

DEFERENCE, HUMAN RIGHTS AND THE FEDERAL COURTS: THE ROLE OF THE EXECUTIVE IN ALIEN TORT STATUTE LITIGATION

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INTRODUCTION

In the early days of our nation's history, Chief Justice John Marshall articulated two principles that form the core of a growing debate regarding international human rights litigation. The first was argued before the House of Representatives in 1800. "The President," Marshall said, "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹ The second principle came three years later in the Chief Justice's infamous *Marbury v. Madison* opinion. He wrote, "It is emphatically the province and duty of the judicial department to say what the law is."² In a simpler world these ideas regarding the separation of powers would be mutually exclusive: international diplomacy on the one hand and domestic jurisprudence on the other. However, in the real world, the two spheres of government collide, begging the question: what role is there for the courts in announcing and applying the law when that law affects the nation's external relations? Further, in the realm of international human rights litigation, where cases of torture scream out for justice, when is it appropriate for the courts to defer to Executive authority? How much deference should the courts give when the President, through the Department of State and the Department of Justice, announces that foreign policy concerns trump those of the private litigants? Though "it is error to suppose that every case or controversy which touches foreign relations lies beyond

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1. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (citing 10 ANNALS OF CONG. 613 (1800)).

2. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

judicial cognizance,”³ a balance must be achieved between the concerns of the Executive and those of the litigants when those concerns are properly put before the court.

There are few areas in American jurisprudence where these issues are clearer than in the Alien Tort Statute (or Alien Tort Claims Act) (ATS) litigation that has come before the federal courts over the past twenty-seven years. Interestingly, the Alien Tort Statute was drafted nearly two hundred years before its recent ascent to the legal spotlight. The statute was passed with the Judiciary Act of 1789, and as codified in 28 U.S.C. § 1350, it states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴ In 1980 the seminal Second Circuit decision in *Filártiga v. Peña-Irala* breathed new life into the ATS and initiated a series of cases in which the lower courts applied *Filártiga*’s principles to human rights claims arising under the law of nations (now known as customary international law).⁵ These cases were affirmed, though to what extent is ambiguous, in the Supreme Court’s 2004 decision: *Sosa v. Alvarez-Machain*.⁶ Thus, *Filártiga* represented an important step in the realm of international human rights litigation. Its progeny represent an outlet through which plaintiffs, though aliens in this country, can use the federal judicial system to seek reprieve for human rights abuses committed against them abroad.

Most recently, a series of cases has been filed in district courts across the country alleging, *inter alia*, torture committed against plaintiffs in the People’s Republic of China (PRC).⁷ Under *Filártiga* and *Sosa*, it is clear that torture violates customary international law, and that, as such, torture is actionable under the jurisdiction of the ATS.⁸ However, aside from the plaintiffs, defendants, and courts, the Executive Branch is a vital player in this litigation. The State Department has become involved in many of these cases, voicing its statements of interest and suggestions of immunity on behalf of the Chinese officials.

3. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

4. Alien Tort Statute, 28 U.S.C. § 1350 (2000).

5. 630 F.2d 876, 876 (2d Cir. 1980).

6. 542 U.S. 692, 732 (2004).

7. See Jacques DeLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 473–76 (2002); Emma Schwartz, *Siding with the Dragon*, LEGAL TIMES, Aug. 7, 2006.

8. *Filártiga*, 630 F.2d at 884; see *Sosa*, 542 U.S. at 723-28.

The question is, therefore, how much deference should the courts give the Executive Branch in ATS human rights litigation. The cases involving Chinese officials are particularly important due to the diplomatic dynamic between the United States and the PRC. The cases, thus, present an interesting backdrop against which to address this question. Ultimately, the decision to defer to the Executive Branch in cases involving torture and other gross violations of human rights is best made by courts applying a uniform standard. By analyzing Supreme Court, lower court, and congressional guidance, and addressing the concerns surrounding too much and too little executive deference, such a uniform standard that brings balance to the system is conceivable.

I. ATS HUMAN RIGHTS LITIGATION: *FILÁRTIGA* TO *SOSA*

On March 29, 1976, Joelito Filártiga, the son of a Paraguayan physician Dr. Joel Filártiga, was kidnapped from his house in Asuncion and tortured to death.⁹ The kidnapper was the Inspector General of Police, Americo Peña-Irala, and though it is unclear why he took the seventeen year old, the kidnapping was alleged an act of retaliation against the boy's father.¹⁰ Dr. Filártiga was an admitted opponent of the dictator General Alfredo Stroessner, who had seized power in Paraguay in 1954.¹¹ Along with having founded and run the "largest private health clinic for the poor in Paraguay," Dr. Filártiga had gained international renown for his artwork, which depicted the extreme suffering of the Paraguayan people due to the inadequacy of the government.¹² The torture of his son took place at the police station over the course of one and a half hours. During that time the boy was whipped, slashed, and subjected to electric shocks.¹³ Joelito died of cardiac arrest due to the frequency and intensity of the shocks.¹⁴

9. *Filártiga*, 630 F.2d at 878.

10. See Richard Pierre Claude, *The Case of Joelito Filártiga and the Clinic of Hope*, 5 HUM. RTS. Q. 275, 275-301, 283-84 (1983). It is likely Peña hoped to obtain incriminating information on Dr. Filártiga. *Id.*

11. *Filártiga*, 630 F.2d at 878; Diana Jean Schemo, *Gen. Alfredo Stroessner, Ruled Paraguay Through Fear for 35 Years, Dies in Exile at 93*, N.Y. TIMES, Aug. 17, 2006, at B7.

12. Claude, *supra* note 10, at 280-82.

13. *Id.* at 284.

