Human Rights Litigation Under the Alien Tort Statute: Is the *Forti v. Suarez-Mason* Decision the Last of Its Kind?

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HUMAN RIGHTS LITIGATION UNDER THE ALIEN TORT STATUTE: IS THE FORTI v. SUAREZ-MASON DECISION THE LAST OF ITS KIND?

I. INTRODUCTION

On February 18, 1977, at Ezeiza International Airport in Buenos Aires, Argentina, military authorities of the Argentine First Army Corps seized Alfredo Forti, his mother and four brothers for alleged crimes of subversion. The army officials also confiscated all of the family's belongings, including several thousand dollars in cash. After six days of detention, authorities blindfolded the five brothers, aged eight to sixteen, and released them on a street in the capital city. Their mother, Nelida Azucena Sosa de Forti, is still missing.¹

On July 25, 1977, plainclothes policemen of the Argentine First Army Corps seized Debora Benchoam, her brother and over $20,000 in valuables from the Benchoams' home in Buenos Aires. The officials detained Debora incommunicado for one month and then imprisoned her without charge for over four years. They released her brother the day following his abduction, but he died shortly thereafter of bullet wounds allegedly inflicted by army officials during his detention. The Benchoam family's assets were never returned.²

Upon their release from captivity, these victims of the Argentine military junta's "dirty war"³ fled for safety to the United States. Once there, Forti and Benchoam joined together in January 1987 to bring an action in federal district court against General Suarez-Mason, the former Commander of the First Army Corps. Forti and

² Id.
³ The "dirty war" in Argentina, occurring during the second half of the 1970s, was a military campaign designed to purge the country of suspected subversive activity. In 1975, the constitutional government of President Peron declared a "state of siege" under an article of the Argentine Constitution and assigned the responsibility of suppressing terrorism to the Argentine Armed Forces. In March 1976, the Armed Forces staged a successful coup d'etat and replaced President Peron with a military junta. The junta increased its attack on subversion and by 1979, the military had detained without charge tens of thousands of civilians or alleged subversives. Over 12,000 persons were "disappeared" or "nunca mas." See generally Human Rights in the World: Argentina, 31 INT'L COMM'N OF JURISTS REV. 1 (1983).
Benchoam sought compensatory and punitive damages for eleven violations of customary international law and laws of the United States and Argentina.\(^4\) Both plaintiffs alleged claims of torture; prolonged arbitrary detention without trial; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and conversion. Separately, Forti asserted a claim for "causing the disappearance" of his mother, and Benchoam asserted claims for the summary execution of her brother, wrongful death and a survival action.\(^5\) The plaintiffs alleged that the defendant ordered Argentine military personnel directly under his control to commit all of the above acts.\(^6\)

Forti and Benchoam sought relief under the Alien Tort Statute.\(^7\) This section of the United States Code grants original jurisdiction over suits brought by aliens for torts "committed in violation of the law of nations or a treaty of the United States."\(^8\) In *Forti v. Suarez-Mason*, despite the defendant's contentions to the contrary, the Federal District Court for the Northern District of California held that it had jurisdiction over plaintiffs' claims under Section 1350.\(^9\) Furthermore, the court refused to apply several procedural limitations asserted by General Suarez-Mason which would have precluded adjudication of the suit.\(^10\)

The *Forti* case never reached the appeals stage. On April 27, 1988, Judge Jensen granted Argentina's request for extradition of

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\(^5\) *Forti*, 672 F. Supp. at 1538. A survival action is a cause of action vested in a deceased person which survives his or her death and which is brought by the personal representative of the decedent. See Memorandum in Opposition to Motion to Dismiss and Request for Stay at 46–47, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (No. C-87-2058-DLJ).


\(^7\) 28 U.S.C. § 1350 (1982) [hereinafter Alien Tort Statute or Section 1350]. The Alien Tort Statute states: "[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."

\(^8\) Id.

\(^9\) *Forti*, 672 F. Supp. at 1544. General Suarez-Mason raised only the issue of subject matter jurisdiction. He never contested the issue of personal jurisdiction, thereby waiving any defense of lack of personal jurisdiction. Id. at 1556 n.3.

\(^10\) Id. at 1552. General Suarez-Mason argued that the act of state doctrine, an Argentine statute of limitations and Federal Rule of Civil Procedure 19 (regarding indispensable parties) each bar adjudication of plaintiffs' claims. Id. at 1538.
the defendant.11 Prior to his extradition, however, General Suarez-Mason managed to bury his assets so that he has become essentially judgment proof.12 Consequently, the district court entered a default judgment against the defendant pursuant to plaintiffs' motion.13 Not surprisingly, Suarez-Mason has failed to answer and thus, the case remains open until the court can hear an appeal to close it.14 A determination of damages to be awarded to the plaintiffs has not yet occurred.

The decision in Forti furthered a recently developed and often debated construction of the Alien Tort Statute that permits foreign nationals to seek justice from other foreign nationals in American courts for international human rights violations. Yet, the Forti decision revealed that federal jurisdiction in this area may be attacked on many fronts, especially by means of threshold limitations. Forti thus brought to light that litigation under the Alien Tort Statute may no longer be an effective means of providing a remedy to plaintiffs.

This Note examines the significance that Forti v. Suarez-Mason and similar cases will have on future human rights litigation in the United States. Part Two discusses the Forti court's use of both the legislative history of the Alien Tort Statute and the subsequent judicial construction of its provisions. Part Three examines the Forti court's treatment of various threshold matters which, if applied, limit broad use of the Alien Tort Statute. Part Four identifies and analyzes related issues not raised in Forti but which affect the potential significance of Forti on human rights case law. Finally, Part Five examines whether, in light of the current obstacles of a conservative judiciary and the problem of enforcing judgments, the Forti decision furthered the possibility of effective international human rights litigation under the Alien Tort Statute.

II. STATUTORY CONSTRUCTION OF THE ALIEN TORT STATUTE

In Forti, the district court first addressed the question of federal jurisdiction under the Alien Tort Statute. The court sought to de-

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11 In the Matter of the Requested Extradition of Carlos Guillermo Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988). The court based extradition on alleged multiple counts of murder, false imprisonment and forging a passport. Id.
12 Telephone interview with Kathleen Comfort, clerk for Judge Jensen of the Federal District Court of the Northern District of California (Apr. 6, 1989).
14 Telephone interview, supra note 12.
termine whether Section 1350 designated federal district court as
the proper forum for claims of the sort brought by the plaintiffs.
The court also examined whether the Alien Tort Statute conferred
a private cause of action on the plaintiffs and whether all of the
alleged "international torts" in the plaintiffs' complaint fell within
the Alien Tort Statute's jurisdiction. To assist in this determina-
tion, Judge Jensen examined the history behind the Alien Tort
Statute and subsequent interpretation of its provisions.

A. Provision of a Forum

The Alien Tort Statute provides federal district courts with
jurisdiction to hear civil tort claims of violations of United States
treaty law or the law of nations. The Alien Tort Statute originated
as part of the Judiciary Act of 1789 completed by the First Con-
gress. Interestingly, no claims were brought under the Alien Tort
Statute for nearly 200 years. Then, in 1980, the United States Court
of Appeals for the Second Circuit revived this original legislation
in Filartiga v. Peña-Irala by deciding that a federal district court
may exercise jurisdiction over an alien tort claim.

Filartiga was a wrongful death action brought in the United
States by a Paraguayan doctor and his daughter, residing in the
United States, against Peña-Irala, an Inspector General of Police in
Asunción Paraguay. The Filartigas alleged that Peña-Irala tor-
tured to death Dr. Filartiga’s seventeen-year old son, Joelito, during
the military regime's "state of siege" as punishment for the doctor’s
anti-governmental political activities. After the military regime col-
lapsed, Peña-Irala fled to the United States whereupon the Filartigas
served him with a summons and civil complaint. The district court
dismissed the Filartigas' claim for lack of subject matter jurisdic-
tion. On appeal, the Second Circuit, in an opinion by Judge Kauf-

15 See Forti, 672 F. Supp. at 1538–44.
16 Id. at 1539.
18 Judiciary Act of 1789, ch. 20 § 9(b), 1 Stat. 73, 76–77 (1789). The Judiciary Act
provided the district courts with “cognizance 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.”
19 630 F.2d 876 (2d Cir. 1980).
20 Id. at 887.
21 Id. at 878.
22 Id. at 878–79.
23 Id. at 880; 577 F. Supp. 860 (E.D.N.Y. 1984).
man, reversed the lower court and held that federal jurisdiction existed under Section 1350 since "deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties."24

The circuit court in Filartiga grounded its decision in the history behind the enactment of Section 1350 as it originally appeared in the Judiciary Act of 1789.25 Although critics of this broad interpretation of the Alien Tort Statute pointed to the lack of legislative history behind Section 1350,26 Judge Kaufman neutralized their criticism by illuminating the principle that prevailed in both the political writings of the time and in the scant but existent legislative history of the Alien Tort Statute. Judge Kaufman deduced that the Framers intended that matters of international law bearing on the national interest should be justiciable in the federal court system.27 The Framers believed that the federal courts would be better able than state courts to promote the young nation's position among other existing nations by treating questions of international law consistently.28

