granted jurisdiction under the Alien Tort Claims Act.

Subsequently, in *Abdul-Rahman Omar Adra v. Clift*, a modern court found that there existed an international principle that bars tampering with passports. The court then concluded that the tortious conduct, the taking of a minor child by one parent from the legal custody of the other and the subsequent concealment of that child’s identity on the noncustodial parent’s passport, violated international law. The court, however, required not only that the alleged tort be found to violate international law, but also that the plaintiff base its claim on a substantive right arising under domestic tort law. Thus, to reach its result, the court had to conclude that the unlawful taking of the child constituted a domestic tort.

The most significant contribution to the jurisprudence of section 1350 jurisdiction was *Filartiga v. Pena-Irala*. Dr. Joel Filartiga and his daughter, Dolly, both Paraguayan citizens, brought a wrongful death action in federal district court against the Inspector General of Police in Asuncion, Paraguay, who then resided in the United States. The plaintiffs claimed that Dr. Filartiga’s son had been tortured to death in retaliation for...
Filartiga's criticism of the Paraguayan government. On appeal, the Second Circuit reversed the district court's finding of lack of subject matter jurisdiction and held that deliberate torture perpetrated under color of official authority violates customary international law. The court reiterated that the threshold question in establishing subject matter jurisdiction under the Alien Tort Claims Act is whether the alleged tortious conduct violates the "law of nations." The court recognized that torture perpetrated by public officers is renounced by virtually all nations. It then reasoned that because international law confers a right upon all persons to be free from such torture, the plaintiffs met the section 1350 jurisdictional requirements. On remand, Pena defaulted and the Filartigas were awarded compensatory and punitive damages of $10 million in an attempt to "make clear the depth of the international

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22. See id. at 878-79.
23. See id. at 884-85. Custom and treaties are the primary sources of international law. Treaties are legally binding without domestic implementing legislation when they are so intended and the language explicitly codifies that intent. Customary international law, by contrast, is a legally effective set of norms developed through repeated, uncontested conduct by a majority of states. See generally I J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 31-47 (1968) (discussing the concept and uses of customary international law). Customary international law is generally "ascertained by consulting the works of jurists . . . ; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820). The law of nations has been incorporated into federal common law since the ratification of the Constitution in 1789. Thus, the enactment of the Alien Tort Claims Act was authorized by article III. Filartiga, 630 F.2d at 885. For a historical understanding of this concept, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223 (1972); Dickinson, supra note 10, at 48.
24. See Filartiga, 630 F.2d at 880. The terms law of nations and customary international law are used interchangeably throughout this Comment.
25. The international definition of torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 30 U.N. GAOR Supp. (No. 34) at 91-92, U.N. Doc. A/1034 (1975) (adopted without dissent by the United Nations General Assembly), reprinted in Filartiga, 630 F.2d at 882 n.11.
26. See Filartiga, 630 F.2d at 883-84.
27. See id. at 880.
revulsion against torture.”  

The district court in *Hanoch Tel-Oren v. Libyan Arab Republic* dismissed the plaintiffs' claim for lack of subject matter jurisdiction under both the Alien Tort Claims Act and section 1331, the federal question provision. The district court used the same analysis for both claims of jurisdiction because it considered the statutes to be functionally equivalent, at least "as to the role of the law of nations.” In rejecting federal question jurisdiction, the court stated that a private cause of action could not be implied from the criminal statutes cited by the plaintiffs. The district court also rejected the claim that a federal question existed because the domestic federal common law, from which the court could imply a cause of action, incorporates treaties and other evidence of customary international law. The court reasoned that it could not imply a cause of action under international law without interfering in the area of foreign policy making. It therefore concluded that only trea-

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28. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 866 (E.D.N.Y. 1984). Judge Nickerson, who had originally dismissed the complaint for lack of subject matter jurisdiction, allowing Pena to leave the country, granted the Filartigas punitive and compensatory damages of $10 million “to reflect adherence to the world community’s proscription of torture and to attempt to deter its practice.” See id. at 867.  
30. See 28 U.S.C. § 1331 (1982). A plaintiff wishing to obtain federal question jurisdiction must present a colorable claim arising under the Constitution or federal law that is neither frivolous nor interposed solely for the purpose of obtaining federal jurisdiction. See *Bell v. Hood*, 327 U.S. 678 (1946); infra notes 61-62 and accompanying text.  
31. See *Tel-Oren*, 517 F. Supp. at 549 n.2.  
33. See *Tel-Oren*, 517 F. Supp. at 545; supra note 23.  
34. See *Tel-Oren*, 517 F. Supp. at 548. The court presumably meant that because the executive branch purposefully negotiated for the precise language of the treaties, judicial expansion of that language to create a private cause of action could contravene executive branch policy.  

The court noted that ratification by the Senate of international agreements has occasionally stalled because of provisions for private rights of action. See id. at 549 (citing Blum & Steinhardt, supra note 9, at 71-72 n.82; Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Peña-Irala*, 33 STAN. L. REV. 353, 369 (1981)). One commentator has observed
ties expressly granting a private remedy satisfy the criteria for federal question jurisdiction and that the treaties cited by the plaintiffs lacked the requisite language creating an express cause of action. The district court used similar reasoning in rejecting the plaintiffs' claim for jurisdiction under the Alien Tort Claims Act.

The court of appeals affirmed the dismissal of the action in a short per curiam opinion. Each judge also wrote a separate opinion. Although disagreeing in analysis, each judge arrived at the conclusion that the granting of this type of jurisdiction over aliens would reverberate worldwide as an invitation to numerous undesirable lawsuits.

Judge Bork adopted the district court's analysis, agreeing that a plaintiff must allege a private right to sue granted by international law in order to secure jurisdiction under section 1350. Finding that customary international law, the treaties cited by the plaintiffs, and section 1350 itself did not impliedly or expressly provide the requisite cause of action, Judge Bork concluded that jurisdiction under section 1350 was lacking.

Judge Bork justified the requirement that a private right to sue be provided under international law by emphasizing that the judiciary should safeguard the separation of powers and refrain from interfering with the political branches. Judge Bork implied that when cases raise potentially "sensitive" political issues the standard should be stricter; not only must a plaintiff find a cause of action in another statute or law, the remedy must be expressly stated. He thus rejected the Tel-

that "[i]n the United States, for example, an international agreement banning genocide has gone unratified chiefly because the Senate did not want to expose American citizens to suits in foreign countries." Comment, Torture as a Tort in Violation of International Law: Filartiga v. Peña-Irala, 33 STAN. L. REV. 353, 359 (1981) (footnote omitted), quoted in Tel-Oren, 517 F. Supp. at 549.

