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IS THE ALIEN TORT STATUTE SACROSANCT?  
RETAINING FORUM NON CONVENIENS IN  
HUMAN RIGHTS LITIGATION

ARIC K. SHORT\*

"Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."<sup>1</sup>

"As a moth is drawn to the light, so is a litigant drawn to the United States."<sup>2</sup>

I. INTRODUCTION

During the past twenty years, the number of lawsuits filed in U.S. courts by persons alleging human rights abuses occurring in foreign countries has grown steadily. In that time, citizens of the Philippines, Nigeria, Ethiopia, Israel, Burma, Indonesia, Ghana, Guatemala, Argentina, Algeria, South Korea, Bosnia-Herzegovina, and many other countries have filed suit in U.S. courts alleging human rights violations committed in their home countries by persons or corporations resident outside the United States. Handling this new breed of case has presented federal courts with a variety of procedural and

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1. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

2. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 2 All E.R. 72, 72 (Eng. C.A. 1982).

substantive challenges, with none more important or controversial than subject matter jurisdiction. As non-resident plaintiffs bring their cases into U.S. courts in ever-growing numbers, they often rely on one of the oldest jurisdictional provisions in effect today: the Alien Tort Statute (ATS).

The ATS, established by the Judiciary Act of 1789,<sup>3</sup> is an important, though before 1980 seldom-used, vehicle that provides federal subject matter jurisdiction in cases brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>4</sup> Although ATS litigation has increased substantially over the past twenty years as plaintiffs in human rights cases have used it to seek relief in U.S. courts,<sup>5</sup> significant disagreement has existed over how properly to interpret and apply the statute. Scholars and courts have debated whether the ATS merely confers federal court jurisdiction or whether it provides not only a federal forum but also a federal cause of action;<sup>6</sup> whether the ATS ever was intended to reach human rights claims;<sup>7</sup> what exactly a "violation of the law of nations" is meant to be and whether that phrase should be construed as referring only to such violations as they existed in 1789 or whether the "law of nations" under

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3. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1350 (1999)).

4. 28 U.S.C. § 1350 (1999).

5. The ATS's language does not limit the statute's applicability to human rights disputes. However, expansive interpretations of the ATS, first by the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and later by other courts, have encouraged significantly the use of the ATS in human rights cases. Today, the ATS is used almost exclusively in the human rights context, with non-human rights suits filed under the ATS few and far between and almost always unsuccessful. See, e.g., *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds in connection with allegedly fraudulent bank activities did not trigger jurisdiction under the ATS); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (ruling that state lottery's decision to pay lottery winnings partly through an annuity and not in one lump sum was not actionable under the ATS as a "shockingly egregious violation[ ] of universally recognized principles of international law").

6. See Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 477-95 (1986) [hereinafter Randall, *Further Inquiries*].

7. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12-17 (1996).

the ATS is a constantly developing concept that incorporates newly-recognized international legal rights and obligations;<sup>8</sup> and whether federal courts, consistent with the U.S. Constitution, may exercise jurisdiction over suits between aliens for violations of the law of nations.<sup>9</sup>

One issue that has been raised recently in scholarship and litigation that deserves further analysis is whether the ATS does or should confer jurisdiction on U.S. courts that is immune from the traditional *forum non conveniens* analysis. The once academic question of whether human rights cases ever should be subject to such an analysis has now become, in recent litigation, a practical issue raised by plaintiffs. In a recent decision by the U.S. Court of Appeals for the Second Circuit,<sup>10</sup> the court established an unprecedented approach to this issue that undermines the invocation of *forum non conveniens* in human rights cases. How future courts address the interplay between *forum non conveniens* and the ATS will have significant implications for the development of international human rights law and federal court practice and will be particularly important given what, in all likelihood, will be a growing number of human rights claims brought in U.S. courts by citizens of other countries.

Plaintiffs who flee human rights abuses in foreign states also often flee corrupt governments or judiciaries incapable of providing them justice. Many human rights plaintiffs in the United States may not be able to return to the countries of abuse to seek judicial compensation from their abusers, and they should not be forced to do so by U.S. courts. However, recent arguments seeking the abolition of *forum non conveniens* in ATS suits go too far, attempting unnecessarily to tie the hands of federal judges when lawsuits before them have no significant connection to the United States, when relevant considerations urge dismissal, and when foreign courts fully are capable of administering justice in those cases.