Furthermore, legal scholars have reasoned that the Framers believed denying an alien a judicial forum was an offense against the foreigner's state that might very well provoke warfare.29 The Framers recognized that a foreign nation could hold the young United States accountable for any action by an American which harmed the other nation's citizen.30 Thus, the Framers' desire to avoid international conflict inspired them to authorize United States

24 Filartiga, 630 F.2d at 878.
25 Id. at 887.
26 In ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), Judge Friendly stated, "This old but little used section is a kind of legal Lohengrin; although it has been with us since the First Judiciary Act . . . no one seems to know [from] whence it came." See also D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 AM. J. INT'L L. 62 (1988); Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute, pt. 1, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).
27 Filartiga, 630 F.2d at 887.
28 Id. Judge Kaufman quoted John Jay's words in THE FEDERALIST NO. 3 (J. Jay): "Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." 630 F.2d at 887. Alexander Hamilton supported Jay's position in the following statement: "[Federal court jurisdiction] is not less essential to the preservation of the public faith than to the security of the public tranquillity." THE FEDERALIST NO. 80, at 476 (A. Hamilton) (C. Rossiter ed. 1961).
29 See, e.g., Randall, supra note 26, at 20–22.
30 Id. at 21.
courts to grant aliens domestic civil remedies for torts committed in violation of the law of nations.\textsuperscript{31} Again, the Drafters intended that this jurisdictional grant should only adhere to federal courts because they were far less likely than state courts to be biased against foreigners\textsuperscript{32} or to create inconsistent case law.\textsuperscript{33}

In accordance with this interpretation of the Framers' intent, Judge Kaufman found federal subject matter jurisdiction under Section 1350 in \textit{Filartiga} for wrongful death by torture.\textsuperscript{34} Since the \textit{Filartiga} decision in 1980, numerous other federal courts have subscribed to Judge Kaufman's interpretation of the jurisdictional grant and the history behind it.\textsuperscript{35} Today, a general consensus supports federal jurisdiction over alien claims arising under Section 1350.\textsuperscript{36} After discussing Judge Kaufman's interpretation and the

\textsuperscript{31} Alexander Hamilton argued that "[a]s the denial or perversion of justice by the sentences of the courts . . . 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. \textit{The Federalist} No. 80 at 476 (A. Hamilton) (C. Rossiter ed. 1961).

\textsuperscript{32} The Framers attributed this bias against foreigners to the more parochial nature of state courts as compared to federal courts. Randall, supra note 26, at 21. \textit{See generally The Federalist} No. 80 (A. Hamilton).

\textsuperscript{33} State courts still have jurisdiction to hear aliens' claims under transitory tort theory. This theory provides the state courts with subject matter jurisdiction over the claims of individuals when the court also has personal jurisdiction. Judge Kaufman gives a more detailed discussion of this theory in \textit{Filartiga}, 630 F.2d at 885. \textit{See also D'Amato, supra} note 26, at 62–66.

\textsuperscript{34} 630 F.2d at 887.


\textsuperscript{36} Exceptions to a finding of a jurisdictional grant have been largely due to factual distinctions or an implementation of procedural limitations. \textit{See, e.g.}, Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986), \textit{rev'd} 830 F.2d 421 (2d Cir. 1987), \textit{rev'd} 109 S. Ct. 683 (1989) (Foreign Sovereign Immunities Act preempts Alien Tort Statute's jurisdictional grant); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), \textit{aff'd}, 770 F.2d 202 (D.C. Cir. 1985) (Congressmen's claims of deprivation of right to participate in President's decision regarding funding of Nicaraguan Contras is nonjusticiable political question); Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), \textit{aff'd per curiam} 726 F.2d 774 (D.C. Cir. 1984), \textit{cert. denied} 470 U.S. 1003 (1985) (international terrorist acts committed by non-state actors such as the PLO are not universally recognized
consensus of courts supporting it, Judge Jensen in *Forti* correspondingly recognized that subject matter jurisdiction existed over the particular claims of the plaintiffs, Forti and Benchoam.37

B. Provision of a Private Cause of Action

After finding jurisdiction under the Alien Tort Statute in *Forti*, Judge Jensen turned to the issue of whether Section 1350 encompasses a private cause of action. Again, he examined and relied on case law precedent, especially *Filartiga*. The Second Circuit in *Filartiga* held that the plaintiffs had a private right of action under Section 1350.38 The *Filartiga* court reasoned that plaintiffs can establish a private cause of action under Section 1350 simply by showing that the alleged tort violated an United States treaty or the law of nations.39 Because Judge Kaufman found that torture by a state official violated the law of nations, he held that plaintiffs had asserted an actionable tort under the Alien Tort Statute.40

Unlike his extensive treatment of the forum question, however, Judge Kaufman failed to articulate clearly his finding of a private cause of action. Rather, he simply inferred that a private cause of action existed within the scope of Section 1350.41 Subsequent judi-

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37 *Forti*, 672 F. Supp. at 1538.
38 *Filartiga*, 630 F.2d at 885.
39 Id. at 880. The law of nations is defined as: “The law which regulates the relationships of nations to each other . . . . Its sources are customs and usages, treaties, and the decisions of such tribunals as the International Court of Justice and the International Court of Human Rights.” *Black's Law Dictionary* 419 (Abr. 5th ed. 1983).
40 *Filartiga*, 630 F.2d at 880. The Second Circuit recognized that the law of nations is a fluid, developing body of law. Judge Kaufman stated, “[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” 630 F.2d at 881. See also *The Paquete Habana*, 175 U.S. 677 (1900).
41 See *Filartiga*, 630 F.2d at 887–88. Judge Kaufman inferred a private cause of action from the plain meaning of the Alien Tort Statute. Id. He noted that in previous Alien Tort Statute cases, courts have had trouble finding a cause of action, but this is attributable to the violations of the law of nations); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Tex. 1989) (plaintiff did not qualify as “alien” under the Alien Tort Statute, and Republic of Sudan’s failure to warn decedent of imminent political danger, failure to provide police protection and failure to observe decedent’s human rights were not violations of the law of nations); *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986) (violation of first amendment right of free speech does not constitute violation of law of nations; act of state precludes adjudication); *Trajano v. Marcos*, Civil No. 86-0207, slip op. (D. Haw. 1986) (case involving torture committed by foreign head of state is nonjusticiable under act of state doctrine); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) (suit against Nazi war criminal for human rights violations in wartime Yugoslavia was time barred); *Siderman de Blake v. Republic of Argentina*, No. CV 82-1772-RMT, slip op. (C.D. Cal. 1984), vacated and dismissed, order (C.D. Cal. 1985) (Foreign Sovereign Immunities Act preempts § 1350 jurisdiction over claim against nation for torture).
cial decisions and legal scholarly works have assailed Judge Kaufman's inference as unsupportable and beyond the constitutional limits of acceptable judicial reasoning. Consequently, a concordant interpretation of the cause of action question was slow to emerge and does not yet rest on solid ground.

The controversy following the Filartiga decision clearly manifests itself in Tel-Oren v. Libyan Arab Republic, a 1984 three-judge panel decision of the D.C. Circuit. In this case, the survivors and relatives of victims of a 1978 armed attack on a civilian bus in Israel brought suit in federal district court for compensatory and punitive damages against the Palestine Liberation Organization (PLO), Libya, and other Arab groups. The plaintiffs relied on the Alien Tort Statute to establish subject matter jurisdiction and a private cause of action because the alleged torts violated the law of nations, United States treaties, criminal laws and the common law. The District Court for the District of Columbia rejected the plaintiffs’ contentions and dismissed the action for lack of jurisdiction.

On appeal, the Circuit Court of Appeals for the District of Columbia affirmed the dismissal but could not agree on a rationale for doing so. Three distinct opinions resulted from the panel decision. In the lead opinion, Judge Edwards embraced the principles espoused in Filartiga, but endorsed the dismissal of Tel-Oren because of factual distinctions between the two cases. Judge Edwards agreed that the Alien Tort Statute requires nothing more than a violation of the law of nations to establish a cause of action. He argued, however, that the law of nations neither encompasses acts of international terrorism as it does official acts of torture nor imposes "the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law" such as the defendant in Filartiga. Hence, Judge Ed-

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43 726 F.2d 774, 775.
44 Id. at 775.
45 Id.
46 Id.
47 Tel-Oren, 726 F.2d at 776.
48 Id. at 779.
49 Id. at 776.
wards believed that although the Alien Tort Statute may provide both a forum and a cause of action, it did not in this particular case because of significant factual differences.  

Judge Robb, by contrast, did not address the applicability or construction of the Alien Tort Statute. Rather, he found that because the dispute in *Tel-Oren* involved international political terrorism, the case was a "nonjusticiable" political question. He stated that "the courts must be careful to preserve [the President's] flexibility and must hesitate to publicize and perhaps legitimize that which ought to remain hidden and those who deserve the brand of absolute illegitimacy." Judge Robb seriously questioned the judiciary's role in cases of this sort. He believed that to exercise jurisdiction over plaintiffs' claims would, at the very least, exceed the role of the court, as delimited by the constitutional separation of powers. At worst, Judge Robb wrote, such jurisdiction could result in irreparable injuries to the national interest.