35. See Tel-Oren, 517 F. Supp. at 549; infra notes 41-42 and accompanying text.
36. See Tel-Oren, 517 F. Supp. at 549.
37. See supra text accompanying notes 29-36.
39. See 726 F.2d at 801-08 (Bork, J., concurring).
40. Judge Bork's standard sprang from his concern that [t]he lack of clarity in, and absence of consensus about, the legal principles invoked by appellants, together with the political context of challenged actions . . . , lead to the conclusion that appellants' case is not the sort that is appropriate for federal-court adjudication, at least not without an express grant of a cause of action. See id. at 808 (Bork, J., concurring) (emphasis added). Judge Bork was particularly concerned that a judicial pronouncement on the PLO's liability for its
Oren plaintiffs' argument that a cause of action should be implied from treaties of the United States, reasoning that implying a cause of action from non-self-executing treaties would intrude on the executive branch's power to negotiate treaties. Judge Bork also asserted that, in the absence of an express grant of a remedy, customary international law does not allow individuals to enforce rights in international or domestic fora. Any other construction would be contrary to the "severe limitations on individually initiated enforcement inherent in international law . . . [as well as] to constitutional limits on the role of

attack on the Israeli bus would disrupt the precarious relations between the United States and the Arab nations. See id. at 805 (Bork, J., concurring). He noted that even the appellants asserted that "[o]ne of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotiations by destroying the positive efforts made in the Camp David accords." See id. (Bork, J., concurring) (quoting Brief for Appellants at 15, Filartiga).


42. See Tel-Oren, 726 F.2d at 808-10 (Bork, J., concurring). Whether a treaty or international agreement is binding as part of domestic United States law depends on whether it is self-executing or non-self-executing. This is decided by the executive during negotiations or by the courts in interpreting the language of the agreement and its negotiating history. See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141, 147, 154 (1965). If the court finds that the signatories intended that the agreement be internationally binding and have effect as domestic law without the enactment of implementing legislation, it is self-executing. If the court finds, however, that the signatories intended that the agreement have effect within their respective states at some future date, after it has become internationally binding and after domestic implementing legislation has been enacted, then the agreement is non-self-executing. The language of international agreements is often ambiguous with respect to this issue of intent, leading to different judicial interpretations. Compare Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (holding the English version of an 1819 treaty with Spain to be non-self-executing) with United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833) (holding the Spanish version of the same treaty to be self-executing). Judge Bork asserted that several of the treaties relied on by the plaintiffs expressly called for implementing legislation, evidencing the intent that the treaties not be self-executing. See Tel-Oren, 726 F.2d at 809 (Bork, J., concurring).

43. See Tel-Oren, 726 F.2d at 816-19 (Bork, J., concurring).
federal courts." Judge Bork concluded that construing section 1350 to cover tort actions by aliens that affect foreign policy would require an act of Congress or a treaty expressly creating a cause of action.

In his opinion, Judge Robb skirted the jurisdictional issue by declaring that *Tel-Oren* raised a political question and therefore was not justiciable. He opined that the federal courts are not equipped to determine the international status of terrorist acts. Because some of the issues raised in *Tel-Oren*, such as recognition of states and the apprehension of terrorists, traditionally have been dealt with by the executive and legislative branches, Judge Robb thought that the judiciary should defer to those with expertise and greater access to the relevant facts. He concluded by expressing the fear that seems to underlie each of the opinions: "It is not implausible that every alleged victim of violence of . . . counter-revolutionaries . . . could argue . . . that they are entitled to their day in the courts of the United States . . . [without] obvious or subtle limiting principle[s] in sight."

Judge Edwards eschewed the district court's proposition that section 1350 required an independent cause of action, favoring instead the statutory interpretation, developed in *Bolchos*, *Adra*, and *Filartiga*, that the alleged tort need only constitute a violation of international law in order to provide a basis for subject matter jurisdiction. In applying the

44. See id. at 812 (Bork, J., concurring).
45. See id. at 822 (Bork, J., concurring). Judge Bork suggested that even if such a statute were passed, he might conclude that "the constitutional core of the political question doctrine precludes jurisdiction." See id. (Bork, J., concurring).
46. See *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring).
47. See id. (Robb, J., concurring).
48. Judge Robb observed that the issues raised by the *Tel-Oren* plaintiffs are regularly encountered by the other branches of the federal government. See id. at 825 (Robb, J., concurring) (citing authorities).
49. See id. at 825-26 (Robb, J., concurring).
50. See id. at 826 (Robb, J., concurring). Judge Bork agreed that the plaintiffs' construction of § 1350 was too sweeping because "[i]t would authorize tort suits for the vindication of any international legal right. . . . [T]hat result would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself." See *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring).
51. 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); see supra notes 16-17 and accompanying text.
52. 195 F. Supp. 857 (D. Md. 1961); see supra notes 18-20 and accompanying text.
53. 630 F.2d 876 (2d Cir. 1980); see supra text accompanying notes 21-28.
principles of *Filartiga*, however, Judge Edwards found the facts of *Tel-Oren* insufficient to establish jurisdiction under section 1350.\(^{54}\) In particular, he noted that the perpetrator of the alleged tort was not a sovereign state or its agent, but rather the PLO. Because he believed that the law of nations relied on in *Filartiga* imputes liability only to states and persons acting under color of state law,\(^{55}\) Judge Edwards refused to find that the actions of the PLO, however tortious, triggered section 1350 jurisdiction.\(^{56}\)

Although the *Tel-Oren* decision was unanimous, the judges expressed sharp differences about how to deal with the difficult issues raised by the case. The result, a striking absence of agreement on any issue but the disposition, diminishes the value of the case as an interpretation of the jurisdictional requirements of section 1350. *Tel-Oren* is a hastily formed reaction to the incorrect assumption that *Filartiga*’s broad holding will beckon to aliens around the world to litigate their claims in United States federal courts. Because it offers so little guidance, *Tel-Oren* should be ignored. Instead, courts should adhere to the restrictive principles unanimously agreed on in *Filartiga* as a guide to understanding the Alien Tort Claims Act.\(^{57}\)

The most dangerous aspect of *Tel-Oren* as precedent is Judge Bork’s assertion that section 1350 requires an independ-

\(^{54}\) *See Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring).

\(^{55}\) *See id.* at 776, 792 (Edwards, J., concurring). Nonetheless, Judge Edwards noted that some modern commentators assume or argue that individuals are liable under international law. *See id.* at 792-93 (Edwards, J., concurring) (citing and discussing authorities).

\(^{56}\) Judge Edwards provided an alternative formulation of § 1350, although he admitted that this “formulation also raises a host of complex problems of its own.” *See id.* at 782 (Edwards, J., concurring). He reasoned that in order for an alien to bring a common law tort action in federal court, a violation of international law must be alleged and “the substantive right on which [the] action is based must be found in the domestic tort law of the United States.” *See id.* (Edwards, J., concurring). This formulation was derived from Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). *See supra* text accompanying notes 18-20. Judge Edwards hypothesized that the *Tel-Oren* “plaintiffs might have alleged that the PLO violated Israeli immigration laws by landing in Israel without passports,” *see Tel-Oren*, 726 F.2d at 788 (Edwards, J., concurring), presumably implicating both municipal and international law.

\(^{57}\) The Second Circuit’s approach to subject matter jurisdiction under the Alien Tort Claims Act as articulated in *Filartiga* is consistent with earlier decisions construing the statute. *See supra* notes 12-20 and accompanying text.
ent cause of action. On its face, section 1350 states only the two requirements that there be a "tort only" and that the commission of such a tort violate international law. Section 1350 contains no explicit requirement that a specific international law grant a private cause of action in order to establish a right to redress, probably because the "tort only" language provides the private right of action. Judge Bork's examination of the congressional intent underlying section 1350 therefore was unnecessary because the statutory language is unambiguous on its face.