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8. Compare *Filartiga*, 630 F.2d at 881 (holding that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today") with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813-19 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS should be extended only to the set of torts recognized in 1789 as violating the law of nations).

9. See *Trajano v. Marcos*, 978 F.2d 493, 501-02 (9th Cir. 1992).

10. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

I argue in this article that no reasonable basis exists to justify federal courts refusing to consider *forum non conveniens* arguments in cases brought under the ATS; in fact, good reasons exist to retain the doctrine in its undiluted form. The purpose and design of *forum non conveniens* make it sufficiently flexible to be invoked in even the most compelling human rights cases brought in the United States. If applied properly, the doctrine will identify ATS cases that cannot and should not be dismissed to foreign fora; however, if *forum non conveniens* operates as it should, it also will determine when alleged violations of the law of nations would be addressed more appropriately by the courts of other countries. By identifying such exceptional cases meriting dismissal, the doctrine will help advance a global development of customary international law norms in the area of human rights and will help ensure that U.S. courts do not antagonize international relations unnecessarily.

Part II of this article reviews the purpose, history, and development of the ATS and the doctrine of *forum non conveniens*. Part III analyzes and evaluates the primary arguments raised by those seeking abolition or significant curtailment of the doctrine in ATS cases: (1) the statute's express language and legislative intent make *forum non conveniens* inapplicable; (2) weighing *forum non conveniens* considerations would nullify the ATS; and (3) U.S. interests support elimination of *forum non conveniens* in human rights suits. Because the arguments for abolition do not withstand critical analysis and because the doctrine plays an important and needed role in all disputes—including human rights cases—I ultimately conclude that *forum non conveniens* should be retained in ATS lawsuits. Part IV proposes a slight modification to the *forum non conveniens* analysis in human rights lawsuits to account for the frequent existence of significant sovereign interests in those cases. It then analyzes *forum non conveniens* arguments in a recent suit brought under the ATS by Holocaust survivors and the heirs of Holocaust victims against three Swiss banks to highlight the continued importance of the doctrine and the critical role that sovereign interests play in such an analysis.

## II. HISTORICAL OVERVIEW

Before turning to an evaluation of the use of the ATS and forum non conveniens in modern federal court practice, I look at history. An understanding of what the ATS was intended to accomplish when it was first passed, why courts first began considering the doctrine of forum non conveniens, and how this statute and doctrine developed over time allows for an informed analysis of how the concepts might be interpreted and applied today.

### A. *The ATS: From a Tool of Foreign Policy to a Vehicle for Human Rights Plaintiffs*

The statute that has been relied on with increasing frequency over the past twenty years to establish federal court jurisdiction in suits alleging international human rights violations is, in fact, over two hundred years old<sup>11</sup> and was developed at a time when "international human rights," as a concept, had no meaning.<sup>12</sup> Although no legislative history exists to reveal the specific purpose of the ATS as it was codified in the Judiciary Act of 1789,<sup>13</sup> the issues confronting the United States during its early history suggest why the ATS first may have been drafted.<sup>14</sup>

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11. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1350 (1999)).

12. *Tel-Oren*, 726 F.2d at 813.

13. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1984); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 467 (1986). Judge Friendly once referred to the ATS as "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." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

14. A significant amount of scholarly attention has focused on the meaning, historical context, and use of the ATS. For a more exhaustive treatment of these issues, see Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Casto, *supra* note 13; Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons From In re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Randall, *Further Inquiries*, *supra* note 6; Kenneth C. Randall, *Federal Jurisdiction over Interna-*

## 1. *Early History*

In the years leading up to 1789, complying with the law of nations and maintaining sound relations with foreign sovereigns were fundamental components of the United States's continued development and security.<sup>15</sup> The prospect of international disputes or aggression from foreign countries was particularly threatening to the young United States, which would need many years of development before it could stand firm in conflicts with other nations.<sup>16</sup> According to the Federalists, relegating matters of international concern to the states—in particular, the responsibility to adjudicate claims of foreign subjects—was a sure recipe for drawing the United States into unwanted international conflict.<sup>17</sup>