Judge Bork stated that Section 1350 is nothing more than a jurisdictional grant and does not create a private cause of action. Unlike Judge Robb, he believed that the court must confront the issues concerning the Alien Tort Statute. He did not, however, agree with Judge Edwards' use of the *Filartiga* approach to respond to these questions. Judge Bork maintained that plaintiffs seeking to invoke Section 1350 must demonstrate a private cause of action arising under either a treaty of the United States or the law of nations.

Treaties of the United States, however, generally do not confer privately enforceable rights. Only when a treaty is self-executing can an individual enforce its provisions in court. Judge Bork examined the five treaties on which the plaintiffs relied and found

50 Id.  
51 *Tel-Oren*, 726 F.2d at 823. Judge Robb declared that "[f]ederal courts are not in the position to determine the international status of terrorist acts." Id.  
52 Id. at 825.  
53 Id. at 826; see U.S. CONST. art. III, § 2.  
54 *Tel-Oren*, 726 F.2d at 826–27.  
55 Id. at 810.  
56 Id. at 820.  
57 Id. at 808. A treaty is self-executing when it explicitly or impliedly grants a private cause of action. See Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).  
58 *Tel-Oren*, 726 F.2d at 808. After referring to a U.S. Department of State document entitled *Treaties in Force*, Judge Bork found that only five out of the thirteen treaties alleged by the plaintiffs in *Tel-Oren* are binding on the United States. Id.
that none grant a private cause of action, either explicitly or impliedly.\(^{59}\) He thus ruled that plaintiffs had failed to assert a cause of action for torts committed in violation of an United States treaty.\(^{60}\)

Similarly, Judge Bork rejected Judge Edwards' reasoning that a private cause of action for torts in violation of the law of nations is implicit in the Alien Tort Statute.\(^{61}\) This proposition, Judge Bork argued, clearly contradicts the original intent of the Drafters and the constitutional role of courts in matters of foreign relations. Nevertheless, Judge Bork conceded that the broadest reading arguably could lead to this construction.\(^{62}\)

Even under a broad reading, Judge Bork believed that the Alien Tort Statute would confer jurisdiction only over the three international crimes recognized at the time of the enactment of the Judiciary Act in 1789: piracy, offenses to ambassadors and violations of safe-conduct.\(^{63}\) Judge Bork feared that to extend jurisdiction beyond these three tortious acts so as to include the terrorist acts in *Tel-Oren* "would be far more likely to exacerbate tensions with other nations than to promote peaceful relations" as the Framers had intended.\(^{64}\) Hence, he advised the judiciary to await a modern legislative act or an executive agreement that explicitly provides a private cause of action before expanding the scope of international torts. Any expansion otherwise, he warned, would be poorly supported by either the Alien Tort Statute or international norms which themselves do not contemplate private enforcement.\(^{65}\)

Judge Edwards criticized Judge Bork's interpretation of the cause of action aspect of Section 1350.\(^{66}\) Judge Edwards reasoned that requiring plaintiffs to find a right to sue in the law of nations

\(^{59}\) Id. at 810.

\(^{60}\) Id.

\(^{61}\) Id. at 811–12.

\(^{62}\) *Tel-Oren*, 726 F.2d at 811–12. When enacting the Alien Tort Statute, Judge Bork asserted that the Framers could not have contemplated cases like *Filartiga* and *Tel-Oren* because no international law of human rights existed in 1789. Id. at 813. Even assuming the Framers intended the law of nations to be a fluid, evolving concept, Judge Bork wrote that the Alien Tort Statute can never be a sanction for federal court policing of actions committed by foreign officials against their own citizens in their own countries. Id. According to Judge Bork, such a construction would actually provoke conflict, rather than avoid it as the Framers intended. Id. at 812. See *The Federalist* No. 80 (A. Hamilton).

\(^{63}\) *Tel-Oren*, 726 F.2d at 815–16. Judge Bork deduced that jurisdiction must be limited to these three offenses because no congressional mandate exists which specifically enumerates the torts over which federal courts have jurisdiction under § 1350. Id.

\(^{64}\) Id. at 816.

\(^{65}\) Id.

\(^{66}\) See *Tel-Oren*, 726 F.2d at 777–82.
is contrary to the plain, unequivocal language of Section 1350, legislative history and relevant precedent. Judge Edwards remarked:

Unlike section 1331, which requires that an action "arise under" the laws of the United States, section 1350 does not require that the action "arise under" the law of nations, but only mandates a "violation of the law of nations" in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a violation of the law of nations is required to invoke section 1350.

Judge Bork's construction of an "arising under" requirement, Judge Edwards asserted, would reduce the Alien Tort Statute to a mere duplication of Section 1331. Judge Edwards refused to accept the proposition that Congress would retain and recodify a redundant jurisdictional statute and thus, he rejected Judge Bork's analysis.

The opinions of Judge Edwards and Judge Bork represent the poles of the continuing dispute as to whether the Alien Tort Statute creates a private cause of action.

Judge Jensen confronted these conflicting constructions of Section 1350 in Forti. After weighing the merits of both analyses, he declined to adopt that of Judge Bork. Like Judge Edwards, Judge Jensen disagreed with Judge Bork's contention that a plaintiff must establish an independent cause of action in international law to

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67 Id. at 778.
68 28 U.S.C. § 1331 (1982) refers to the Federal Question Statute which provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
69 Tel-Oren, 726 F.2d at 779 (emphasis in original).
70 Id. at 778. Alternatively, many plaintiffs allege independent jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331. See supra note 68. Federal question jurisdiction allows jurisdiction over claims which "arise under" treaties and laws of the United States. In Martinez-Baca v. Suarez-Mason, No. C-87-2057-SC, the federal district court held that the plaintiff had a cause of action in federal court directly under § 1331 for acts of torture and prolonged arbitrary detention. The majority of courts, however, find that unless the plaintiff can point to a specific or implied remedy granted by the law of nations, he or she cannot invoke § 1331 independently of § 1350. See Tel-Oren, 726 F.2d at 779-80 n.4 (Edwards, J., concurring); Guinto v. Marcos, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986).
71 Tel-Oren, 726 F.2d at 777. Federal question jurisdiction does not necessarily mean that an "arising under" requirement can be ascribed to the Alien Tort Statute. Id. at 779. Although Congress enacted § 1350 prior to § 1331, it retained the Alien Tort Statute long after § 1331 had become well-established. The retention of the Alien Tort Statute implies that Congress did not intend § 1331 to render § 1350 redundant. Id.
72 Forti, 672 F. Supp. at 1539. General Suarez-Mason urged the court to follow Judge Bork's construction of the Alien Tort Statute. Alternatively, Forti and Benchoam asked that the court mirror the Filartiga interpretation which Judge Edwards supported in Tel-Oren. See 672 F. Supp. at 1539.
invoke Section 1350 jurisdiction. Judge Jensen reasoned that such a requirement would negate the entire Section 1350 jurisdictional grant over alien tort claims involving customary international law "since the law of nations clearly does not create or define civil actions . . . ." Judge Jensen stated that a more logical approach and one which better reflects modern principles of international law is the analysis which Judge Kaufman proffered in Filartiga and Judge Edwards espoused in Tel-Oren. Judge Jensen thus held that the Alien Tort Statute confers jurisdiction over alien tort claims on federal district courts and creates a private cause of action for alien plaintiffs. Moreover, Judge Jensen wrote, Section 1350 requires only that a plaintiff plead a tort in violation of the law of nations in order to invoke a cause of action under Section 1350.

Judge Jensen recognized that a growing consensus supported this holding. This consensus consists of other federal judges and numerous legal scholars who have criticized both Judge Bork's

73 Id.
74 Id.
75 Id.
76 Forti, 672 F. Supp. at 1540. The court also found that it could exercise jurisdiction under § 1351. See supra note 70. Adopting the reasoning of the Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Forti court held that claims which arise under the law of nations also arise under the laws of the United States since federal common law includes international law. Forti, 672 F. Supp. at 1544.
77 Forti, 672 F. Supp. at 1539. At this point in the litigation, General Suarez-Mason, relying on dictum in Dreyfus v. Von Finck, 534 F.2d 24, 30–31 (2d Cir. 1976), cert. denied 429 U.S. 835 (1976), argued that the law of nations extends only to relations between sovereign states. Forti, 672 F. Supp. at 1540. Judge Jensen noted that the Second Circuit later rejected this dictum in Filartiga, 630 F.2d at 884, by holding that the law of nations included the law of individual human rights. Forti, 672 F. Supp. at 1540. Suarez-Mason also contended that plaintiffs must establish that every alleged tort claim constitutes an international tort in order to support jurisdiction under § 1350. Id. Judge Jensen held that federal jurisdiction only requires the pleading of one such claim; pendent and ancillary jurisdiction cover the other claims. Id. Accordingly, the court rejected these contentions of the defendant. Id.
interpretation of Section 1350 and Judge Robb's application of the political question doctrine to the Section 1350 claim in Tel-Oren. The consensus embraces the Filartiga position, thereby reinforcing this significant precedent for human rights litigation in United States courts.