The contrast between the language creating subject matter jurisdiction in the federal courts in sections 1350 and 1331 further undermines Judge Bork's conclusion that section 1350 requires a separate cause of action. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." The term "arising under" traditionally has been interpreted to mean that the source of a plaintiff's right to sue must be expressly provided for in another law, treaty, or constitutional provision. Section 1350 does not require that the alleged tort "arise under" an international treaty or customary interna-

58. See Tel-Oren, 726 F.2d at 799 (Bork, J., concurring); supra text accompanying notes 37-38.
59. See supra text accompanying note 7.
60. Judge Bork believed that had it foreseen the possibility, Congress undoubtedly would have explicitly prohibited use of § 1350 in Tel-Oren-type litigation. See Tel-Oren, 726 F.2d at 812-16 (Bork, J., concurring); supra text accompanying note 11; cf. 726 F.2d at 789 (Edwards, J., concurring) ("While conceding that the legislative history offers no hint of congressional intent in passing the statute, [Judge Bork] infers Congress' intent from the law of nations at the time of the passage of section 1350. The result of this analytical approach is to avoid the dictates of the [Supreme Court] and to limit the 'law of nations' language to its 18th century definition.").
62. For discussion of the meaning and scope of "arising under," see H. Hart & H. Wechsler, The Federal Courts and the Federal System 844-87 (2d ed. 1973); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 160-63 (1953); supra note 30; see also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974) (allowing a suit under the Nonintercourse Act of 1790, which protects possessor rights to tribal lands); International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 696 (1963) (holding that a suit to enforce an award of an airline system board adjustment arises under the federal Railway Labor Act); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 805-08 (1824) (holding that a congressionally chartered bank's capacity to sue or be sued arises under federal law within the meaning of the Constitution); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821) (stating that a case that arises under the laws of the United
tional law, but only that it be committed “in violation of” such law. In 1948, Congress had an opportunity while reviewing the jurisdictional provisions to revise the language of section 1350,63 the meaning and use of which was, by then, quite familiar.64 Congress nonetheless chose to leave section 1350 unchanged, strongly suggesting that Congress did not intend section 1350 to require a separate cause of action.65

Judge Bork’s analysis violates another rule of statutory construction by construing a section of the Alien Tort Claims Act out of existence.66 As a general rule, international law does not state express causes of action67 but rather, out of respect for domestic sovereignty, relegates to individual states the

States must involve a right given by some act that becomes necessary in order to execute powers of the Constitution).


64. Section 1331 was promulgated in 1789. By 1948, Congress was well-acquainted with the judiciary’s conclusion that “arising under” required an express cause of action. Therefore, had Congress intended the same meaning for § 1350, it could have changed the language when it reviewed the Act in 1948. By leaving the language untouched, Congress presumably intended to maintain the different standards.

65. An interesting analysis contrasting the differences between §§ 1350 and 1331 is found in Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978). Just before the fall of South Vietnam, the United States airlifted several thousand Vietnamese orphans to the United States. The grandmother of four of these children brought suit to have the children returned to her custody. In examining the claims for jurisdiction, the court denied jurisdiction under § 1331 on the ground that the treaty invoked by the plaintiff did not expressly create a cause of action for aliens in federal courts. *See id.* at 629. The court also rejected § 1350 jurisdiction but did so on the ground that the granting of custody to foster parents instead of grandparents did not violate the law of nations. *See id.; see also Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (“Once a tort can be considered to be in violation of the law of nations, § 1350 allows immediate access to a federal court.”).* In Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), the court observed that the action was grounded directly on a domestic tort—the unlawful taking of a minor child from its guardian—but it also implicated an international law—the misuse of a passport. *See supra* notes 15-20 and accompanying text. Under this approach, the court did not have to decide whether § 1350 requires a separate cause of action because, fortuitously, the cause of action relied upon was expressly provided in domestic tort law.

66. It is a basic principle of statutory construction that no part of a statute should be construed so as to render it “inoperative or superfluous, void or insignificant.” 2A C. SANS, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 63 (4th ed. 1973); *see FTC v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994 (D.C. Cir. 1975).

decision of whether to grant a private cause of action to remedy violations of international law.\footnote{See Re\textsc{emtation}, supra note 42, \textsection 3 comment h, illustration 5 (observing that municipal law may provide a remedy to a person injured by a violation of a rule of international law).} Under Judge Bork's reading of the Act, no plaintiff will ever be able to prove a right to sue under customary international law, a construction that effectively nullifies that portion of section 1350.

Although Judge Bork's objective in \textit{Tel-Oren} was to stiffen the requirements for access to the federal courts, a close examination of the holding of \textit{Filartiga} reveals that the Second Circuit's standard was not overly lax. The court in \textit{Filartiga} held that because torture perpetrated under state authority violates international law, aliens who are victims of this tort were entitled to section 1350 jurisdiction.\footnote{See supra text accompanying notes 21-28.} The simplicity of this holding need not lead to its overly broad application. First, in order to constitute the requisite violation of international law under the test set out in \textit{Filartiga}, the tortious act must be "official,"\footnote{See \textit{Filartiga} v. Pena-Irala, 630 F.2d 876, 884 (1980) (concluding that "official torture is now prohibited by the law of nations").} that is, an act conducted by the state, its agent, or under "color of state law."\footnote{In limiting its recognition of torture as a violation of international law to official acts, the court only acknowledged that official torture is universally condemned. \textit{See supra} note 25; \textit{cf. \textit{Filartiga}}, 630 F.2d at 890 ("Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.") (citations omitted).} Second, \textit{Filartiga}'s holding identifies only \textit{torture} as an actionable violation of international law. Terrorism, often differing from torture only in semantics in the western world,\footnote{For example, it could be argued that among the PLO's activities were some incidents of torture and arbitrary killing, such as setting fire to the bus while passengers were bound to their seats. \textit{See supra} note 1. The delineation between torture and terrorism on the ground that terrorism is an instrument of political negotiation and torture merely conduct done without reason by a nonstate actor is an affront to the principles of human rights. Such reasoning mandates the conclusion that terrorists who torture victims of an enemy state for the advancement of political goals are exempt from liability. Terrorists would guarantee their safety by perpetrating other acts in addition to the torture, so as to hide the acts of torture under the liability-free cloak of terrorism. If the allegations regarding the torture and arbitrary killing of the victims can be proved, the distinction between terrorism and torture in \textit{Tel-Oren} is specious. \textit{Cf. Note}, supra note 11, at 243-47 (urging courts to rule that terrorism violates international law).} is not proscribed by a general consensus in the international community.\footnote{This is largely a result of the debate between the developing countries}
statutory reference to the “law of nations” narrowly, noting that very few types of conduct have been proscribed widely enough to have evolved into principles of customary international law. Because the list of crimes is short and restrictive, the Tel-Oren court’s fear that section 1350 jurisdiction would be conferred readily on an alien citing any international precept is exaggerated.