14. *Id.*

The Filártigas' efforts to find reprieve through the Paraguayan judicial system were met with threats and ultimately denied.¹⁵ As the Filártigas stated in their complaint against Peña, filed on April 6, 1979 in the Eastern District of New York, "no relief can be obtained [in Paraguay], as the Paraguayan judiciary is an appendage of the executive branch."¹⁶ Regardless, public sympathy for the family was widespread.¹⁷ Two thousand people attended the boy's funeral and an art exhibit displaying Dr. Filártiga's work was held at the Paraguayan-American cultural center. It was sponsored by the U.S. Embassy and dedicated to Joelito.¹⁸

On July 21, 1978, Peña entered the United States on a visitor's visa, having been "retired" by Stroessner, who had succumbed to international pressure after the murder.¹⁹ Joelito's sister Dolly Filártiga, who was seeking asylum in the United States, became aware of Peña's presence in the country and, when he was arrested by the Immigration and Naturalization Services for overstaying his visa, promptly had him served with a complaint under the Alien Tort Statute § 1350.²⁰ On July 30, 1980, the Second Circuit held that "deliberate torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."²¹

As noted above, § 1350 states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²² The district court in *Filártiga* found that it lacked jurisdiction under § 1350 because it interpreted "the law of nations' . . . as excluding that law which governs a state's treatment of its own citizens."²³ Thus, on appeal, the Second Circuit set out to review the threshold question of jurisdiction and, specifically, whether

15. *Filártiga*, 630 F.2d at 878; Claude, *supra* note 10, at 285.

16. Complaint at 18, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 97 Civ. 917), available at <http://www.yale.edu/lawweb/avalon/diana/filartiga/13june.html>.

17. See Claude, *supra* note 10, at 285-86.

18. *Id.*

19. *Id.* at 286.

20. *Filártiga*, 630 F.2d at 878-79; Claude, *supra* note 10, at 286-87.

21. *Filártiga*, 630 F.2d at 878.

22. 28 U.S.C. § 1350.

23. *Filártiga*, 630 F.2d at 880.

the torture of Joelito violated the law of nations.²⁴ To aid in making its decision, the court requested the opinion of the Executive Branch.²⁵ The memorandum from the Department of State and Department of Justice responding to this request stated two main points. First, the Alien Tort Statute is not static, but “encompasses international law as it has evolved over time.”²⁶ As such, “today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.”²⁷ Second, it rejects the idea that “only states, not individuals, could seek to enforce rules of international law.”²⁸ In this way, in cases such as this one, where there is a wrong that is “both clearly defined and universally condemned . . . private enforcement is entirely appropriate.”²⁹

In its opinion, the court looks at all the implications of finding that official torture violated the law of nations. The court lists the various sources of international law, including “works of jurists[,] . . . general usage and practice of nations [and] . . . judicial decisions,”³⁰ and acknowledges that international law does evolve over time.³¹ The court, though, sets a high standard for determining what qualifies as the law of nations. It examines the various sources, particularly the United Nations Charter, U.N. declarations, international treaties and accords, and national law, and notes not only the widespread acceptance of torture as a violation of the international law, but also

24. *Id.*

25. See Memorandum for the United States as Amicus Curiae, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146, at *1.

26. *Id.* at *3.

27. *Id.*

28. *Id.* at *20.

29. *Id.* at *23.

30. *Filártiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61).

31. The court cites for both points *The Paquete Habana*, which states that

Where there is no treaty, and no controlling executive act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. 677 at 700 (1900) (quoted in *Filártiga*, 630 F.2d at 880-81). *The Paquete Habana* involved the seizure of a Spanish fishing vessel during the Spanish-American War. The Court held that the proscription of such seizures had, over time, become international law “by the general consent of the civilized nations of the world, and independently of any express treaty or other public act.” *Id.*

the lack of dissent against that general view.³² It concludes that “[t]he prohibition [of official torture] is clear and unambiguous, and admits no distinction between treatment of aliens and citizens.”³³ Of further importance, the court makes clear that the international law is part of the federal common law. It acknowledges that historically, “[d]uring the eighteenth century, it was taken for granted . . . that the law of nations forms a part of the common law,”³⁴ and cites *The Paquete Habana*, stating that “international law is part of our law.”³⁵ This historical analysis was crucial to validating the Alien Tort Statute under Article III of the Constitution, which grants federal courts the power to hear cases “arising under . . . the laws of the United States.” These laws include both statute and federal common law.³⁶

Filártiga was a watershed for international human rights adjudication in the federal courts. A few cases decided between *Filártiga* and *Sosa* are illustrative. Amongst these were a series of cases, consolidated in *In re: Estate of Ferdinand Marcos, Human Rights Litigation (Marcos I)*, filed in the late 1980s and early 1990s against former Filipino president Ferdinand Marcos and his daughter Imee Marcos-Manotoc for torture and wrongful death.³⁷ As these cases were the first time the Executive Branch had announced its position in an ATS case since *Filártiga*, the court addressed Executive’s position directly. The court recognized the flip in the opinion of the Department of Justice between its expansive reading of the Alien Tort Statute in *Filártiga* and its far more narrow reading in its *Marcos I* amicus brief, and found that the Executive Branch’s “change of position in different cases and by different administrations is not a definitive statement by which [the courts] are bound on the limits of § 1350.”³⁸ The court proceeds to find that torture, a violation

32. *Filártiga*, 630 F.2d at 881-84.

33. *Id.* at 884.

34. *Id.* at 886.

35. *Id.* at 887 (quoting *The Paquete Habana*, 175 U.S. at 700).

36. *Id.* at 886 (citing U.S. CONST. art. III, § 2).

37. The procedural history of the Marcos litigation is explained in *In re Estate of Ferdinand Marcos Human Rights Litigation (Marcos II)*, 25 F.3d 1467, 1469 (9th Cir. 1994) (noting that various lawsuits were filed in 1986, shortly after Marcos and his supporters fled to Hawaii, that though the district courts dismissed the actions based on the “act of state” doctrine, they were remanded and later consolidated and certified as a class action, and finally that in one of these consolidated cases, motions based on the Foreign Sovereign Immunities Act (FSIA) and ATS that challenged a default judgment against Marcos-Manotoc were denied in 1992).