C. Defining a Violation of the Law of Nations

The Forti court then addressed General Suarez-Mason's contention that even if Section 1350 provided jurisdiction and a private cause of action, not all of the torts alleged were violations of the law of nations.\textsuperscript{80} Generally, a federal court will deny relief to a plaintiff who brings a claim under Section 1350 for an alleged offense which is not a violation of customary international law.\textsuperscript{81} Judge Jensen found, however, that courts may have difficulties ascertaining which torts qualify as violations of the law of nations.\textsuperscript{82}

Initially, when confronting this particular issue, federal courts relied on various international documents which codify customary international law in order to determine what constitutes an international tort for purposes of Section 1350.\textsuperscript{83} These documents, however, were not conclusive because they contained ideal principles beyond fundamental rights. Courts thus had the arduous task of classifying alleged violations as either established law or as mere aspirations. Jurisdiction could be exercised only over the former category.\textsuperscript{84}

To assist them in this classification process, courts turned to a judicially-created standard, commonly referred to as the Lopes/IIT

\textsuperscript{80} Forti, 672 F. Supp. at 1539–40.
\textsuperscript{81} See supra note 36.
\textsuperscript{82} Forti, 672 F. Supp. at 1540.
\textsuperscript{84} Despite the difficulties involved with ascertaining the law of nations and application of standards, most courts continue to employ the classification method. A minority view proposes an alternative method of using municipal law as the standard of liability. Randall, supra note 26, at 36–38. This approach sees the Alien Tort Statute as a forum-shifting statute where a cause of action for tort arises under municipal law, thereby providing the substantive standard for liability just as in an ordinary transitory tort action. Id. If a plaintiff can assert that the tort is also a violation of international law, the suit would shift into federal court. Id. Thus, the plaintiff must allege conduct which is both a tort under domestic law and a violation of the law of nations. See also Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (1961).
rule.85 This rule states that "a violation of the law of nations arises only when there has been a 'violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se.'"86 Through application of this standard, courts have determined that torts in violation of the law of nations are fundamental rights which are definable, obligatory, and universally condemned and which are reflected in international accords.87

The Forti court applied the "definable, obligatory and universally condemned" standard when examining whether the plaintiffs' allegations of international tort violations were cognizable under the Alien Tort Statute.88 Judge Jensen emphasized the requirement

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85 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
87 On the question of violations of customary international law, Judge Kaufman reasoned in Filartiga v. Peña-Irala: "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 [§ 1350]." 630 F.2d 876, 888 (2d Cir. 1980). Some torts clearly meet the Lopes/IIT standard, including:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

Restatement of the Law (Third) of Foreign Relations Law of the United States § 702 (1987) [hereinafter Restatement of Foreign Relations Law]. Condemnation of these offenses is deeply rooted in international custom and unequivocally codified in many international agreements. Thus, courts generally recognize these offenses as violations of customary international law for Alien Tort Statute purposes.

In the same respect, courts have used the Lopes/IIT standard to exclude certain tortious acts from the scope of § 1350. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795–96 (D.C. Cir. 1984) (court held that the lack of a pronounced consensus precluded a terrorist act from rising to the level of an international tort); see also Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986) (court held that a violation of first amendment right to free speech does not constitute a violation of the law of nations).

88 Forti, 672 F. Supp. at 1539–40. Although the plaintiffs in Forti raised eleven causes of action, the court addressed only the alleged international human rights violations in its opinion. See id. at 1540–43. The Forti court did not discuss the state law claims of false imprisonment, assault and battery, intentional infliction of emotional distress, conversion and wrongful death because, if the court could exercise jurisdiction over any of the international law claims, principles of pendent and ancillary jurisdiction would provide jurisdiction over
of universality which represents "the willingness of nations to be bound by the particular legal principle, and so can justify the court's exercise of jurisdiction over the international tort claim." Consequently, the court ruled that it had Section 1350 jurisdiction over claims that state officials were responsible for acts of torture, prolonged arbitrary detention and summary execution. The court found a consensus that these acts are international torts by reference to international custom, international accords and prior judicial decisions. The court concluded that each of the above allegations is precisely definable, substantially obligatory and unequivocally proscribed by the law of nations, thereby validating any exercise of jurisdiction over these claims.

Employing this same standard, the Forti court dismissed the claim of cruel, inhuman and degrading treatment. The court held that this claim did not meet the international tort standard because it lacked universal condemnation and definition. Accordingly, the state law claims.

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90 Id. at 1540. Due to the grave nature of the plaintiffs' claims of official torture, the court held Forti and Benchoam should precisely state the acts upon which they predicated their claim. Id. The court treated Suarez-Mason's motion to dismiss as a motion for a more definite statement under FED. R. CIV. P. 12(b)(6), (e) and hence ordered the plaintiffs to amend this portion of their complaint accordingly. Id.

91 With respect to the claims of prolonged arbitrary detention, the Forti court pointed to a consensus found in United States case law, primarily Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 795-98 (D. Kan. 1980). Forti, 672 F. Supp. at 1541. Moreover, the court found that this consensus is much stronger where a state arbitrarily detains its own citizens. Id.

92 With respect to the claim of summary execution, the court noted that several international documents and several cases in dicta proscribe summary execution, including Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) and Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986). Forti, 672 F. Supp. at 1542. Thus, the court held this international tort is universal, definable and obligatory. Id.

93 Id. Judge Jensen stated that "[b]ecause this right lacks readily ascertainable parameters, it is unclear what behavior falls within the proscription—beyond such obvious torts as are already encompassed by the proscriptions of torture, summary execution and prolonged arbitrary detention." Id.
court held that a cause of action for cruel, inhuman and degrading treatment failed to state a claim upon which relief may be granted under Section 1350.97

Similarly, the Forti court initially dismissed Forti's claim of "causing disappearance."98 The court held that while many nations condemn "causing disappearance," these nations by no means represent an universal consensus. Rather, Judge Jensen noted, a lack of agreement exists in the international community as to the elements needed for this claim.99 Thus, the court found that "causing disappearance" did not rise to the level of being a violation of customary international law.100

Later, however, in July, 1988, the court granted plaintiffs' Motion to Reconsider the Order and reinstated Forti's claim for disappearance.101 After reviewing additional evidence submitted by the plaintiffs,102 the court concluded that the plaintiffs had met the burden of demonstrating international consensus as to the status and content of this proposed tort.103 Therefore, "causing disappearance" has become a valid cause of action under the Alien Tort Statute.

III. LIMITATIONS ON THE JUSTICIABILITY OF ALIEN TORT CLAIMS

As noted above, a consensus among federal courts holds that the Alien Tort Statute provides both jurisdiction to federal district courts and a private cause of action to an individual plaintiff.104

97 Forti, 672 F. Supp. at 1543.
98 Id.
99 Id. at 1542–43. The court recognized that although causing disappearance of individuals by state officials is among the Restatement of Foreign Relations Law list of violations of international law, RESTATEMENT OF FOREIGN RELATIONS LAW § 702 (1987), there is no precedent case declaring this proposed tort as a violation of the law of nations. Forti, 672 F. Supp. at 1542.
100 Forti, 672 F. Supp. at 1543.
101 Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988), modifying 672 F. Supp. 1531 (N.D. Cal. 1987). The court also reviewed its decision regarding plaintiffs' claim of cruel, inhuman and degrading treatment. Id. The court did not reverse its prior holding with respect to that claim. Id.
103 Id. at 711. The court determined that international accords characterized "causing disappearance" as: 1) abduction by state officials or their agents; followed by 2) official refusals to acknowledge the abduction or to disclose the detainee's fate. 694 F. Supp. at 711. The court concluded that Forti had established both of these elements. Id.
104 See supra notes 78–79 and accompanying text.
This consensus does not imply, however, that every claim by an alien for a tort committed in violation of customary international law would proceed to trial in federal district court. Threshold limitations such as the act of state doctrine, political question doctrine and statutes of limitations exist to ensure that the court acts within the contours of the Alien Tort Statute's jurisdictional grant. These limitations allow a judge to abstain from hearing a case if she believes that it would exceed the bounds of judicial authority. After finding Section 1350 jurisdiction and a private cause of action for acts of torture, prolonged arbitrary detention and summary execution, the Forti court addressed whether any threshold limitations raised by the defendant should bar adjudication of the claims otherwise actionable under the Alien Tort Statute.

A. The Act of State Doctrine

General Suarez-Mason primarily advocated for application of the act of state doctrine. This doctrine, based on respect for sovereign independence, urges American courts to abstain from inquiring into the validity of a foreign sovereign's acts even if those acts violate the sovereign's territorial law, United States law or international law. General Suarez-Mason asserted that the challenged acts were committed pursuant to a state of siege which the constitutional government of Argentina had declared and the military junta later reaffirmed. Thus, the defendant argued, Forti, which concerned state-sanctioned actions, commanded application of the act of state doctrine.

A classic statement of the act of state doctrine appears in the late nineteenth century Supreme Court case of Underhill v. Hernandez. There, the Court stated that

105 Other such procedural limitations include the basic requirements that a defendant be subject to service of process and amenable to personal jurisdiction. See Memorandum of Professor Anthony D'Amato et al. as Amici Curiae in Support of Plaintiffs at 23 n.14, Trajano v. Marcos, No. 86-0207 (D. Haw. 1986) [hereinafter Trajano Plaintiffs' Memorandum]; Randall, supra note 26, at 65–67.