The District of Columbia court had no need to depart from the framework of analysis developed in Filartiga in analyzing whether the PLO acted under color of state law. On the one hand, a strict application of Filartiga’s requirement that the act be “official” supports Judge Edwards’s finding that the PLO was a nonstate actor and therefore incapable of violating the prohibition recognized in customary international law against official torture. On the other hand, had Judge Edwards explored the possibility that by acting as an agent of the Libyan government the PLO was acting under color of state law, he might have viewed the PLO’s conduct as “official” and therefore within the Filartiga principle. The PLO acted as an agent for the Libyan government if the latter authorized the PLO to act on Libya’s behalf and subject to its control and if the PLO had consented so to act. In deciding whether an agency relationship exists, courts try to discern the intent of the parties based on facts, such as the control of the principal over the agent, the method, if any, of remuneration, and the nature of

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and the industrial nations concerning an acceptable definition of terrorism. The United Nations Ad Hoc Committee on International Terrorism reached an impasse over the definition of terrorism and the scope of the proposed convention condemning terrorism. Certain countries were particularly concerned about the convention’s potential impact on national liberation groups. See Nanda, Progress Report on the United Nations’ Attempt To Draft An “International Convention Against the Taking of Hostages”, 6 Ohio N.U.L. Rev. 89, 89, 96 (1979). These countries consider politically motivated acts of terrorism to be legitimate acts of aggression and therefore immune from condemnation. Cf. Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30), at 142, U.N. Doc. A/9030 (1973) (supporting the struggles against such regimes) [hereinafter cited as Basic principles]; see also Blum & Steinhardt, supra note 9, at 92 (suggesting that one indication of the lack of international consensus about terrorism is that accusations are often answered with a justification for, rather than a denial of, the act).

74. See infra text accompanying notes 85-88.

75. An agency relationship is “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).
the past relationship of the parties.\textsuperscript{76} The complaint\textsuperscript{77} in \textit{Tel-Oren} asserted that the Libyan government planned, funded, and claimed responsibility for the attack\textsuperscript{78} that later formed the basis of the Israeli plaintiffs' claim of tortious conduct in violation of international law. If the PLO carried out Libya's instructions with the use of Libyan funds, it was arguably operating as an agent\textsuperscript{79} under color of state law.\textsuperscript{80} It is possible,

\begin{footnotes}
\item[76] See id. at § 1 commentary at 9; see also id. at §§ 12-14(0).
\item[77] Because the merits of the case had not been heard by the court, the agency theory depends on the facts alleged in the pleadings. Without passing on the validity of the facts, a court can exercise jurisdiction "[i]f the pleadings contain sufficient matter to challenge the attention of the court, and such a case is thereby presented as to authorize the court to deliberate and act." Thompson v. Terminal Shares, Inc., 89 F.2d 652, 655 (8th Cir. 1937). Furthermore, jurisdiction does not depend on the sufficiency of the pleadings or character of the defense; jurisdiction "is wanting only where the claim set forth in the complaint is so insubstantial as to be frivolous or, in other words, is plainly without color of merit." Binderup v. Pathe Exch., Inc., 263 U.S. 291, 305-06 (1923) (citations omitted). Thus, the court in \textit{Tel-Oren} would not have had to adjudge the liability of the PLO as an agent of Libya in order to find § 1350 jurisdiction; it would have needed only to find credible allegations that the PLO was acting as agent of Libya and, therefore, under color of state law.
\item[78] See \textit{Tel-Oren}, 726 F.2d at 799 (Bork, J., concurring); see also E. MICKOLUS, \textit{TRANSNATIONAL TERRORISM, 1968-1979}, at 778 (1980) (describing the attack).
\item[79] This analysis inevitably leads to the question whether, if the PLO was acting as an agent of a sovereign government, it can claim immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982). For a discussion of the Foreign Sovereign Immunity Act, see infra notes 113-19 and accompanying text.
\item[80] Although not considered by the court, the PLO arguably could be held liable as a group of individuals, as opposed to a state. Historically, only states were considered actors and therefore subject to liability under international law. The protection of individuals generally had been left to each sovereign state by way of bilateral or multilateral agreements. The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights 1, U.N. Sales No. E.82.XIV.1 (1982). The international community first attributed liability to individuals in the 1945 Charter of the International Military Tribunal at Nuremberg. See Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/64/Add. 1, at 188 (1947) (affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal"). Shortly thereafter, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277, expanded the Nuremberg concept of crimes against humanity and defined the liability for such crimes. See A. KLAFKOWSKI, \textit{THE NUREMBERG PRINCIPLES AND THE DEVELOPMENT OF INTERNATIONAL LAW} (1966). Subsequent international agreements demonstrate the growing international consensus that individuals, at least in the area of human rights, bear responsibility for certain actions. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 53, U.N. Doc. A/6316 (1967) ("Realizing that the
therefore, that the Tel-Oren court possessed facts sufficient to grant subject matter jurisdiction under section 1350. Regardless of the conclusion that it reached, the Tel-Oren court should have used the framework developed in Filartiga to avoid instilling superfluous meaning in the Alien Tort Claims Act.

A second limiting element of the Filartiga court’s holding is its premise that only torture, and not terrorism, violates international law. In applying this distinction, the Tel-Oren court could have considered whether any aspect of the alleged treatment of the plaintiffs fit within the definition of torture that was used as the basis for section 1350 jurisdiction in Filartiga. The Filartiga court’s definition excludes terrorism, a political activity that is not yet condemned by the international community.


An alternative way to circumvent this controversy is to characterize the PLO as a quasi-state. Partial statehood would bear with it at least partial responsibility to the international community. See Kassim, The Palestine Liberation Organization’s Claim to Status: A Juridical Analysis Under International Law, 9 DEN. J. INT’L L. & POL. 1 (1980). The PLO’s status as an actor in international law is based on four factors: self-proclamation as sole and legitimate representative of the Palestinian people; diplomatic recognition by other states; membership in governmental organizations; and governmental authority in war situations, extraditions, and tax collections. See id. at 18-25. The natural conclusion of Professor Kassim’s postulate is that if the PLO claims all the advantages born from a quasi-state status under international law, it must also accept liability for breaches of the same laws. For background and further discussion of the status of the PLO in the international community, see Friedlander, The PLO and the Rule of Law: A Reply to Dr. Annis Kassim, 10 DEN. J. INT’L L. & POL. 221 (1981); Levine, A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order, 10 DEN. J. INT’L L. & POL. 243 (1981).

81. See supra note 25. But see supra note 72.
82. See Tel-Oren, 726 F.2d at 795-96 (Edwards, J., concurring). But see Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and...
be characterized as official torture will not survive Filartiga's interpretation of section 1350. For example, the bombing of buildings, the seizure and arbitrary detention of hostages, and border blockades are all actions that would fall outside a strict reading of Filartiga.83 Perpetrators of such acts may, of course, be held criminally liable, but their victims will not be able to gain access to United States courts by asserting section 1350 jurisdiction.