38. *In re Estate of Ferdinand Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 500 (9th Cir. 1992).

of *jus cogens*,³⁹ does invoke subject-matter jurisdiction under the ATS.⁴⁰ In a later appeal of the consolidated cases, the Ninth Circuit reiterated that “[a]ctionable violations of international law must be of a norm that is specific, universal and obligatory,” and that torture satisfies this standard.⁴¹

In *Kadić v. Karadžić*, a suit alleging various atrocities including genocide, torture, and summary execution, the Second Circuit’s finding of jurisdiction under the ATS was supported, as in *Filártiga*, by the Executive Branch.⁴² The defendant Karadžić was the leader of “Srpska,” a self-proclaimed, though unrecognized, republic within the territory of Bosnia, after the break up of Yugoslavia. In its opinion, the court states that “[t]he Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.”⁴³ It also recognizes that, per the Executive Branch’s statements, there is no conflict with the political branches in adjudicating the plaintiff’s claims in this case.⁴⁴ Quoting the Government’s Statement of Interest, the court acknowledges that though ATS claims may invoke political questions that would preclude their justiciability, this claim does not.⁴⁵ However, the court also points out that “even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication.”⁴⁶

The Supreme Court finally addressed the Alien Tort Statute in *Sosa v. Alvarez-Machain*.⁴⁷ The story of Alvarez-Machain began in Mexico in 1985 with the torture and murder of Enrique Camarena-

39. *Jus cogens* is “[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” BLACK’S LAW DICTIONARY 876 (8th ed. 2004).

40. *Marcos I*, 978 F.2d at 503 (The plaintiff’s “suit as an alien against Marcos-Manotoc for having caused the wrongful death of her son, by official torture in violation of a *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350.”).

41. *Marcos II*, 25 F.3d at 1475.

42. 70 F.3d 232, 232 (2d Cir. 1995).

43. *Id.* at 239-40.

44. *See id.* at 250.

45. *Id.*

46. *Id.*

47. 542 U.S. 692, 697 (2004).

Salazar, an agent for the Drug Enforcement Agency (DEA).⁴⁸ The DEA claimed that Alvarez-Machain, a doctor in Mexico, prolonged the agent's life so that his abductors could interrogate and torture him.⁴⁹ After negotiations with Mexican officials failed to produce Alvarez-Machain for trial in the United States, the DEA offered payment for the doctor's kidnapping.⁵⁰ He was, thereafter, abducted by Jose Francisco Sosa, among others, in Guadalajara, taken to a motel, held overnight, and finally handed to federal agents in El Paso, Texas.⁵¹ Alvarez-Machain initially challenged his arrest claiming both outrageous government conduct and lack of jurisdiction because the government violated the extradition treaty with Mexico.⁵² In *United States v. Alvarez-Machain*, the Supreme Court found against Alvarez-Machain on both issues;⁵³ however, upon proceeding to trial in 1992, the doctor was ultimately acquitted.⁵⁴

In 1993, Alvarez-Machain began an action under the Alien Tort Statute, claiming arbitrary detention in violation of the law of nations. The Court granted certiorari and in 2004 issued its decision finding that § 1350 was a jurisdictional statute that in itself granted no cause of action.⁵⁵ However, the Court made clear that the statute's passage and legislative history imply that it was intended to have some practical effect; namely, it provides jurisdiction over certain recognizable, though limited, common law principles that arise out of customary international law.⁵⁶ The Court notes three violations of the law of nations at the time the ATS was drafted that set the standard for recognizable violations of customary international law today:

48. *Id.*; *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

49. *Sosa*, 542 U.S. at 697; *Alvarez-Machain*, 504 U.S. at 657.

50. *See Alvarez-Machain*, 504 U.S. at 657 n.2.

51. *Sosa*, 542 U.S. at 698.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 712.

56. *Id.* at 724-25. In his concurrence, Justice Scalia, too, argues that because the ATS is purely jurisdictional and because there is no exception here to *Erie*'s "fundamental holding that a general common law *does not exist*," an act of Congress is necessary to create a cause of action in cases invoking the jurisdiction of the ATS. *Id.* at 744 (Scalia, J., concurring) (emphasis in original). Thus, by inviting the courts to use their discretion, though with appropriate restraint, Justice Scalia admonishes Justice Souter's majority opinion, stating:

In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags its finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* used—invites them to try again.

Id. at 750 (Scalia, J., concurring) (emphasis in original).

offences against ambassadors, violations of safe conduct, and piracy.⁵⁷ Though adamant in its opinion that courts apply a high degree of judicial caution in recognizing international norms as enforceable international law under § 1350, the Court does affirm the reasoning in *Filártiga*, finding that torture is a violation of an “international law norm with [as] definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted.”⁵⁸

With regard to Alvarez-Machain’s claims, the Court ultimately found that detention for such a short period of time did not meet these strict requirements.⁵⁹ This decision, regardless, flew in the face of the Executive Branch’s insistence that the Alien Tort Statute requires a separate act of Congress to establish a cause of action under which it can be invoked.⁶⁰ The Justice Department had clearly stated regarding this litigation: “Just as Section 1350 does not itself create a cause of action, a cause of action is not supplied by the instruments of international law relied on by the Ninth Circuit or, more generally, by some sort of federal-common-law theory.”⁶¹ The Court, though, far from rejects the importance of deference in handling cases that touch on foreign relations. Citing *In re South African Apartheid Litigation*,⁶² a case that South Africa claimed, and the United States Department of State agreed, would “interfere with the policy embodied by its Truth and Reconciliation Commission,”⁶³ the Court notes that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”⁶⁴

57. *Id.* at 720.

58. *See id.* at 732.

59. *Id.* at 738.

60. *See* Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.html>.

61. *Id.* at 24; *see* Brief for the United States of America as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628), available at <http://www.hrw.org/press/2003/05/doj050803.pdf> (“The ATS, which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for courts to decipher and enforce their own concepts of international law.”).

62. 238 F. Supp. 2d 1379 (S.D.N.Y. 2002).

63. The Truth and Reconciliation Commission was created to deal with the injustice that occurred under apartheid in South Africa. Information on the Committee is available at The Official Truth and Reconciliation Commission Website, <http://www.doj.gov.za/trc/> (last visited March 30, 2007).

64. *Sosa*, 542 U.S. at 733 n.21.

II. EXECUTIVE DEFERENCE IN RELATION TO FOREIGN RELATIONS: *ALTMANN* AND BEYOND

A few weeks before issuing its *Sosa* decision, the Supreme Court issued a decision in a case arising under a different, yet closely related, statute, the Foreign Sovereign Immunities Act (FSIA). *Republic of Austria v. Altmann* involved a claim by Maria Altmann, the niece and sole surviving heir of Jewish Czechoslovakian art collector Ferdinand Bloch-Bauer, for six Gustav Klimt paintings that had been seized by the Nazis in World War II and that had ended up in a museum in Austria.⁶⁵ Altmann claimed jurisdiction in the federal courts under the FSIA; however, the FSIA was not passed until 1978, years after the alleged wrong.⁶⁶ The Court granted certiorari to address the question of whether or not the FSIA applied retroactively.⁶⁷

The FSIA “grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases,” including expropriation cases.⁶⁸ A codification of a restrictive theory of immunity, the Act gives the courts “primary responsibility” in determining whether to grant immunity.⁶⁹ In *Altmann*, the Court held that the FSIA does apply to pre-enactment conduct.