106 See U.S. Const. art. III, § 2.

107 Forti, 672 F. Supp. at 1538.

108 Id. at 1544.


110 Forti, 672 F. Supp. at 1544.

111 Id.

112 168 U.S. 250 (1897).
[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.113

Later, however, this doctrine was significantly reworked in several Supreme Court cases involving Cuba's expropriation of American property after the 1960 Cuban Revolution.114

In the leading case of Banco Nacional de Cuba v. Sabbatino,115 the Supreme Court held that although Cuba's expropriation of American assets appeared to be a taking in violation of international law, the act of state doctrine barred adjudication of this taking.116 These claims, the Court concluded, were nonjusticiable because no judicial standards existed by which to review cases involving foreign matters of this kind.117 The Court then designed a three-pronged test to aid courts in determining when to apply this doctrine. The test directs courts to balance the universality of an international legal principle, the effect of the matter on American foreign relations, and the foreign sovereign's world political status.118 After weighing these three factors and finding no clear international consensus but strong potential for adverse impact on U.S.-Cuba relations, the Court determined that the executive or legislature could better address the issue.119

In addition to expropriation cases, courts have consistently applied the act of state doctrine to actions against foreign heads of state. For example, in Republic of Philippines v. Marcos,120 the Aquino government of the Philippines pressed suit to recover funds which President Marcos and his wife allegedly embezzled from the country during the Marcos' reign.121 The Ninth Circuit ruled that the act of state doctrine applied because the court could not adjudicate this case without addressing the legality of official government acts of

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113 Id. at 252.
115 376 U.S. 398.
116 Id. at 398–99.
117 Id. at 430–33.
118 Id.
119 Sabbatino, 376 U.S. at 398–99.
120 818 F.2d 1473 (9th Cir. 1987), withdrawn and reh'g en banc granted, 832 F.2d 1110 (9th Cir. 1987) (en banc). The Forti decision preceded the withdrawal of this case.
121 Id. at 1480.
the foreign head of state, the latter being beyond the scope of judicial power.\textsuperscript{122}

In \textit{Forti}, General Suarez-Mason predicated his argument for the act of state doctrine on the Ninth Circuit \textit{Marcos} case.\textsuperscript{123} The \textit{Forti} court held that Suarez-Mason erred in relying on the Ninth Circuit case because that case was clearly factually distinguishable.\textsuperscript{124} In \textit{Marcos}, the claim was against a foreign head of state, not a subordinate government official as in \textit{Forti}. Also, \textit{Marcos} involved alleged violations of economic rights, not "fundamental human rights lying at the very heart of the individual's existence."\textsuperscript{125} Thus, the court concluded that the \textit{Marcos} case did not control in this instance.\textsuperscript{126}

Furthermore, the \textit{Forti} court rejected the defendant's argument that allegations of official conduct under Section 1350 automatically require application of the act of state doctrine.\textsuperscript{127} Judge Jensen pointed out that most human rights violations can be linked to government activity. Thus, if the act of state doctrine were to apply to all official acts, it would prevent much of the litigation under Section 1350 for torts in violation of the law of nations.\textsuperscript{128} For these reasons, the \textit{Forti} court held that the act of state doctrine did not preclude adjudication of plaintiffs' claims under Section 1350.\textsuperscript{129}

B. Untimely Claims and Indispensable Parties

General Suarez-Mason also based his motion to dismiss on two other procedural limitations: an Argentine statute of limitations and

\textsuperscript{122} \textit{Id.} at 1482. Similarly, in \textit{Guinto v. Marcos}, 654 F. Supp. 276 (S.D. Cal. 1986), the federal district court held that even if it had jurisdiction under \S\ 1350, the act of state doctrine would require the court to dismiss the plaintiffs' claim that Marcos systematically suppressed free speech in the Philippines. \textit{Id.} at 280. The court stated that it was beyond the judiciary's role to "subject the official acts or policies of the head of a foreign state to traditional standards of judicial review." \textit{Id.}

\textsuperscript{123} \textit{Forti}, 672 F. Supp. at 1545. Civil defendants bear the burden of establishing applicability of the act of state doctrine to bar adjudication of claims. \textit{Id.} at 1546 n.9.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} at 1546.

\textsuperscript{126} \textit{Id.} at 1545. The court did not reach a legal analysis of the \textit{Sabbatino} factors since Suarez-Mason failed to meet the threshold burden of a factual showing that an act of state had occurred. \textit{Id.} at 1546 n.9.

\textsuperscript{127} \textit{Forti}, 672 F. Supp. at 1546.

\textsuperscript{128} \textit{Id.}

Federal Rule of Civil Procedure (FRCP) 19 relating to indispensable parties. The court denied these portions of the defendant's motion because he was unable to establish the elements required under each.

First, the defendant contended that an Argentine statute of limitations should apply, thereby rendering plaintiffs' claims untimely and nonjusticiable. The court, however, disagreed. Not only did the court apply an American, rather than an Argentine statute of limitations, the court also specified a federal, not state, statute of limitations because the plaintiffs' claim was a federal claim.

Moreover, the court held that Forti merited application of a federal equitable tolling statute. Equitable tolling arises under federal law when a defendant's wrongful actions or extraordinary circumstances beyond plaintiff's control prevent plaintiff from filing his claim on time. If a plaintiff can raise a genuine issue of material fact on either of these two points, federal equitable tolling tolls the limitation period until the barrier that prevented timely filing is removed. Forti and Benchoam claimed that it was impossible for them to file a timely claim because General Suarez-Mason had hidden himself in order to escape liability. The court found that the defendant's actions raised the issue of whether such actions substantially hindered the plaintiffs' efforts to file a timely claim, and thus, the federal equitable tolling statute applied.

The court also dismissed the General's claim that the plaintiffs had failed to include his government superiors as parties in this

130 Forti, 672 F. Supp. at 1538.
131 Id. at 1552.
132 Id. at 1547.
133 Id. at 1548–49. After examining the equitable benefits and costs of applying a foreign state's statute of limitations, the court determined that justice and efficiency demand application of the forum state's statute. Id. This position is consistent with the judicial policy of providing a wholly objective forum for claims of violations of internationally recognized human rights. Id. at 1548.
134 Forti, 672 F. Supp. at 1549. Originally, the court ruled that the state statute of limitations for personal injury actions applies to claims under the Alien Tort Statute. Id. at 1548. This ruling followed a court finding that no specific statute of limitations exists under § 1350 or international law. Id. at 1547. Nevertheless, even though a state limitations period governs a claim, federal equitable tolling doctrines, if invoked by a plaintiff as in Forti, supersede use of state law in a federal claim. Id. at 1549.
135 Id.
136 Id. at 1549–50.
137 Id.
138 Forti, 672 F. Supp. at 1550–51.
litigation.\textsuperscript{139} The General argued that his superiors were necessary parties under FRCP 19(a) and (b).\textsuperscript{140} In support of his argument, the defendant relied on the case of \textit{Krug v. Fox},\textsuperscript{141} an action brought by the former operations manager of a coal mine against the United States Secretary of the Interior to restrain the latter from regulating the mine and exercising possessory rights over it.\textsuperscript{142} In \textit{Krug}, the Fourth Circuit found that the federal government, having legal possession of the mine, was a necessary party. The \textit{Krug} court ruled that the government’s presence was essential in order to protect its interest in the subject matter of the litigation.\textsuperscript{143} General Suarez-Mason asserted that the challenged conduct in the \textit{Forti} action is similar to \textit{Krug} because he carried it out in his capacity as a government official and pursuant to orders from his superiors.\textsuperscript{144}

The \textit{Forti} court, however, distinguished \textit{Krug} on the facts.\textsuperscript{145} The court concluded that \textit{Krug} concerned a possessory interest that would have been impaired in the government’s absence. By contrast, here, the General’s superiors who allegedly commanded Suarez-Mason to commit the challenged acts did not have such an interest in the subject matter of the litigation.\textsuperscript{146} Without an acute interest, these government superiors were merely potential joint tortfeasors. The court then noted that joint tortfeasors are not necessary, but only permissive parties within the meaning of Rule 19.\textsuperscript{147} Accordingly, the court denied Suarez-Mason’s motion to dismiss for failure to join indispensable parties.\textsuperscript{148}

\section*{IV. Other Considerations Affecting Future Application of and Extension Beyond \textit{Forti v. Suarez-Mason}}

General Suarez-Mason raised only the act of state doctrine, a statute of limitations and a procedural rule regarding indispensable

\textsuperscript{139} Id. at 1552.

\textsuperscript{140} Id. A party is indispensable under Rule 19(a) if: “(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may . . . impair or impede the person’s ability to protect that interest . . . .” \textit{Fed. R. Civ. P.} 19(a).

\textsuperscript{141} 161 F.2d 1013 (4th Cir. 1947).

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 1018.

\textsuperscript{144} \textit{Forti}, 672 F. Supp. at 1551.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 1551–52.

\textsuperscript{147} Id. at 1552.

\textsuperscript{148} \textit{Forti}, 672 F. Supp. at 1552.
parties as defenses to adjudication of the plaintiffs' claims under the Alien Tort Statute. However, other means exist which could preclude or shape adjudication of such claims. Threshold limitations such as the doctrine of sovereign immunity, embodied in the Foreign Sovereign Immunities Act, and the political question doctrine allow a court to refrain from hearing a Section 1350 case. When no theoretical limitations apply, members of the executive branch may intervene in a Section 1350 case and pressure a court into deferring to the executive's position.