A third limiting factor of Filartiga is its narrow interpretation of the scope of customary international law for purposes of determining which tortious acts are "committed in violation of the law of nations." Judge Kaufman concluded that customary international law contains only those precepts that are subscribed to by a general consensus of the international community.84 Writing for the court, Judge Kaufman cited piracy and slave trading as traditionally recognized violations of the law of nations.85 Other courts interpreting section 1350 included tampering with passports,86 seizure of a neutral's goods,87 and official torture.88 Because the defendant state and its allies most likely will deny the precept's place in customary law,89 this requirement may reduce the number of claims based on a univer-

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83. A less strict reading of Filartiga might allow a finding that these terrorist acts were "official" because of Libyan participation in the planning of the attack. See Comment, Jurisdiction—private right of action under the law of nations—subject matter jurisdiction under Alien Tort Claims Act—separation of powers: Tel-Oren v. Libyan Arab Republic, 78 Am. J. Int'l L. 668, 670 (1984).

84. See Filartiga, 630 F.2d at 888; supra note 14.

85. See Filartiga, 630 F.2d at 890; see also Dickinson, supra note 10, at 26-34 (discussing the law of nations as it existed in the eighteenth century).


87. See Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607); supra text accompanying note 17.


89. Developing nations as a block, for example, probably would deny that government expropriation of an alien's property is a violation of international law. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S 398 (1964) (finding no consensus in the international law governing the expropriation of alien property). Judge Edwards also suggested that nations struggling under alien domination might join together to declare legitimate acts that lead to independence and self-determination. See Tel-Oren, 726 F.2d at 795 (Edwards, J., concurring) (citing Basic principles, supra note 73).
sally accepted rule of international law.\textsuperscript{90}

The \textit{Tel-Oren} court thus had three grounds on which to reject or accept the plaintiffs' claims without departing from \textit{Filartiga}'s interpretation of section 1350 jurisdiction. Instead, by resorting to the innovative analyses of the three separate opinions, the judges in the \textit{Tel-Oren} panel revealed their fear that following \textit{Filartiga} and granting section 1350 jurisdiction would result in a deluge of alien tort claims. This fear is unfounded, however, because of the procedural hurdles built into the domestic legal system, such as the doctrines of personal jurisdiction, forum non conveniens, the act of state doctrine, and foreign sovereign immunity.\textsuperscript{91} A final limiting factor, subject to the most misuse because of its discretionary nature, is the political question doctrine. Although not all of these factors could have been applied in \textit{Tel-Oren} and \textit{Filartiga}, they could operate to filter future tort claims of alien plaintiffs seeking access to the United States courts.

The requirement of due process carefully delineates the parties over whom personal jurisdiction constitutionally may be exercised.\textsuperscript{92} In a case involving only alien parties, personal ju-

\textsuperscript{90} Courts in the past also have construed the scope of the "law of nations" narrowly, finding that no international rights are involved in airplane crashes in international territories, see Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), \textit{cert. denied}, 439 U.S. 1114 (1979), in granting custody to grandparents rather than foster parents, see Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978), and in the unseaworthiness of a vessel, see Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963). \textit{See generally supra} note 13.

\textsuperscript{91} A less imposing barrier is the requirement of exhaustion of local remedies. It is not yet settled whether the requirement, a general principle of international law usually applied in the context of international redress, is only procedural or is a substantive bar to future claims. Generally, parties must exhaust all local remedies by seeking reparation through the courts and administrative agencies of their own state before proceeding to a foreign forum. If no local remedies are available or if the procedure is unreasonably slow, the plaintiff may proceed to alternative fora. \textit{See generally A. Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law} (1983); Mummery, \textit{The Content of the Duty to Exhaust Local Judicial Remedies}, 58 AM. J.INT'L L. 389 (1964). The requirement should be automatically triggered in § 1350 cases because, by alleging a violation of international law or a United States treaty, the plaintiff has put the procedural rules of international law into play.

\textsuperscript{92} The due process clause of the fourteenth amendment requires that the defendant have at least "minimum contacts" with the forum state. \textit{See International Shoe Co. v. State of Wash.}, 326 U.S. 310, 316 (1945). The due process clause extends to aliens as well as to United States citizens. \textit{See R. Casad, Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts} § 4.06(5) (1983).
Jurisdiction can be established if the defendant has attachable assets or property in the United States or if the defendant is physically present in the United States, either permanently or transitorily. Basing jurisdiction on property that is the subject of the suit presents no constitutional obstacle. Quasi in rem jurisdiction based on the presence of the defendant's property in the United States with no other connection between the defendant and the United States, however, is more tenuous. If it can be shown that no other forum exists in the United States and that the plaintiff would suffer extreme hardship if required to litigate in a foreign country, a court might exercise quasi in rem jurisdiction over the defendant based only on property in the United States.

Physical presence in the United States falls well within the due process requirements of personal jurisdiction and therefore there is no barrier to the assertion of personal jurisdiction over an alien defendant sojourning at length in the United States. A more constitutionally tenuous, yet permissible, claim is for personal jurisdiction over a defendant only transitorily present in the forum. The "transient rule" has been extensively criticized, causing courts generally to restrict its use to suits against aliens. Thus, in section 1350 cases, a defen-

94. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court extended the standard of fair play and substantial justice set forth in International Shoe Co. v. State of Wash., 326 U.S. 310 (1945), to quasi in rem jurisdiction. See Shaffer, 433 U.S. at 212. Although International Shoe requires minimum contacts with the forum state, the Court in Shaffer reserved the question whether an exception might be made if no other forum is available. See id. at 211 n.37; cf. Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630 (D. Conn. 1977) (allowing a Connecticut plaintiff to obtain in rem jurisdiction by garnishing a debt owed to the defendant, a Kuwait corporation, by a Connecticut corporation because the defendant was not more disadvantaged by litigating in Connecticut than in any other state and because there were no alternative fora in the United States).
95. See Pennoyer v. Neff, 95 U.S. 714 (1877).
96. Pena remained in the United States after his visitor visa had expired. While in custody pending deportation, he was served with the Filartiga complaint. See Filartiga, 630 F.2d at 878-79.
97. The "transient rule" allows personal jurisdiction over defendants by physical service of process regardless of the lack of contact with the forum. See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. Rev. 288, 289 (1956); Ross, The Shifting Basis of Jurisdiction, 17 Minn. L. Rev. 146, 146-47 (1932).
98. See Ehrenzweig, supra note 97, at 303. Professor Albert A. Ehrenzweig suggested that one rationale for applying the transient rule to aliens is that plaintiffs who cannot sue the defendant in the United States may completely lose their remedies. See id. Thus, the alien defendant in Bishop v.
ant must be at least transitorily present or must own property in the United States in order to be subject to a federal court's exercise of personal jurisdiction. In *Tel-Oren*, personal jurisdiction could have been founded on the extended presence in the United States of the PLO's Information Office in Washington, D.C.99

Another jurisdictional limit on the access to United States courts of alien tort claimants who have established subject matter jurisdiction under section 1350 is the doctrine of forum non conveniens,100 which permits a court having subject matter and personal jurisdiction to choose not to exercise its jurisdiction if the forum is sufficiently inconvenient. A court may dismiss an action on forum non conveniens grounds with a stipulation that the case be reinitiated in the more convenient forum.101 The

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99. *Vose*, 27 Conn. 1 (1853), was served with process while on a train passing through Connecticut. The court upheld the service, finding no reason why Connecticut creditors should have to pursue their debtors in foreign jurisdictions when the debtor is in the plaintiff's jurisdiction.