The Court also makes an important comment with respect to executive deference. Though the Executive Branch had contended that the FSIA does not apply to pre-enactment conduct, the Court finds that this was “a ‘pure question of statutory construction . . . well within the province of the Judiciary.’”⁷⁰ However, the Court clarifies that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁷¹

Upon post-*Altmann* remand, in *Whiteman v. Dorotheum GmbH & Co KG*, the Second Circuit expanded on these Supreme Court statements regarding deference in the immunity context.⁷² Looking at

65. 541 U.S. 677, 680-84 (2004).

66. *Id.* at 685.

67. *Id.* at 681.

68. *Id.*

69. *Id.* at 691.

70. *Id.* at 701 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)).

71. *Id.* at 702 (emphasis in original) (internal citations omitted).

72. 431 F.3d 57, 59 (2d Cir. 2005).

a class action suit against Austria, arising “from sweeping confiscations of property that were part of the systematic Nazi victimization of Austrian Jews between 1938 and 1945,” the court sought to answer the question of how much deference should be given the Executive Branch.⁷³ In dismissing the case as non-justiciable under the political question standards of *Baker v. Carr*,⁷⁴ the court notes three reasons for affording deference on this “particular” question:

(1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of the claims in question; (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated to this Court that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of this case.⁷⁵

It clearly notes, though, the narrowness of its holding given the interests of the Executive and the facts of the case and cites *Sosa* for the importance of case-specific deference.⁷⁶

The Eleventh Circuit, also had occasion to address deference with regard to claims arising out of the Nazi policy of expropriating Jewish property. In *Ungaro-Benages v. Dresdner Bank AG*, the court looked at the question of justiciability in cases affecting foreign policy and found that, “although the executive’s statement of interest is entitled to deference, it does not make the litigation non-justiciable.”⁷⁷ It ultimately did find, however, that deference is appropriate when analyzing whether the case should be dismissed due

73. *Id.*

74. 369 U.S. 186, 217 (1962). The *Baker* court stated:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question..

Id. In *Whiteman*, the court finds the case nonjusticiable under the fourth standard, “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.” *Whiteman*, 431 F.3d at 72.

75. *Whiteman*, 431 F.3d at 74.

76. *Id.*

77. 379 F.3d 1227, 1236 n.12 (11th Cir. 2004).

to international comity considerations.⁷⁸ Because of the government's agreement with Germany and establishment of a foundation to handle claims such as the plaintiff's, the court found that "based on the strength of our government's interests in using the Foundation, the strength of the German government's interests, and the adequacy of the Foundation as an alternative forum," it was appropriate for it to abstain from adjudicating the case.⁷⁹

Finally, in *Sarei v. Rio Tinto, PLC.*, an ATS case involving war crimes, environmental devastation, racial discrimination, and violations of the United Nations Convention on the Law of the Sea (UNCLOS) related to mining operations that led to a ten year civil war in Papua New Guinea, the Ninth Circuit addressed the question of Executive deference in the context of the political question doctrine, the act of state doctrine, and international comity.⁸⁰ It held that despite the Executive's Statement of Interest (SOI) seeking dismissal of the case, the district court erred in finding the claims non-justiciable.⁸¹

Looking first at the political question doctrine, it found that "it is [the court's] responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."⁸² The court's opinion looks closely at the six *Baker* factors.⁸³ It determines that because, absent the State Department's Statement of Interest, this case would not evoke political question concerns, "the SOI must carry the primary burden of establishing a political question."⁸⁴ It thus concludes that despite the SOI, there is no political question due to three considerations:

[1] The State Department explicitly did *not* request that [the court] dismiss this suit on political question grounds, and [the court is] confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear. [2] Nor

78. *Id.* at 1238-39.

79. *Id.* at 1239.

80. 456 F.3d 1069, 1074 (9th Cir. 2006). On April 12, 2007 the 9th Circuit granted Rio Tinto's petition for rehearing en banc withdrawing this opinion, *Sarei v. Rio Tinto*, No. 02-56256, 2007 U.S. App. LEXIS 8387, at *1 (9th Cir. Apr. 12, 2007), and re-issuing this opinion, unchanged, as an en banc opinion, *Sarei v. Rio Tinto*, No. 02-56256, 2007 U.S. App. LEXIS 8430, at *1 (9th Cir. Apr. 12, 2007).

81. *Sarei*, 456 F.3d at 1074.

82. *Id.* at 1081.

83. *See supra* note 74 (listing the six factors).

84. *Sarei*, 456 F.3d at 1082.

do[es] [the court] see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. [3] And finally, given the guarded nature of the SOI, [the court] see[s] no “embarrassment” that would follow from fulfilling [the court’s] independent duty to determine whether the case should proceed.⁸⁵

The court also notes the possibility, argued by plaintiffs, of a political shift in Papua New Guinea that would undercut the four-year-old letter from the State Department.⁸⁶

Next, the Ninth Circuit addressed the role of Executive deference with regard to the act of state doctrine.⁸⁷ Addressing first the racial discrimination claim, the court found that this is a violation of *jus cogens* and, therefore, not an official sovereign act.⁸⁸ As the act of state doctrine requires an official sovereign act, the court concluded that the claim cannot be barred by it. With regard to the claims arising under the UNCLOS, the court found that its discussion of the SOI in the political question context is relevant, though not dispositive, to the act of state analysis. The court stated, “A consideration of foreign policy concerns is one of several *Sabbatino* factors, and the SOI’s foreign policy concerns are entitled to consideration, but only as one part of that analysis.”⁸⁹ The court then vacated the district court’s decision, remanding for further

85. *Id.* (citing the fourth, fifth and sixth *Baker* factors, *supra* note 74). The court also notes that this conclusion is consistent with its holding in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), which dismissed ATS claims under the political question doctrine. The court stated: “We do not understand *Vatican Bank* as foreclosing the plaintiffs’ claims that relate to the PNG regime’s alleged war crimes, but instead read its holding to apply only to the narrower category of war crimes committed by enemies of the United States.” *Sarei*, 456 F.3d at 1084. The Ninth Circuit, thus, avoids a circuit split with the Second Circuit’s decision in *Kadić*. *Id.*

86. *Sarei*, 456 F.3d at 1083 n.13.