As the federal judiciary has grown more conservative over the past decade, the use of procedural limitations and judicial deference to executive intervention in Section 1350 cases has become more frequent. Judges who oppose Filartiga's broad interpretation of the Alien Tort Statute tend to employ these vehicles and thus, thwart the potential effectiveness of the Alien Tort Statute in American human rights litigation. Consequently, the use of these limitations counteracts progress in the evolution of international human rights litigation in United States courts.

A. Doctrine of Sovereign Immunity

General Suarez-Mason could not raise the doctrine of sovereign immunity as a defense in Forti, but this doctrine is frequently applied in Section 1350 actions brought against foreign sovereigns.

149 The current conservative political climate arguably began with the inauguration of former President, Ronald Reagan. Reagan has come to symbolize the politically conservative ideology that characterized the 1980s. Perhaps, the area in which this ideology best manifested itself is judicial appointments. During his presidency, Reagan appointed three Supreme Court Justices, 79 Circuit Court Judges and 265 District Court Judges—nearly 47 percent of the federal judiciary. Coyle, The Judiciary: A Great Right Hope, Nat'l L.J., Apr. 18, 1988, at 22, col. 1. One report stated that "the President has been remarkably successful in finding candidates who share his view of the judiciary's role: so-called judicial restraint in interpreting the U.S. Constitution and statutes, deference to the actions of the other branches of government and strict enforcement of criminal laws." Id.; see also Williamson, Reagan Justice: A Conservative Legacy on the Appellate Courts, 10 AMERICAN LAWYER, June, 1988, at S1; Rice, 'Earl Warren Would Blush': On the President's Native Turf, There Has Been a Strong and Historic Shift From Left to Right, Legal Times, May 30, 1988, at 46, col. 1.; Wermiel, Tilting Bench: Reagan Choices Alter the Makeup and Views of the Federal Courts; Affirmative-Action Decisions Reflect Rightward Trend; Prison Terms Are Longer; An Agenda or Wise Restraint?, Wall Street J., Feb. 1, 1988, at 1, col. 1.

150 See supra note 36 and accompanying text.

151 28 U.S.C. § 1603 (1982) of the Foreign Sovereign Immunities Act provides that, in order to raise the defense of sovereign immunity, a defendant must be an agent or instrumentality of a foreign state such as a political subdivision or a corporation owned by the foreign state. General Suarez-Mason did not fall within the statutory definition of "agent or instrumentality" and thus, could not raise this defense to adjudication.
Originally, the United States espoused the principle of absolute sovereign immunity which grants sovereign states immunity from all suits against them in American courts. Unconditional respect for the principle of sovereignty continued until the mid-twentieth century. Then, in the famous Tate letter of 1952,\textsuperscript{152} the State Department urged the judiciary to adopt the restrictive theory of sovereign immunity which was increasingly gaining support among other nations.\textsuperscript{153} Due to the increasing participation of governments in commercial activities, judicial adherence to this new theory, which exempts such activities from blanket protection of sovereignty, would allow persons transacting business with these nations to have their claims determined in an United States court.\textsuperscript{154}

For this reason, Congress passed the Foreign Sovereign Immunities Act (FSIA) in 1976.\textsuperscript{155} The FSIA effectively denies sovereigns immunity from lawsuits arising out of their private, commercial activities.\textsuperscript{156} The FSIA still recognizes sovereign immunity as the norm, but significantly narrows the scope of its applicability.\textsuperscript{157}

Courts have generally viewed the exceptions enumerated in the FSIA as the exclusive means of abrogating sovereign immunity. Hence, in claims against sovereign nations for torts in violation of customary international law, U.S. courts have held that the sovereign is immune because these acts are non-commercial and thus, not within the FSIA exceptions.\textsuperscript{158} In the mid-1980s, however, an argument emerged that there should not be immunity in those instances in which a sovereign state commits a violation of international human rights law.\textsuperscript{159}

This argument is predicated on three bases. First, proponents of the theory conclude from a plain reading of the FSIA that Section

\textsuperscript{152} Letter from the Acting Legal Adviser of the Department of State to the Department of Justice, May 19, 1952, \textit{reprinted in} 26 United States Department of State Bulletin 984 (1952) (The so-called “Tate letter” was a letter sent on behalf of the Secretary of the State Department, Jack B. Tate, to the acting Attorney General on May 19, 1952).

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{See generally id.}

\textsuperscript{155} Foreign Sovereign Immunities Act, 28 U.S.C. § § 1 note, 1330, 1332, 1391, 1441, 1602 et seq. (1976) [hereinafter FSIA].

\textsuperscript{156} 28 U.S.C. § 1330(a).

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{See, e.g.,} Siderman de Blake v. Republic of Argentina, No. CV82-1772-RMT, slip op. (C.D. Cal. 1984) \textit{vacated and dismissed, order} (C.D. Cal. 1985) (The district court vacated its \$2.6 million judgment and held that Argentina had a valid claim to sovereign immunity under the FSIA from suit for alleged torture and property deprivation).

\textsuperscript{159} \textit{See Bazyler, Litigating the International Law of Human Rights: A “How To” Approach, 7 Whittier L. Rev. 713 (1985); Paust, supra note 129, at 233–42.}
1604, in combination with Section 1330(a), exempts human rights violators from the norm of sovereign immunity by reference to relevant provisions of existing international agreements. Second, after an examination of the legislative history behind the enactment of the FSIA, these scholars assert that the drafters purposely excluded an explicit exception to the norm of sovereign immunity for human rights violations. Finally, supporters of this modern view contend that because the Alien Tort Statute and customary international law both recognize sovereign states as potential human rights violators, it is clear that Congress intended courts to exercise jurisdiction over foreign sovereigns in claims of violations of international law falling outside of the FSIA provisions. Therefore, these scholars claim, United States courts that wish to follow the plain meaning of Section 1350 and evolving customary international law should no longer immunize sovereigns from suit for alien tort claims involving human rights abuses.

This modern approach to the FSIA quickly gained acceptance. The Second Circuit relied upon it in the 1987 decision of Amerada Hess Shipping Corp. v. Argentine Republic. This case involved an action brought under the Alien Tort Statute by the owner of a Liberian oil tanker for damages resulting from Argentina's bombing of his ship on the high seas during the Falklands War. The district court dismissed the case for lack of jurisdiction on the theory of sovereign immunity under the FSIA. On appeal, the Second Circuit, espousing the interpretation of the FSIA discussed above,

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160 Both § 1330(a) and § 1604 of the FSIA subject the general provision of sovereign immunity to existing and applicable international agreements. 28 U.S.C. § § 1330(a), 1604. The modern view proponents maintain that because the United States endorses the United Nations Charter, any provision thereof is an exception to the sovereign immunity rule. See Bazyler, supra note 159, at 732–34. Thus, Articles 55 and 56 of the U.N. Charter, which address human rights and international enforcement of human rights, remove immunity privileges for human rights violators. See id.; U.N. CHARTER arts. 55, 56.

161 Bazyler, supra note 159, at 733. Proponents of the modern view deduce that the drafters believed that customary international law and § 1604 of the FSIA adequately recognized this exception and that an additional expression of it in the FSIA would be redundant. Id.

162 Nowhere in its text does the Alien Tort Statute limit the class of defendants to private individuals. See 28 U.S.C. § 1350.

163 See supra note 83.

164 Bazyler, supra note 159, at 733–34.

165 Id.


168 Id. at 687; 638 F. Supp. 73 (S.D.N.Y. 1986).
reversed and held that the FSIA did not preempt jurisdiction under the Alien Tort Statute. 169

This decision was a significant victory for the "modern view" of sovereign immunity but was short-lived. In January, 1989, the Supreme Court, on writ of certiorari, overturned the lower court. 170 The Court rejected the modern view on all three bases mentioned above and held that the FSIA precludes a finding of jurisdiction under the Alien Tort Statute in this instance. 171 Arguably, the modern view still has vitality if a plaintiff in a Section 1350 action against a foreign sovereign can point to international agreements that expressly provide for a private right of action. 172 Nevertheless, no plaintiff has been able to offer such an agreement in the past and it is reasonable to conclude that it will not be possible to do so in the future. Given this presumption, the Court's holding in Amerada Hess, in effect, limits the class of defendants in future cases under the Alien Tort Statute to individuals acting under color of state law.