99. *But cf. D'Amato, Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 Am. J. Int'l L. 92, 93-94 (1985) (suggesting that the basis for jurisdiction over the PLO was the presence of money and other assets owned by the PLO in the United States).

100. Within the United States federal court system, cases may be transferred under 28 U.S.C. § 1404(a) (1982), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." If the proposed recipient forum is outside the United States, thereby making transfer impossible, the court may dismiss the action. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (dismissing an action because Scotland, the situs of the airplane crash, was a more appropriate forum).

101. The purpose of the doctrine of forum non conveniens is to allow a court to decline jurisdiction when the practical aspects of litigating a case indicate that a more convenient location is necessary to ensure that substantial justice will be done. Among the factors that different courts have taken into consideration in applying the doctrine are the relative ease of access to sources of proof, the availability of compulsory process and the cost of obtaining the attendance of unwilling witnesses, the possibility of viewing the situs, if appropriate, and the enforceability of a judgment. On one occasion, demonstrated bias of the foreign court defeated a motion for dismissal under the forum non conveniens doctrine. *See Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978). *But see Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891 (S.D.N.Y. 1981) (dismissing the action on forum non conveniens grounds in favor of Saudi Arabia, despite the Arizona plaintiff's assertion that the trial would be unfair because members of the Saudi royal family were parties to the suit and, consequently, no local attorneys would be available).

101. The dismissal order usually is conditioned upon the defendant's waiver of statute of limitations defenses and any jurisdictional objections. *See Panama Processes, S.A. v. Cities Serv. Co.*, 650 F.2d 408, 414 (2d Cir. 1981) (conditioning the dismissal on the defendant's willingness to accept service of process in Brazil, to waive any statute of limitations defenses, and to pay any
defendant's motion must establish not only that a more convenient forum exists, but also that the original forum is seriously inconvenient. In addition, the doctrine of forum non conveniens requires that the alternative court be equipped and willing to administer justice. A court, for example, probably would refuse to dismiss a case if it appeared that the officials of the proposed forum would persecute any of the litigants; if the evidence, witnesses, and litigants were spread among several countries; or, perhaps, if the parties resided in a country without an internationally recognized legal system.

In considering the question of forum non conveniens in *Filartiga*, the district court found on remand that it would not be able to substitute a Paraguayan forum without risk of an unjust result. Before the Filartigas brought their action in the United States, they had filed a lawsuit in Paraguay that resulted in the arrest of their Paraguayan attorney and the threat of his death if he continued with the suit. Had the issue of forum non conveniens arisen in *Tel-Oren*, the court may well have found the Israeli courts equally equipped to administer justice and more convenient because Israel was close to the parties' resi-

judgment rendered in the Brazilian courts). A court may reserve the power to reinstate the case if its conditions are not met. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828, at 42 n.13 (Supp. 1984).

102. See 15 C. Wright, A. Miller & E. Cooper, supra note 101, at § 3828, at 180.

103. See id.; see also R. Casad, supra note 92, at § 1.04.

104. In addition to convenience, the requirement that the court also be “effective” serves to protect a plaintiff's right to redress. “It must appear to a certainty that jurisdiction of all parties can be had and that complete relief can be obtained in the supposedly more convenient court.” 15 C. Wright, A. Miller & E. Cooper, supra note 101, at 179 (footnote omitted). It has been suggested that heinous violations of human rights, by themselves, may preclude the situs of the tort as an alternative forum. See Blum & Steinhardt, supra note 9, at 104.

105. In cases alleging a violation of international law perpetrated by a state official or an agent of the state in the alternative forum, for example, courts may be predisposed to retain jurisdiction. See infra text accompanying notes 106-07.

106. See *Filartiga*, 630 F.2d at 878. The defendant, Pena, brought a motion to dismiss based on forum non conveniens in the district court. Because the case had been dismissed solely for lack of subject matter jurisdiction, however, the issue did not come before the Second Circuit. On remand, the district court noted that Pena's default cast doubt on his argument that the Paraguayan courts were more convenient. The court retained jurisdiction, holding that forum non conveniens depends on the availability of justice as well as convenience and that Pena did not rebut the plaintiffs' argument that resort to Paraguayan courts would be futile. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).
dences and was the situs of the tort.\textsuperscript{107}

Other barriers to alien tort actions include the act of state doctrine and foreign sovereign immunity.\textsuperscript{108} The act of state doctrine has been judicially evolved from the customary international privilege of sovereign immunity. It precludes courts from reaching the merits of issues\textsuperscript{109} that question a foreign sovereign's public acts committed within that sovereign's territory.\textsuperscript{110} The \textit{Filartiga} court suggested in dicta that when illegal acts are not ratified by the state, application of the doctrine may be unjustified.\textsuperscript{111} Moreover, in \textit{Tel-Oren}, the opinions of

\textsuperscript{107} No Israeli official or agent of the government was a party to the suit. Moreover, as demonstrated by the celebrated trial of the convicted war criminal, Adolf Eichmann, Israel's adversarial legal system provides a relatively objective forum. \textit{See J. Stone, The Eichmann Trial and the Rule of Law} 14-17 (1961) (discussing the impartiality of the Israeli court). \textit{See generally 6,000,000 Accusers: Israel's Case Against Eichmann} 177-305 (S. Rosenne ed. trans. 1961) (discussing the legal channels for challenging the court's fairness).


\textsuperscript{109} Judge Edwards emphasized in \textit{Tel-Oren} that the act of state doctrine, unlike foreign sovereign immunity, does not require a court to decline jurisdiction but, rather, requires it to abstain from passing on the merits of certain issues. Thus, he considered it inappropriate to apply the act of state doctrine to facts that raised only a jurisdictional question. \textit{See Tel Oren}, 726 F.2d at 789-90 (Edwards, J., concurring). Judge Bork, on the other hand, relied on more recent formulations of the doctrine and its purpose—to preserve the basic relationship between the branches of government through the separation of powers principle—as support for declining to hear the case on political question grounds. \textit{See} 726 F.2d at 801-03 (Bork, J., concurring).