87. The act of state doctrine of justiciability “prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory.” *Id.* at 1084 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). The act of state doctrine is invoked whenever a court’s decision would invalidate an official act taken by a foreign state. *Id.* (citing *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp.*, 493 U.S. 400, 404 (1990)).

88. *Id.* at 1085.

89. *Id.* at 1086. The *Sabbatino* factors noted by the Supreme Court are:

[1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it [2] [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.

Id. at 1084 (quoting *Sabbatino*, 376 U.S. at 428).

consideration given its SOI analysis.⁹⁰ Finally, the court conducted a similar analysis under the comity doctrine, again sending the case back to the district court for consideration consistent with its political question SOI discussion.⁹¹

As these cases illustrate, what amounts to giving “serious weight” to the Executive’s “considered judgments” in private actions against foreign parties is far from clear. If the Executive makes a statement alleging the “particular” foreign policy implications of a “particular” judgment involving the “particular” parties in a case, does “serious weight” require instant dismissal of the case? How “particular” must the Executive be? How much latitude does “serious weight” afford the courts? Further, the courts’ opinions above have applied executive deference to justiciability doctrines such as political question, act of state, and international comity. What is the relationship between deference and these doctrines in ATS human rights litigation?

III. THE ATS AND CLAIMS OF HUMAN RIGHTS ABUSES IN CHINA

The cases arising out of human rights abuses in China reflect the importance of answering these questions. The Southern District of New York, the Seventh Circuit, and the Northern District of California have all ruled on ATS actions involving Chinese officials. The Southern District of New York and Seventh Circuit, however, did not reach the merits. In *Zhou v. Peng*, an ATS claim was brought against Li Peng, the Premier of China at the time of the human rights abuses that stemmed from the Tiananmen Square protests in Beijing in 1989.⁹² Though initially finding that process had been properly served on Peng through the State Department security detail protecting him, the Southern District vacated that judgment on August 30, 2003, upon receiving a motion by the Government to vacate on the grounds that the order effectuating service of process on Peng required that the State Department official deliver the papers to Peng.⁹³ Thus the order violates the U.S. Government’s

90. *Id.* at 1086.

91. *Id.* at 1088. International comity, the court explains, suggests that courts “defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted.” *Id.* at 1086.

92. 286 F. Supp. 2d 255, 257 (S.D.N.Y. 2003).

93. *See id.*

sovereign immunity by requiring the federal official to act.⁹⁴ In *Ye v. Zemin*, the Seventh Circuit found that a suit by Falun Gong adherents against former People's Republic of China president Jiang Zemin was barred by head of state immunity.⁹⁵ Heads of state, the court held, were not covered by the Foreign Sovereign Immunities Act and, therefore, determination of head of state immunity still belonged to the Executive Branch.⁹⁶ Unquestionable deference was required.⁹⁷

The widespread persecution of the Falun Gong, a massive Chinese spiritual movement, began on July 22, 1999 when it was officially outlawed as an "evil cult" by the Chinese government under President Zemin. Due to the size of the movement, it has been perceived by the government as a threat to the Communist Party's control.⁹⁸ On July 21, 2005, Gretchen Birkle, Acting Principal Deputy Assistant Secretary at the Bureau for Democracy, Human Rights, and Labor at the U.S. State Department, noted that since 1999 more than 100,000 Falun Gong adherents and sympathizers have been detained.⁹⁹ Amnesty International reports that "[m]ost of those detained were assigned to periods of 'Re-education through Labour' without charge or trial, during which they were at high risk of torture or ill-treatment, particularly if they refused to renounce their beliefs."¹⁰⁰ The State Department's 2005 Country Report on Human Rights Practices stated that "[s]ince the crackdown on Falun Gong began in 1999, estimates of Falun Gong adherents who died in

94. *Id.*

95. 383 F.3d 620, 627 (7th Cir. 2004).

96. *Id.* at 625.

97. *See id.* at 626 ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.").

98. Mark J. Leavy, Note, *Discrediting Human Rights Abuse as an "Act of State": A Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L. J. 749, 757 (2004); *see Falun Gong and China's Continuing War on Human Rights: Joint Hearing Before the Subcomm. on Afr., Global Human Rights and Int'l Operations and the Subcomm. on Oversight and Investigation of the H. Comm. on Int'l Relations*, 109th Cong. 13 (2005) (statement of Gretchen Birkle, Acting Principal Deputy Assistant Secretary, Bureau for Democracy, Human Rights and Labor, U.S. Department of State) ("[The Chinese Communist Party leaders] proclaim stability and social order as a top priority, often at the expense of basic human rights and freedom, as a means to perpetuate the rule of the Chinese Communist Party."), available at <http://www.internationalrelations.house.gov/archives/109/22579.pdf>.

99. Birkle, *supra* note 98, at 14.

100. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2005: THE STATE OF THE WORLD'S HUMAN RIGHTS 78 (2005), available at <http://web.amnesty.org/report2005/chn-summary-eng>.

custody due to torture, abuse, and neglect ranged from several hundred to a few thousand.”¹⁰¹

On December 8, 2004, in the case *Doe v. Liu Qi*, the Northern District of California granted default declaratory judgment in favor of the Falun Gong plaintiffs.¹⁰² Though this has been seen by supporters of the Falun Gong ATS cases as a hopeful precedent,¹⁰³ the Northern District of California proceeded cautiously in its *Liu* decision denying both injunctive and monetary relief.¹⁰⁴ Ultimately it found that the act of state doctrine, due primarily to the State Department’s concerns voiced in its Statement of Interest, precludes granting any relief except declaratory relief for the plaintiffs’ specific substantive claims and deemed adjudication of plaintiffs’ claims regarding the general conduct of the Chinese government inappropriate.¹⁰⁵