Under the law of nations as it existed during this time, each country was obliged to open its courts to foreign subjects, allowing them to bring suit within the country's territory.<sup>18</sup> At the same time, a denial of justice to a foreign subject or the apparent condoning of a wrongful act against such person by the United States would make this country "answerable not to

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*tional Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985) [hereinafter Randall, *Inquiries*]; Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995). I am particularly indebted to the research undertaken and published by Professors Casto and Randall.

15. See D'Amato, *supra* note 14, at 64; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-25 (1989); Randall, *Inquiries*, *supra* note 14, at 12-13.

16. See D'Amato, *supra* note 14, at 63.

17. In *The Federalist*, John Jay observed that "[i]t is of high importance to the peace of America that she observe the laws of nations . . . and . . . it appears evident that this will be more perfectly and punctually done by one national Government than it could be . . . by thirteen separate States." THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961). "Under the national Government, 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 thirteen States . . . will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them." *Id.*; see also Fitzpatrick, *supra* note 14, at 492-93; Randall, *Inquiries*, *supra* note 14, at 15.

18. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Robb, J., concurring) (citing 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 165a (Hersch Lauterpacht ed., 8th ed. 1955)).

the injured alien but to his home state."<sup>19</sup> In this way, a private act committed by one individual against another person, such as an act against an ambassador or other public minister, occurring in this country,<sup>20</sup> could escalate into an international incident—a result the ill-prepared United States wanted desperately to avoid.<sup>21</sup>

The likelihood of such an international incident was very real in 1781 because the Continental Congress had little power over foreign affairs and, in fact, lacked power even to redress violations of treaty or the law of nations. Accordingly, the burden of enforcing the law of nations fell on state tribunals—notorious for their anti-foreigner bias and lack of predictable decisions.<sup>22</sup> Realizing its lack of direct power in this area and also the profound importance of consistent, responsible adjudications of such claims, the Continental Congress passed a resolution in 1781 recommending that the states “provide expeditious, exemplary and adequate punishment” for “infrac-

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19. See *Tel-Oren*, 726 F.2d at 783 (Robb, J., concurring) (citing JAMES BRIERLY, *THE LAW OF NATIONS* 284-91 (6th ed. 1963)). As Alexander Hamilton stated this concern:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members . . . . As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison noted that one of the fundamental defects of the Confederation was that it “could not cause infractions of treaties, or of the law of nations to be punished; that particular States might by their conduct provoke war without control.” JAMES MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 60 (Erastus H. Scott ed., 1894) (1787); see also D’Amato, *supra* note 14, at 64; Randall, *Inquiries*, *supra* note 14, at 20-21.

20. See 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Library of Cong. ed., 1912).

21. *Tel-Oren*, 726 F.2d at 782-83 (Edwards, J., concurring) (“The focus of attention, then, was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien. For these acts, the United States was responsible.”).

22. See Dodge, *supra* note 14, at 235-36 (“We well know, sir, that foreigners cannot get justice done them in these [state] courts . . .” (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., 2d ed. 1881))); Randall, *Inquiries*, *supra* note 14, at 21.



tions of the law of nations."<sup>23</sup> In particular, the resolution requested that the states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen."<sup>24</sup>

The Federalists' concerns with the national government's inability to enforce the law of nations proved prophetic in 1784. In that year, a French citizen, Chevalier De Longchamps, assaulted French Consul General Marbois in Philadelphia.<sup>25</sup> Although the international community clamored for justice,<sup>26</sup> there was little the Continental Congress could do, apart from offering a reward for De Longchamps's capture so that he could be tried in Pennsylvania state court.<sup>27</sup> De Longchamps ultimately was tried and convicted by the Pennsylvania Supreme Court for a crime against the law of nations.<sup>28</sup>