\textsuperscript{111} The court observed: "[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state." \textit{Filartiga}, 630 F.2d at 889; \textit{see also} Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 690-95 (1976) (suggesting that abstention on
Judges Edwards and Bork noted that the doctrine probably could not be stretched to shield the PLO, whose sovereignty is questionable and whose acts were committed inside the territory of an unrelated sovereign government.\textsuperscript{112}

Of greater import is the barrier raised by the doctrine of foreign sovereign immunity,\textsuperscript{113} codified in the Foreign Sovereign Immunities Act (FSIA).\textsuperscript{114} The FSIA bars actions against a foreign state and its agencies and instrumentalities unless the action falls within one of the specified exceptions or the foreign state waives its immunity.\textsuperscript{115} The only exception that is potentially relevant to section 1350 cases, although inapplicable in both Filartiga and Tel-Oren, precludes immunity for tort claims in which the injury or death of the plaintiff occurs in the United States.\textsuperscript{116} The plaintiffs in Filartiga circumvented the issue of sovereign immunity by suing an individual, the Inspector-General of Police, rather than the government of Paraguay. Similarly, the Tel-Oren court retained jurisdiction only over the PLO, summarily dismissing the plaintiffs' original claim against Libya\textsuperscript{117} as barred by the Foreign Sovereign Immunities Act.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{112} See Tel-Oren, 726 F.2d at 789 (Edwards, J., concurring); 726 F.2d at 802, 803-04, 804 n.9 (Bork, J., concurring).
\item \textsuperscript{113} The barrier raised by the doctrine of foreign sovereign immunity is more formidable than that raised by the act of state doctrine because, if successfully invoked, it bars the suit completely. In contrast, the act of state doctrine merely removes from litigation the specific issue of the validity of a state's acts. See supra note 109 and accompanying text.
\item \textsuperscript{114} 28 U.S.C. §§ 1602-1611 (1982).
\item \textsuperscript{115} For example, the statute provides that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication." See 28 U.S.C. § 1605(a)(1) (1982). A state may waive its immunity explicitly by signing treaties or implicitly by making a general appearance in court or by agreeing to arbitrate in another country. See Maritime Int'l Nominees Establishment v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981) (agreement to arbitrate). One commentator has also suggested that Article 56 of the United Nations Charter may waive immunity with respect to violations of fundamental human rights. See Comment, The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist, 17 U.S.F.L. REV. 71, 82 (1982).
\item \textsuperscript{116} The statute provides immunity in any case in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . .
\item \textsuperscript{117} Theoretically, the court could have found that Libya had implicitly
\end{itemize}
Thus, in order to surmount the sovereign immunity barrier, a plaintiff would have to aver either that the "official" tortious conduct fell within an exception to the Foreign Sovereign Immunities Act or, when it is in the state's interest to deny a relationship with the defendant, that there is no agency relationship without ratification of the act by the state.\textsuperscript{119}

Finally, the political question doctrine\textsuperscript{120} is the most difficult hurdle to overcome in reaching the federal courts in cases of this type. The political question doctrine requires that the judiciary refrain from adjudicating politically sensitive issues waived its immunity and therefore was subject to liability. In Letelier v. Republic of Chile, 488 F. Supp 665 (D.D.C. 1980), for example, the court held that the FSIA does not shield a foreign state that has ordered its agents to conduct an assassination or other act of political terrorism in the United States. In dictum, the court implied that the Act does not give foreign states discretion to commit assassinations or other illegal acts anywhere. See id. at 673. Such acts would include those "clearly contrary to the precepts of humanity as recognized in both national and international law." \textit{Id.} Thus, the question whether Libya could be held liable for authorizing the PLO to commit illegal acts of terrorism in Israel remains unanswered.

\textsuperscript{118} See supra note 2.

Assuming that the claim against Libya is properly barred by the Foreign Sovereign Immunities Act, one should query whether the agency theory used to find that the PLO acted under color of state law, see infra text accompanying note 79, will extend Libya's immunity to shield the PLO. According to 28 U.S.C. § 1603(a) (1982), the term "foreign state" includes an agent or instrumentality of a foreign state. The statute, however, explicitly excludes those entities created under the laws of any third country. See § 1603(b)(3) (1982). The implication is that, in order to be shielded by the FSIA, the PLO would have to be a Libyan organization. Moreover, although the Foreign Sovereign Immunities Act has been applied to individuals who represent a foreign government, such as diplomats, the PLO has not held itself out as Libya's representative. Finally, because the Foreign Sovereign Immunities Act has not been extended to protect a foreign sovereign from acts committed outside its territory, it is unlikely that the FSIA would shield the PLO for its acts in Israel.

\textsuperscript{119} In order to safeguard its reputation in the international community, a foreign state whose officials or agents are engaged in lawsuits for human rights violations may be unwilling to claim responsibility for, or associate itself in any way with, the suit. The Paraguayan government, for example, actively denied that Filartiga's son died by torture at the hands of defendant Pena. See Blum & Steinhardt, \textit{supra} note 9, at 72 n.83 (citing Report on the Situation of Human Rights in Paraguay, O.A.S. Inter-American Commission on Human Rights, DEA/Ser./P/Ag./doc. 920/78, Apr. 27, 1978, at 26).

\textsuperscript{120} The political question issue was not raised by either party before the Tel-Oren courts. Judge Edwards, however, commenting on his colleagues' reliance on "fable labels of abstention or nonjusticiability, such as the 'political question doctrine,'" see Tel-Oren, 726 F.2d at 796 (Edwards, J., concurring), emphasized that "[n]onjusticiability based upon 'political question' is at best a limited doctrine, and it is wholly inapposite to this case, see \textit{id.} (Edwards, J., concurring) (emphasis in original).
that are traditionally within the ambit of the executive branch, such as those involving foreign relations.\textsuperscript{121} The parameters of the doctrine have remained shadowy,\textsuperscript{122} rendering it difficult to check the courts’ discretionary application of the doctrine. Because section 1350 cases always implicate foreign relations by alleging violations of international law, there may be no way to stem the automatic application of the political question doctrine. Judge Robb, for example, looked immediately to the fact that questions relating to the activities of terrorists traditionally have been the exclusive domain of the executive and legislative branches in denying the \textit{Tel-Oren} plaintiffs’ jurisdiction.\textsuperscript{123}

Although its discretionary application may shield the political question doctrine from careful scrutiny, such reflex application of the doctrine must be challenged. Automatic application of the doctrine, precluding the consideration of important countervailing factors,\textsuperscript{124} may constitute an unconstitu-

\textsuperscript{121} See, \textit{e.g.}, Occidental of Umm al Quwayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1201 (5th Cir. 1978) (holding that issues as to the right to oil extracted from the Persian Gulf involved a political question), \textit{cert. denied}, 442 U.S. 928 (1979); Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973) (holding that the challenge to the President’s conduct of an unconstitutional war in Indo-China was a political question because it falls within the President’s wide discretion in conducting the country’s foreign affairs); Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967) (holding that a suit by an army private seeking an injunction blocking the orders sending him to Viet Nam on the ground that the American military action there was illegal was a political question).

\textsuperscript{122} The Supreme Court outlined the general boundaries of the doctrine in \textit{Baker v. Carr}, 369 U.S. 186 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a policy decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.


\textsuperscript{123} See \textit{Tel-Oren}, 726 F.2d at 824-26 (Robb, J., concurring).

\textsuperscript{124} See \textit{infra} text accompanying notes 128-35.
tional abdication of judicial power.\(^{125}\) Congress intended for the judiciary to address matters of international law, as is evidenced by the enactment of a statute that confers jurisdiction in cases in which a tort violates international law. Abstention at the mere mention of the politically sensitive nature of international principles effectively nullifies the Alien Tort Claims Act. The executive branch also has indicated that legal questions implicating foreign relations are within the domain of the judiciary.\(^{126}\) Furthermore, the Supreme Court has distinguished between political questions and mere political cases in stating that "it is error to suppose that every case or controversy which touches foreign relations is beyond judicial cognizance."\(^{127}\)

A court, therefore, must look beyond the surface implications for international relations and decide\(^{128}\) whether the case involves issues constitutionally committed to a coordinate branch of government, whether the resolution of the issues demands expertise beyond the judiciary's capacity, and whether any prudential considerations counsel against intervention.\(^{129}\)

\(^{125}\) See Jessup, Has the Supreme Court Abdicated One of Its Functions?, 40 Am. J. Int'l L. 168 (1946).