Currently, another Falun Gong case is pending in the District Court for the District of Columbia. *Li v. Bo* presents allegations very similar to those in *Liu*, including torture, genocide, deprivation of the right to life, arbitrary detention, and deprivation of freedom of religion.¹⁰⁶ The notable difference between the cases is the reason for each defendant’s presence in the United States, which enabled them to be served. Bo Xilia, former Governor of the Liao Ning Province and current Minister of Commerce of the PRC, was served on April 22, 2004 while on special diplomatic mission “pursuant to an invitation of the Executive Branch to participate in an annual meeting of the U.S.-China Joint Commission on Commerce and Trade.”¹⁰⁷ Consequently, it is because of the official nature of Bo’s presence in the United States that the Executive Branch has urged the D.C. District Court to dismiss the claims.¹⁰⁸ Plaintiffs, however, insist this case is justiciable for three reasons. First, Bo Xilai is not subject to any cognizable immunity. Second, neither sovereign immunity nor act of state bars this action because torture and genocide can never be

101. U.S. Dep’t of State, Country Reports on Human Rights Practices: China (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>.

102. 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004). On December 8, 2004, the Honorable Judge Wilken adopted the October 28, 2004 Report and Recommendation of Magistrate Judge Chen.

103. See Schwartz, *supra* note 7.

104. *Liu Qi*, 349 F. Supp. 2d at 1266.

105. See *id.*

106. See Class Action Complaint at 16-23, *Li v. Bo*, No. 04-0649 (D.D.C. June 30, 2004).

107. Suggestion of Immunity and Statement of Interest of the United States at 2, *Li v. Bo*, No. 04-0649 (D.D.C. July 24, 2006).

108. *Id.* at 1.

legally justified actions of a state. Third, foreign policy considerations do not apply as there is a clear legal standard that the court can apply.¹⁰⁹

IV. DEFERENCE TO THE EXECUTIVE BRANCH: ESTABLISHING A PRACTICAL STANDARD

Li v. Bo illustrates the complexity of the question of judicial involvement in litigation, particularly Alien Tort Statute litigation, affecting foreign governments. It has been argued that the courts have no place in international human rights litigation. Surely, though, various factors place this type of litigation within the competency of the courts, and further, the courts have made it clear that they are not about to defer without good reason. The doctrines of justiciability including immunity, act of state, political question, and international comity foreclose the adjudication of many claims. Further, post-*Sosa*, the courts have mandated a very narrow scope of discretion for themselves in identifying causes of action under the ATS.¹¹⁰ On the other hand, in 1992 Congress, instead of muting the influence of the ATS, affirmed its importance, particularly with regard to torture and extrajudicial killing, through the Torture Victims Protection Act.¹¹¹ Ultimately, the limited scope of human rights litigation with its well-defined doctrines of justiciability, its Supreme Court guidance, and its Congressional approval argue for, rather than against, its adjudication. Regardless, in many situations deference to the Executive as “the sole organ of the nation” is advisable and, indeed, necessary. The challenge for the courts is in deciding when to defer. In light of the cases above, the compelling nature of the human rights claims, the interest of the Executive Branch, and need for uniformity, deference must be based on a legally cognizable principle: namely, the specific and foreseeable costs of the litigation to the Executive’s administration of foreign policy. The benefits of such a standard are far-reaching. First, it is practical and consistent with the mandates of the Supreme Court and Congress. It also explains many of the lower court decisions and brings uniformity to their reasoning. Second, it addresses many of the concerns on both sides on the deference

109. See Response to the Suggestion of Immunity and Statement of Interest of the United States, *Li v. Bo*, No. 04-0649 (D.D.C. Aug. 23, 2006).

110. The question of what causes of action are recognizable under *Sosa* is outside the scope of this Note. For the purposes of this Note, it is sufficient to recognize that torture and other such gross violations of human rights pass the *Sosa* test.

111. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000).

debate: it minimizes many of the inherent costs of international human rights litigation, it balances the rights of individual plaintiffs with the compelling concerns of the Executive Branch, and finally, it maintains the independence of the judicial system.

A. Examining a Test for Deference: A Practical Standard

Comparing the Statements of Interest in the *Liu* and *Bo* cases best illustrates the application of a test focusing on specific and foreseeable costs of litigation to the Executive's administration of foreign affairs. In *Li v. Bo*, the Department of State urged the D.C. District Court to dismiss the case on the grounds that Minister Bo had been invited by the Executive to Washington and that it was pursuant to that invitation that he was in the United States and able to be served. The Suggestion of Immunity and Statement of Interest of the United States notes the possible ramifications of allowing this case to proceed, such as the negative effects this may have on future invitations extended to foreign, particularly Chinese, officials. It states,

The prospect that senior foreign officials who are in the United States for government-to-government business may be served with process in a civil suit poses a severe impediment to the conduct of foreign relations. Its effect is to deprive the President of an essential foreign policy tool—the ability to host meetings without fear of harassment or, ultimately, to host meetings at all.¹¹²

This is a specific and foreseeable cost to the Executive's administration of foreign affairs.

Conversely, in *Doe v. Liu*, the State Department focuses on the act of state doctrine and vague references to possible impacts the litigation can have on U.S. relations with China.¹¹³ In urging the court to find the case non-justiciable, the State Department cites “the *potentially* serious adverse foreign policy consequences that such litigation *can* generate.”¹¹⁴ There are no foreseeable costs that the Executive pointed to with any specificity.¹¹⁵ Further, both reasons the State Department gives for dismissing the action, foreign sovereign

112. Suggestion of Immunity and Statement of Intent of the United States, *supra* note 107, at 13.

113. Statement of Interest of the United States, *Doe v. Liu*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (No. 02 Civ. 672) (attaching letter from William H. Taft, IV, Legal Advisor, Department of State, to Honorable Robert D. McCallum, Assistant Attorney General, Civil Division, United States Department of Justice (Sept. 25, 2002)).

114. *Id.* (emphasis added).

115. *See generally id.*

immunity and the act of state doctrine, have been repudiated by subsequent litigation as possible means for dismissal.¹¹⁶ Thus, the Executive has given no reason to abstain from adjudicating the case.