Surprisingly, the Supreme Court's decision in Amerada Hess actually pleased some human rights activists because the holding was quite narrow. 173 The Court did not address the construction or application of the Alien Tort Statute, even though these issues were arguably up for review. If the Court had directed its attention towards the current interpretation of Section 1350, many feared that the Rehnquist Court would gut the present force of Section 1350, thereby undermining any progress in American human rights litigation. 174 Despite this perceived threat, the Court passed over the Filartiga interpretation of the Alien Tort Statute. Nevertheless,

169 Amerada Hess, 109 S. Ct. at 687.
170 Id. at 692.
171 Id. The Court found that the FSIA exception for international agreements, see supra note 160 and accompanying text, only applies when the international agreements relied upon by the plaintiffs expressly conflict with the FSIA's general provision of immunity. Such conflict can only arise if these agreements explicitly provide for private causes of action for recovery. Amerada Hess, 109 S. Ct. at 691–92. Furthermore, the Court found that Congress contemplated violations of international law when enacting the FSIA, clearly evidenced by the creation of an exception to immunity for takings in violation of international law in § 1605(a)(3). Thus, the Court concluded that sovereign immunity exists for violations of international law which do not fall within one of the exceptions. Id. Finally, the Court held that because the First Congress, which adhered to the principle of absolute sovereign immunity, could not have contemplated sovereigns as defendants, and since no court had exercised jurisdiction over a foreign sovereign under the Alien Tort Statute prior to the FSIA, Congress had no reason to repeal § 1350 when it enacted the FSIA. Id. at 689.
172 See supra note 171.
174 See id.
the Supreme Court's *Amerada Hess* decision demonstrates that the conflicting constructions of Section 1350 leave the legislation vulnerable to future legislative or judicial action. In the current politically conservative climate, such action is likely to contravene the progressive *Filartiga* reasoning.

B. Political Question Doctrine

In *Forti*, General Suarez-Mason espoused the argument of Judge Robb in *Tel-Oren* and urged the court to refrain from adjudicating the case because of the political aspects surrounding the dispute. Judge Jensen, however, summarily refused to apply the doctrine to the claims alleged by Forti and Benchoam.

The political question doctrine is based on constitutional separation of powers principles and related prudential concerns. The doctrine essentially permits courts to abstain from hearing controversial issues that involve constitutionally-delegated functions of the political branches. The Supreme Court has continuously struggled to formulate a precise standard regarding use of this doctrine. The Court's most definitive statement appeared in the 1962 case of *Baker v. Carr*:

> 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 respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Courts continue to rely on the standard of *Baker v. Carr* today. Despite articulation of a standard, the lack of agreement within the

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175 See supra notes 51–54 and accompanying text.
176 *Forti*, 672 F. Supp. at 1539.
177 *Id.*
179 See *id.* at 107.
181 *Id.* at 217.
judiciary over the political question doctrine has not dissipated. In fact, the controversy is perhaps more pronounced than ever.182

With respect to the Alien Tort Statute, the lack of clear standards for applying the political question doctrine presents an especially complex problem. Section 1350 cases, by their nature, typically involve sensitive matters of diplomacy and intergovernmental relations and thus ostensibly command automatic application of the political question doctrine.183 Yet, as Justice Brennan stated in Baker v. Carr, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."184 Courts facing Section 1350 claims thus have the heightened dilemma of determining whether the case presents a political question or is merely "politically-charged."185 These factually-oriented determinations have resulted in inconsistent case law.186

Because of the nebulous standards of the political question doctrine, the judiciary is moving away from use of this doctrine. Courts now tend to hear cases that present possible political questions, but narrow the issues and restrict the holding to these narrow issues.187 Judicial avoidance of the political question doctrine weak-

182 See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (mem.) (a mere plurality applied the political question doctrine to the issue of the President's power to abrogate a treaty).


184 Baker v. Carr, 369 U.S. at 211. Later, in Japan Whaling Ass'n. v. American Cetacean Soc'y., 478 U.S. 221 (1986), the Court reasserted this position by holding that the judiciary has the authority to construe executive agreements and congressional legislation and cannot abstain from this duty merely because an issue has political overtones. Japan Whaling, 478 U.S. at 228–29.

185 Some legal scholars argue that a court must hear a valid § 1350 claim regardless of whether a political question exists because "a violation of international law is at stake." Paust, supra note 129, at 244; see also Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1179 (1985).


187 See, e.g., Dames & Moore v. Reagan, 453 U.S. 654, 661 (1981) (Supreme Court confined its decision "to the very questions necessary to the decision of the case," thereby avoiding application of the political question doctrine to dispute over President Reagan's compliance with an Executive Agreement between the U.S. and Iran); Ramirez de Arellano, 724 F.2d at 147 (D.C. Circuit held that issue was narrow one of whether U.S. officials had
ens the force of this doctrine with respect to Section 1350 cases. Nevertheless, the political question doctrine remains a viable means by which a court may abstain from adjudicating an alien tort claim. Thus, especially in light of the growing conservatism within the judiciary, the doctrine remains a threat to the success of human rights litigation under the Alien Tort Statute.

C. Executive Intervention and Judicial Deference

Generally, the judicial branch is uneasy about deciding questions of international law because of its lack of expertise in international affairs. Hence, the judiciary frequently turns to the more internationally-experienced executive branch for guidance.¹⁸⁸ In response to a court's request for advice, the Department of State, usually through the Office of the United States Attorney General, submits a brief on the case in question.¹⁸⁹ Rather than merely using the brief as a suggestion on how to approach the case, however, courts tend to adopt the executive's position and echo it in their decisions.¹⁹⁰

Ample evidence exists on the tendency of courts to defer to the executive on questions of international human rights law. For instance, in Filartiga, the State Department submitted a memorandum to the Second Circuit which supported an exercise of jurisdiction under Section 1350.¹⁹¹ Consequently, the circuit court acted

unlawfully deprived Honduran citizens of their land, not broader one of propriety of American military presence in Honduras).

¹⁸⁸ Judicial deference to the executive is similar to the political question doctrine in that it is based on the principle of separation of powers. Nevertheless, the two concepts are temporally distinguishable. The political question doctrine allows a court to abstain before reaching the merits of the case. See supra note 178 and accompanying text. Judicial deference to the executive does not occur until after the court reviews the material issues of the litigation. At that point, if the court finds that the executive's position provides necessary guidance, the court will defer to the executive branch.

¹⁸⁹ See generally Bazyler, supra note 159, at 736.

¹⁹⁰ Professor Bazyler remarked, "Case precedent indicates that if the executive enters on the side of human rights litigant, suggesting to the court that the case should be decided on its merits, the court will follow the executive's recommendation." Bazyler, supra note 159, at 736. Bazyler then states that a plaintiff's failure to establish a connection with the State Department "may lead to dismissal, regardless of the merits of the practitioner's case." Id. at 738.

¹⁹¹ See Memorandum for the United States submitted to the Court of Appeals for the Second Circuit in Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), reprinted in 15 I.L.M. 585, 597 (1980) [hereinafter Filartiga Government Memorandum]. In its Filartiga Government Memorandum, the State Department laid out guidelines for the court to follow and then stated that "[w]hen these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a
upon this advice by reversing the district court’s dismissal for lack of jurisdiction.192

In *Tel-Oren*, the State Department also submitted an amicus brief, but there it discouraged the Supreme Court from hearing the case.193 The government’s brief warned that the issue of jurisdiction under Section 1350 was too premature to warrant Supreme Court review.194 Moreover, the government argued that any resulting Supreme Court decision would not affect directly the *Tel-Oren* outcome because the D.C. Circuit had dismissed the case on several other grounds.195 Accordingly, the Supreme Court denied the writ of certiorari.196

Most recently, in *Amerada Hess*, the Supreme Court reversed the decision of the Second Circuit upon the advice of the State Department.197 Arguing the separation of powers principle, the State Department cautioned that an affirmation of the circuit court’s broad reading of the Alien Tort Statute with respect to the FSIA would have serious repercussions on international affairs.198 In addition, an affirmation would transform the United States judiciary into another international human rights court.199 These

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private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights.” *Id.* at 604.

192 *Filartiga*, 630 F.2d at 876.


194 *Id.* at 432.

195 *Id.* at 434. The State Department concluded its brief for the *Tel-Oren* case by saying: “In these circumstances, we question whether this Court should exercise its discretionary jurisdiction to construe a statute as complex and little understood as the [Alien Tort Statute] in a context in which the outcome of the case is unlikely to be affected.” *Id.*

196 *Tel-Oren*, 470 U.S. 1003.


198 The State Department asserted that the Second Circuit’s holding in *Amerada Hess* “is inconsistent with the FSIA and international law, and it exposes the United States to reciprocal action by the courts of other Nations.” Brief for the United States as Amicus Curiae Supporting Petitioner, at 1, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (No. 87-1372) [hereinafter *Amerada Hess Government Brief*].

199 The State Department asserted in the *Amerada Hess Government Brief* that: The decision below not only has the extraordinary effect of requiring petitioner [Argentina] to answer to the courts of a neutral third party regarding its conduct during a time of war. It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not United States citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States.

*Amerada Hess Government Brief* at 29.
arguments prompted the Court to reverse the Second Circuit’s decision.\textsuperscript{200}

Some legal scholars believe that courts should refrain from deferring to the executive whenever a difficult international law question comes before them.\textsuperscript{201} These scholars reason that the Constitution mandates insulation of the judiciary from executive intervention in areas of statutory construction and federal jurisdiction, even when the question is international in nature.\textsuperscript{202} Nevertheless, as illustrated above, federal courts generally are increasingly uncomfortable with judicial activism in Section 1350 cases.