\(^{126}\) The State Department has commented that it is most appropriate for the judiciary to decide cases that turn on questions of international law. See Letter from the Legal Advisor, Dept. of State, to Robert Bork, Solicitor General (Nov. 26, 1975), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 710-11 (1976).

\(^{127}\) It also has been suggested that even though a question might be "political," the executive branch's deference to the judiciary may achieve a desired foreign policy objective. In Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980), the State Department brought the action as a vehicle for expressing its displeasure at Chile's unwillingness to extradite the defendants. Ostensibly, then, the State Department may wish to use the Tel-Oren action to communicate its commitment to the vindication of human rights. Cf. Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir.) ("Even in controversies affected in some degree by a treaty with a foreign country . . . the courts may in a particular context have a legitimate and useful function to perform."), cert. denied, 449 U.S. 869 (1972).


\(^{129}\) The Supreme Court stated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that it is the function of the judiciary to decide which of two arguably appropriate branches should be allowed to resolve issues. Justice Brennan reiterated this view in his dissent in First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). Expressing his disapproval of a "Bernstein letter," see infra note 132, Justice Brennan stated that the executive branch has no authority to decide which branch resolves political questions. It is the role of the judiciary to choose the appropriate branch; the executive's view is irrelevant. See 406 U.S. at 790-93 (Brennan, J., dissenting).

\(^{129}\) See Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment). Similarly, in Epstein v. Resor, 421 F.2d 930, 933 (9th
Tel-Oren did not require the court to formulate or review an act of foreign policy, an area that clearly is committed to the executive branch. Instead, the court was asked to use its judicial expertise in interpreting and applying a statute, a task far-removed from the functions of the coordinate branches. Specifically, Tel-Oren required the interpretation and application of the Alien Tort Claims Act to resolve whether terrorism is proscribed by any international law. At trial, had jurisdiction been granted, the court would have continued to interpret and apply appropriate international and domestic laws to the facts in order to determine whether the plaintiffs were entitled to relief. Admittedly, the rules of international law are not as clearly articulated as are those of domestic law, but that is not sufficient grounds for abstention. The Supreme Court has charged the federal courts with applying the rules of written and customary international law in the same way that common-law courts find and apply municipal rules of decision.\textsuperscript{130} Courts also must inquire whether "prudential considerations"\textsuperscript{131} require or forestall adjudication. In measuring the sensitivity of a case, courts are free to gather information from the State Department.\textsuperscript{132}

\textsuperscript{130} See The Paquete Habana, 175 U.S. 677 (1900). There are ample guidelines in the 50 cases since 1952 in which United States courts have dealt with international human rights issues. See Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, 1980 AMERICAN SOC. OF INT'L LAW PROCEEDINGS 21; R. LILlich, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 66-114 (1964) (describing the role domestic courts should play in matters of international relations).

\textsuperscript{131} Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment).

\textsuperscript{132} Requesting an advisory opinion in the form of an amicus curiae does not constitute judicial abdication; accepting a binding "Bernstein letter" does. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting). The Bernstein doctrine, originating in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), is an exception to the act of state doctrine. It requires that where the executive branch expressly represents to the court that application of the act of state doctrine would not advance American foreign policy, the court may not apply the doctrine. The letter sent from the State Department was binding. See First National City Bank, 406 U.S. 759, 763 (1972). In response to the refusal of the Supreme Court to pierce the sovereign veil in Sabbatino, 376 U.S. 398, Congress passed the Hickenlooper amendment to the Foreign Assistance Act, 22 U.S.C. § 2370 (e)(2), designed to prevent such abstention. Inter alia, it states that no court may decline on the ground of federal act of state doctrine claims relating to expropriated property. See Banco Nacional de Cuba
which would express any pressing concerns and particular knowledge of the executive branch.\footnote{Courts have successfully requested and received advisory views from the State Department. See Filartiga, 630 F.2d at 877. They have been treated merely as sources of information, not as executive directives. See e.g. Sayne v. Shipley, 418 F.2d 679, 684 (5th Cir. 1969), cert. denied, 398 U.S. 903 (1970) (stating that advice from the state department as to whether a treaty was still in effect was not conclusive, but should be accorded great weight and importance).} With facts in hand, courts then should examine how other courts have handled similarly sensitive cases, always bearing in mind the legal obligations of the United States to the international community.\footnote{Courts must take into account their international obligations and their role in the formation of international law. The International Court of Justice, the tribunal of the United Nations, has declared that states owe certain obligations to the international community in general. All states have a legal interest in their own protection against outlawed acts of aggression, genocide, and violations of human rights. Therefore, domestic courts, as guardians of legal principles, must participate by hearing cases. For example, if a foreign government official violated international law and one of our courts recognized a claim to immunity, the court's decision would have the undesirable effect of supporting illegality. The judiciary's commitment to international law would be compromised and its decision to tolerate illegality would essentially be the same as if the court had been an accomplice of the offending government. Refusal to prosecute also constitutes impermissible assistance to and toleration of terrorist acts and therefore violates the United Nations charter provision requiring states "to refrain from assisting terrorist acts in another state." See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, first principle, ninth paragraph, 9 I.L.M. 1292, 1294 (1970). Professor Falk asserts that "[d]omestic courts are agents of a developing international legal order, as well as servants of various national interests . . . . It is readily appreciated that domestic courts have a responsibility to improve the quality of international legal stability . . . ." See R. Falk, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 65 (1964).}

The implications of Tel-Oren for future cases involving alien tort claims are serious. If cited for its legal analysis, the case offers three grounds on which to deny section 1350 jurisdiction: the lack of a specified cause of action, a nonjusticiable political question, and an alleged tort perpetrated by a nonstate actor. Only the last basis rests on sound judicial principles as born out by the interpretations of other courts. The first two depend on improper interpretations of the Alien Tort Claims Act and of the proper judicial function.

The existence of the three differing opinions in Tel-Oren imply that this area of law is unsettled. Yet, for two hundred years the same section 1350 analysis—examining first the na-
ture of the tort and then the relationship between the tort and the international law—consistently has been applied. The Tel-Oren courts’ departure from and reinterpretation of the Alien Tort Claims Act may unjustly discourage the filing of otherwise colorable claims in the face of fabricated uncertainty.

_Tel-Oren_ must be understood in its reactionary context. The _Tel-Oren_ court feared that _Filartiga_ would unleash a torrent of claims that would uncontrollably flood the federal courts and believed that the court could only stem the flood by denying jurisdiction. Yet, five years after _Filartiga_, there is no flood of section 1350 claims in the courts. Rather than adhering to the erroneous reasoning of the _Tel-Oren_ decision, future courts should rely on the sound principles articulated in _Filartiga_ and on other existing procedural mechanisms to keep alien tort claims within manageable bounds.

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