Ultimately it is likely that this standard will lead to the dismissal of cases via the political question or international comity doctrines. Once a cognizable cost to the Executive has been identified, the continued litigation of a particular case would likely fall within the fourth, fifth, or sixth *Baker* standard of non-justiciability: namely, “[4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹¹⁷ For instance in *Li v. Bo*, there is a clear lack of respect for the President’s decision to invite certain ministers if those ministers are subject to being served with a civil suit upon entering the country.¹¹⁸ Likewise, in the case of *In re: South African Apartheid Litigation*, comity concerns regarding the usurpation of South Africa’s efforts to deal with its troubled past illustrate a specific and foreseeable cost to adjudicating those claims.¹¹⁹ The specific and foreseeable conflict with the Truth and Rehabilitation program mandates deference to the Executive’s call for an end to the litigation. Naturally a handful of cases may arise where the Executive announces a specific and foreseeable cost and yet that consideration does not place the case squarely in either of these doctrines. In such cases, separation of powers is sufficient grounds for dismissal. It would simply be improper to proceed with such a case.

This standard is also consistent with the Supreme Court’s decisions in *Sosa* and *Altmann*. It asks the courts to look, on a case-

116. As explained in Part II of this Note, the Ninth Circuit held in *Sarei* that the adjudication of violations of *jus cogens* do not fall into the province of the act of state doctrine, thus, given the district court’s opinion in *Liu*, the case will possibly be reversed given the new precedent. Interestingly, in its Suggestion of Immunity and Statement of Interest in the Bo Xilai litigation, the State Department urges the Court not to undertake a sovereign immunity or act of state analysis, as both doctrines require official actions and the State Department would like to avoid implicating the PRC in egregious official action.

117. See *Baker v. Carr*, 369 U.S. 216, 217 (1962).

118. See Suggestion of Immunity and Statement of Intent of the United States, *supra* note 107, at 4-11.

119. See *Sosa v. Alvarez-Machain*, 542 U.S.692, 733 n.21 (2004).

by-case basis, at the particular concerns of the Executive.¹²⁰ It also limits the issues on which the courts would defer, maintaining the ability to interpret statutes and adjudicate private claims in the judiciary, while deferring to the Executive's knowledge on what the ramifications of litigation may be.

With regard to the allegations of torture and extrajudicial killing, striking this balance is also consistent with the will of the Congress. In 1992, Congress passed the Torture Victims Protection Act (TVPA).¹²¹ The purpose of the act was "to provide a Federal cause of action against any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing."¹²² In this way, Congress has sanctioned this type of litigation. Universal deference would, therefore, be inappropriate. As Justice Jackson noted in the *Youngstown Sheet & Tube Co. v. Sawyer*, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."¹²³ The President's constitutional powers in the realm of foreign relations are great and, with good reason, can trump the other branches, but it is unquestionable that Congress, through statute, can create causes of action enforceable in federal courts.

Further, the courts have, in effect, been using this standard in the cases preceding *Sosa* and *Altmann*. In *Whiteman* and *Ungaro-Benages* the courts were ultimately looking at the specificity and foreseeability of the Executive's concerns.¹²⁴ In both cases, the claims were dismissed because of the specific and foreseeable cost to the Executive's administration of Nazi expropriation claims. Accordingly, in *Sarei*, the Ninth Circuit viewed the Statement of Interest's "nonspecific invocations of risks to the peace process," as not sufficient to require the court's deference.¹²⁵

120. See *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (stating that deference should be given to "the considered judgment of the Executive on a particular question of foreign policy").

121. 28 U.S.C. § 1350 (2000).

122. H.R. REP. NO. 102-367, at 2 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 84.

123. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

124. See *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 59-60 (2d Cir. 2005); see *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-36 (11th Cir. 2004).

125. See *Sarei v. Rio Tinto, PLC.*, 456 F.3d 1069, 1082 (9th Cir. 2006).

B. Addressing the Concerns in the Deference Debate

Human rights litigation under the ATS has spurred strong sentiments from both its advocates and its critics. A quick search on LexisNexis or Westlaw reveals hundreds of articles published since the Second Circuit's decision in *Filártiga* either condemning the litigation as an unconstitutional or inappropriate use of judicial power, or praising it as "rais[ing] the voices of the oppressed, and at the same time . . . remind[ing] those responsible for carrying out human rights abuses that they no longer operate with impunity."¹²⁶ Consequently, scholars in the field have voiced various concerns with both adjudicating these cases and abstaining from such adjudication. By establishing a cognizable test focusing on the specific and foreseeable costs of litigation, many of these concerns are, if not negated, diminished: "Gratuitous tensions with other nations should certainly be avoided[, b]ut sometimes tensions are not gratuitous[.]"¹²⁷

1. *Minimizing the Inherent Costs of International Human Rights Litigation.* In an article published in the *Chicago Journal of International Law* in 2001, Professor Curtis Bradley outlined three major costs associated with international human rights litigation: costs to foreign relations, costs to democracy, and costs to the international system.¹²⁸ As Bradley notes, however, "these costs would not be worthy of serious concern if we could be assured that this litigation would be contained within narrow bounds."¹²⁹ By defining a legally cognizable test to determine when a court should defer to the Executive in human rights cases, such a limitation would be assured. Further, the test focuses on addressing the specific and foreseeable costs of litigation, thus by its nature minimizing those very costs.

For instance, Bradley notes the costs to the international system of allowing service of process to be effected on those traveling to the U.N. headquarters in New York.¹³⁰ Clearly, as in the case of *Li v. Bo*, there is a specific and foreseeable cost to allowing such litigation to

126. Mark Gibney, *U.S. Courts and the Selective Protection of Human Rights*, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 177, 179 (Mark Gibney & Stanislaw Frankowski eds., 1999).

127. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law* 11 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 128, 2006), available at <http://www.law.uchicago.edu/academics/publiclaw/128.pdf>.

128. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460 (2001).

129. *Id.* at 470.

130. *Id.* at 469-70.

proceed. Thus, should the Executive Branch raise that issue, the court would find just cause to defer to its judgment.

This raises another concern relating to the costs of ATS litigation to foreign relations: namely the burden on the Executive of having to “stake[] out positions that it might wish to leave ambiguous or unarticulated.”¹³¹ Without succumbing to universal deference, setting narrow and transparent criteria for deference would set clear guidelines on what the Executive would need to assert to convince a court. This minimizes the Executive’s burden in two ways. First, if there is no specific and foreseeable reason for the court to defer, the Executive Branch is not in a position where it has to articulate its general position on a matter in effort to convince a judge. Second, this transparency would extend to foreign governments observing this process, thereby making it less awkward for the Executive Branch.