Perhaps judicial deference to the executive in these cases is simply due to respect for the separation of powers doctrine and the presumed expertise of the executive in foreign matters.\textsuperscript{203} Alternatively, it may be a manifestation of the political conservatism present in the federal court system today.\textsuperscript{204} Regardless of the reason, the result is a shift within courts hearing Alien Tort Statute cases from activism to deference. The shift within the judiciary threatens to obviate adherence to and any broadening of the \textit{Filartiga} construction of Section 1350.\textsuperscript{205} Moreover, if the State Department and Justice Department continue to sway the judiciary, the Alien Tort Statute will not be able to survive as a beacon for human rights litigation in United States courts.\textsuperscript{206}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Amerada Hess}, \textit{109 S. Ct.} 683.\textsuperscript{200}
\item \textit{See supra} note 79 and accompanying text.\textsuperscript{201}
\item Amici for plaintiffs in \textit{Trajano} state in their brief: “The opinions of persons in the Justice Department may change with the political winds, but questions of statutory construction, federal jurisdiction and international law should not.” \textit{Trajano Plaintiff’s Memorandum} at 10.\textsuperscript{202}
\item As Judge Bork cautioned in \textit{Tel-Oren v. Libyan Arab Republic}: “A statute [Alien Tort Statute] whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection.” \textit{726 F.2d} \textit{774}, 812 (D.C. Cir. 1984) (Bork, J., concurring).\textsuperscript{203}
\item \textit{See supra} note 149.\textsuperscript{204}
\item Interestingly, the State Department has completely reversed its stance since \textit{Filartiga} as to whether the Alien Tort Statute creates a private cause of action. In 1980, when the State Department submitted its \textit{Filartiga} brief, it recognized that “an individual’s fundamental human rights are in certain situations directly enforceable in domestic courts.” \textit{Filartiga Government Memorandum}, at 603. Most recently, however, the State Department asserted that the Alien Tort Statute is only jurisdictional in nature and does not create a cause of action. \textit{Amerada Hess Government Brief} at 28 n.26. Without an express grant of a private cause of action, the State Department recognized that courts may attempt to imply a cause of action. \textit{Id.} Yet, the State Department warned, “[s]uch an approach would present sensitive questions of foreign relations and the proper role of Article III courts . . . .” \textit{Id.} \textsuperscript{205}
\item Fortunately, no court yet has rejected the line of judicial reasoning regarding the interpretation of the Alien Tort Statute established by \textit{Filartiga}. Nevertheless, courts may not\textsuperscript{206}
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V. The Future of International Human Rights Litigation in United States Courts After Forti v. Suarez-Mason

A. Assessing the Forti Decision

In the 1980 Filartiga decision, Judge Kaufman recognized the potential effect which the Second Circuit’s decision would have on human rights litigation in the United States. He concluded his opinion in Filartiga by saying: “Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.” Many federal courts, including the Forti court, have adopted the progressive reasoning of Filartiga. Consequently, a consensus emerged which supports the exercise of jurisdiction under the Alien Tort Statute in human rights cases.

This consensus has met with considerable challenge from various levels of the federal judiciary. Judges, such as Judge Bork and Judge Robb in Tel-Oren, questioned the propriety of Judge Kaufman’s interpretation of the Alien Tort Statute. These dissenters claimed that Judge Kaufman imposed modern principles of human rights on an outdated statute. Moreover, they believed that Judge Kaufman did not substantiate sufficiently his finding of a jurisdictional grant, his inference of a cause of action and his standard for determining an international tort under Section 1350. Thus, the dissenters conclude, it is error for subsequent courts to follow the Filartiga decision.

Despite these attacks on the Filartiga interpretation, courts generally continue to adhere to it. When assessing the conflicting interpretations of Section 1350, courts have found Filartiga to be the stronger theory. In Forti, Judge Jensen aligned the district court with the Filartiga position for this very reason. He agreed with Judge Kaufman that courts should interpret the Alien Tort Statute in light of modern principles of international law. Accordingly, Judge Jensen held that Section 1350 provides original jurisdiction and a private cause of action for torts in violation of the law of nations.

be able to avoid reviewing the statutory interpretation if they face continued pressure from the executive branch. A strong hypothesis is that if the judiciary falls prey to the conservative ideology of the executive branch, courts will read the Alien Tort Statute much more narrowly. It is foreseeable that only civil actions brought by aliens for specified, egregious human rights violations directly affecting the interests of the United States will meet the restricted standards of the Alien Tort Statute. See Kirgis, Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts, Am. J. Int’l L. 323, 330 (1988).

207 Filartiga, 630 F.2d at 890.
In order to support the Forti court's adoption of the Filartiga interpretation, Judge Jensen relied heavily on case law precedent. With respect to the jurisdictional grant, Judge Jensen pointed to a "growing consensus" within the federal judiciary. With respect to a private cause of action under the Alien Tort Statute, Judge Jensen again looked to precedent. The existence of such precedent legitimized the court's holding.

After aligning the court with Filartiga, Judge Jensen expanded the scope of the Alien Tort Statute to include a private cause of action for the new claims of summary execution, prolonged arbitrary detention and "causing disappearance." Again, relying on precedent in addition to international legal agreements, Judge Jensen found that these torts violated the law of nations and thus were actionable under Section 1350. Judge Jensen did not find such precedential support for the new claim of cruel, inhuman and degrading treatment. Despite the existence of several international legal documents which recognized this claim as a violation of international law, the lack of precedent caused Judge Jensen to dismiss this alleged tort.

Interestingly, Judge Jensen did not turn to precedent to support his rejection of several procedural limitations asserted by General Suarez-Mason. In fact, Judge Jensen refused to follow the cases raised by the defendant. With respect to each of the asserted limitations—act of state doctrine, statute of limitations and the procedural rule on dispensable parties—the Forti court distinguished the case law precedent supporting the General's position. The court did not allow any of these limitations to preclude adjudication of the case under the Alien Tort Statute.

This inconsistent treatment of precedent in Forti raises two points. First, Judge Jensen knew that precedent was essential in a conservative era to support adequately his ruling on the statutory interpretation questions of Forti. He saw an opportunity for the court to follow the Filartiga interpretation and to expand upon it by including new international torts. To justify its decision, the court had to adhere strictly to precedent; where precedent was scant, the court did not venture into new areas. Second, Judge Jensen realized that his decision must withstand procedural attacks. Thus, the court broke down General Suarez-Mason's defenses. In order to do this, the court distinguished precedents on their facts and avoided a discussion of the merits of each precedent. The question arises whether a more detailed analysis of these cases would have produced a different result. Perhaps, the Forti court dismissed the
precedent supporting the General's defense too quickly in an effort to further the progressive reasoning of Filartiga.

B. Conservatism within the Federal Judiciary

The Forti court's avoidance of precedent with respect to procedural limitations is suspect in light of the rising conservatism within the judiciary. Conservative judges are finding that procedural limitations and deference to executive intervention are an attractive means of restricting the growth of a consensual interpretation of the Alien Tort Statute. Thus, when a court advances the progressive Filartiga interpretation, but dismisses procedural limitations without grounding its decision in precedent, it is inviting reversal by a less judicially active, higher court. To date, the judiciary has not exploited these opportunities to reverse the Filartiga interpretation. Nevertheless, if the conservative trend continues, conservative judicial activism may chip away at the scope of the Alien Tort Statute and the strength of the current consensus following Filartiga.

C. Remedies Under the Alien Tort Statute

The Forti case also revealed a serious flaw in remedying human rights abuses through the Alien Tort Statute: monetary sanctions are very difficult to enforce against powerful foreign defendants. Because the Alien Tort Statute is a jurisdictional grant over certain civil actions, the form of remedy is typically compensatory or punitive. In Forti, the court ruled in favor of the plaintiffs on their claims of torture, prolonged arbitrary detention without trial, summary execution and "causing disappearance." At the time of judgment, the court did not make a determination as to damages. Before such a determination could occur, however, General Suarez-Mason hid most of his assets. Thus, the court could not locate anything to attach in satisfaction of the judgment. The plaintiffs in Forti were successful litigants but remained unrecompensed victims of abuse.

VI. Conclusion

Forti v. Suarez-Mason will be a significant case for future human rights litigants in some respects. The Forti decision strengthened the consensus adopting the Filartiga interpretation of the Alien Tort Statute. Moreover, the Forti court expanded the scope of international torts which fall within the Alien Tort Statute's jurisdiction. Nevertheless, the significance of Forti will be subject to certain lim-
itations. Considering this era of judicial conservatism, *Forti* sets a somewhat unstable precedent due to its quick dismissal of procedural defenses. Thus, any subsequent federal district court case that factually distinguishes the case law precedent without discussing the merits of these cases may encounter difficulties on appeal.

Furthermore, the *Forti* case demonstrates that enforcing judgments in Alien Tort Statute cases may be virtually impossible. Thus, human rights litigants who rely on *Forti* and similar cases may not find a satisfactory remedy of their claims. Unfortunately, after *Forti*, the force of the Alien Tort Statute as a means of providing relief to human rights abuse victims has somewhat diminished.208

Allison J. Flom

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208 Although the significance of the Alien Tort Statute as a means of relief to human rights litigants is declining, other legislative efforts may assist such litigants. For example, on October 2, 1989, the House of Representatives has approved a bill entitled Torture Victim Protection Act of 1989 which allows torture victims to sue their aggressors in U.S. courts regardless of their nationality. See H.R. 1662, 101st Cong., 1st Sess. (1989). If enacted, this act would further the progressive approach of *Filartiga*. See 66 INTERPRETER RELEASES, 1143, 1144 (1989).