2. *Balancing the Rights of Individual Plaintiffs with the Compelling Concerns of the Executive Branch.* It has been argued that the cases alleging human rights violations in China “interfere with . . . political balancing” of U.S.-China relations, particularly balancing of economic matters with the United States’ disapproval of China’s human rights record.¹³² Though this concern carries great weight, particularly in light of Chinese complaints that this litigation “adversely affect[s]” U.S.-China relations,¹³³ it must be remembered that “[o]fficial China is not so uncomprehending of the United States system of separation of powers as it claims to be.”¹³⁴ Understanding these two points illustrates how a uniform and transparent standard will satisfy many concerns regarding fears of the judiciary stepping on the Executive’s toes. More deference would only serve to deny individuals the right to appeal to the judicial system for relief under the laws of the United States.¹³⁵ Vague concern that these cases will actually affect U.S.-China relationships is not sufficient to usurp judicial power. On the other hand, specific and foreseeable costs such as a threat to our ability to host meetings of Chinese officials without embarrassing harassment would be sufficient to require respectful deference. Further, plaintiffs would be aware that serving an official here on a diplomatic mission would only lead to dismissal, thus, it

131. DeLisle, *supra* note 7, at 488.

132. Bradley, *supra* note 128, at 461.

133. Schwartz, *supra* note 7.

134. DeLisle, *supra* note 7, at 491-92.

135. See U.S. CONST. art. III, § 2, cl. 1.

would make it less likely they would attempt to serve such ministers again.

In *Filártiga*, the court concluded its opinion stating, “In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture.”¹³⁶ As Congress understood, “[t]hese universal principals provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world.”¹³⁷ The ATS and TVPA allow victims of some of the most heinous crimes to seek relief when, in most cases, none is available elsewhere. Though it is argued that no real relief can be granted to these victims by the courts because of the difficulty in enforcing and collecting monetary damages in ATS litigation,¹³⁸ plaintiffs in these suits beg to differ. After the Second Circuit’s decision in *Kadić*, for instance, one of the plaintiffs noted that the case “was not about monetary damages, but about gaining recognition of the acts committed by Bosnian Serb ultra-nationalists.”¹³⁹

Despite the noble cause of adjudicating torture and other gross violations of human rights, there are times such adjudication imposes real costs on the Executive’s exercise of foreign relations. It was for this reason that the *Altmann* Court mandated “deference [to] the considered judgment of the Executive on a particular question of foreign policy.”¹⁴⁰ By requiring a specific and foreseeable cost to the Executive, the rule for deference would ensure a plaintiff’s day in court while ensuring the Executive’s ability to protect real interests of the nation with regard to foreign relations.

3. *Maintaining the Independence of the Judicial System.* Finally, establishing a practical standard for executive deference ensures a higher level of judicial independence. Surely, the defense of human rights is a political issue. Different administrations have given human rights varying degrees of priority. When *Filártiga* was being decided, President Jimmy Carter had made human rights his utmost priority.

136. *Filártiga v. Peña-Irala*, 630 F.2d 867, 890 (2d Cir. 1980).

137. H.R. REP. NO. 102-367, *supra* note 122, at 3.

138. Bradley, *supra* note 128, at 458-59.

139. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 546 (4th ed. 2006).

140. *Republic of Austria v Altmann*, 541 U.S. 677, 702 (2004).

In December 1978, he said, “Human rights is the soul of our foreign policy. And I say this with assurance, because human rights is the soul of our sense of nationhood.”¹⁴¹ Alternatively, President Bush has focused his foreign policy on national security and fighting the war on terror. As noted above, amongst the costs of human rights litigation is the cost to democracy. For better or worse, the course of our current foreign policy was decided by an election. Thus, ATS litigation can be seen as amounting to “plaintiffs’ diplomacy,”¹⁴² and thereby usurping the democratic process.

At the same time, however, it runs contrary to the separation of powers to therefore assert that the Executive should have the ability to determine what cases the courts can and cannot adjudicate. As Justice Powell noted in his concurring opinion in *First National City Bank v. Banco Nacional de Cuba*, “I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive’s permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.”¹⁴³

In her 2004 article published in the *Harvard Human Rights Journal*, Professor Beth Stephens questions the motivations behind the Bush Administration’s involvement in recent ATS litigation and recommends caution in deferring to its foreign policy concerns.¹⁴⁴ She notes that her position “is not to suggest that the courts second-guess the wisdom of a particular foreign policy, a task clearly assigned to the executive branch. But the courts should review the evidence as to the substance of that policy and assess whether the evidence . . . supports the results it requests.”¹⁴⁵

Again, a legal standard based on the specificity and foreseeability of the cost to the Executive’s administration of foreign policy

141. Jimmy Carter, U.S. President, *The U.S. Commitment: Human Rights and Foreign Policy* (Dec. 1978), *excerpts available at* <http://usinfo.state.gov/products/pubs/hrintro/carter.htm>.

142. Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2243 (2004) (“The broadest critiques of the ATS have been that the private litigation of human rights violations complicates the war on terrorism, that it amounts to ‘plaintiffs’ diplomacy’ by interfering with executive branch prerogatives in foreign affairs.”).

143. 406 U.S. 759, 773 (1972) (Powell, J., concurring).

144. Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 182 (2004) (arguing that the Bush Administration’s legal stance on recent ATS litigation “mask an interest in shielding favored defendants from accountability for egregious human rights abuses”).

145. *Id.* at 195.

addresses these concerns. It allows the courts to adjudicate cases based on a clear legal standard and precludes the Administration from using its position to stop the litigation of cases it simply does not like.

CONCLUSION

As ATS litigation expands and cases are filed throughout the country, American jurisprudence, as it has so many times in our history, calls for uniformity. The potential for abuse of both executive power and plaintiff power demand a definite standard courts can use in addressing executive deference. Such a standard would allow the judiciary to balance the need for justice in individual cases with the specific and foreseeable concerns of the Executive. It adds transparency to the decision-making process which benefits both the domestic and international players in ATS disputes. Finally, it upholds our system of separation of powers in the face of two compelling and competing forces: international diplomacy on the one hand and domestic jurisprudence on the other.