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23. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 20, at 1136; *see also* Casto, *supra* note 13, at 490; Dodge, *supra* note 14, at 226-27. The particular violations that the states were asked to remedy included violations of safe-conducts, acts against friends of the United States, acts against ambassadors and other public ministers—including personal injury and damage to property, and violations of treaty. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 20, at 1136-37. The resolution also recommended criminal penalties for the identified violation. *See id.* at 1137 (noting that "public faith and safety" required "that punishment should be co-extensive with such crimes"). These prohibited acts generally correspond to the major "offenses against the law of nations" that Blackstone had identified in his Commentaries: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 WILLIAM BLACKSTONE, COMMENTARIES \*68. *See generally* Jay, *supra* note 15, at 821-28.

24. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 20, at 1137; *see also* Dodge, *supra* note 14, at 227.

25. *See* Dodge, *supra* note 14, at 229-30; Randall, *Inquiries*, *supra* note 14, at 24-25; Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. HIST. & BIOGRAPHY 294, 294 (1939).

26. *See* Casto, *supra* note 13, at 491; Randall, *Inquiries*, *supra* note 14, at 24-25; Rosenthal, *supra* note 25, at 295-96.

27. Casto, *supra* note 13, at 492; *see also* Rosenthal, *supra* note 25, at 295. Pennsylvania's initial handling of the Marbois Affair likely reinforced concerns about states' adjudication of international law claims. Once captured, De Longchamps escaped from police custody, leading to an investigation of possible collusion between the police and De Longchamps. *See* Rosenthal, *supra* note 25, at 295.

28. *See* *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116-18 (Pa. Oyer & Terminer 1784). For his "atrocious violation of the law of nations," De Longchamps was fined and sentenced to two years in prison. *Id.* at 117-

The Marbois Affair and other similar cases<sup>29</sup> were surely in the minds of those who sat down to craft the Judiciary Act of 1789 following the new Constitution's grant of judicial power to the federal government over "Cases affecting Ambassadors, [and] other public Ministers and Consuls" and disputes "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."<sup>30</sup> Indeed, Oliver Ellsworth—widely considered to be the primary architect of the Judiciary Act of 1789—was a member of the Continental Congress that passed the 1781 Resolution recommending action on the part of the states.<sup>31</sup> Section 9 of the Judiciary Act of 1789 was drafted to read as follows: "[T]he district courts . . . shall also have 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<sup>32</sup> in violation of the law of nations or a treaty of the United States."<sup>33</sup> Today's version of the ATS,

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18. As a result of the diplomatic unease following the Marbois Affair, Congress passed a Resolution on April 27, 1785, "strongly recommend[ing] to the legislatures of the respective States [that they] pass laws for the exemplary punishment of such persons as may in future by violence or by insult attack the dignity of sovereign powers in the person of their ministers or servants." 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 314-15 (Library of Cong. ed., 1912); see also Rosenthal, *supra* note 25, at 300.

29. In 1788, a New York City constable broke into the house of the Dutch Ambassador Van Berckel and arrested one of his servants. Once again, the Continental Congress was forced to sit back and watch an individual—this time a U.S. citizen—be convicted of a violation of the law of nations in state court. See Dodge, *supra* note 14, at 230. The incident involving Van Berckel likely further inflamed Federalists' concerns about the impotency of the federal government in the area of international affairs.

30. U.S. CONST. art. III, § 2, cl. 1; see also Dodge, *supra* note 14, at 229-30.

31. See Casto, *supra* note 13, at 495 n.155; Dodge, *supra* note 14, at 231.

32. Commentators have disagreed over the original purpose of the word "only" in the ATS. Compare Casto, *supra* note 13 (suggesting that the drafters of the Judiciary Act extended the ATS to jurisdiction over a "tort only" to exclude minor commercial claims that otherwise would have been brought by British merchants against U.S. citizens) with Sweeney, *supra* note 14 (positing that the ATS was intended to confer jurisdiction over prize cases in which the legality of the capture was not in issue—where a "tort only" was being litigated).

33. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1350 (1999)). Section 9 of the Judiciary Act was only one part of a broader effort to vest jurisdiction over matters involving foreign citizens—and thereby possibly touching on foreign affairs—with the national government. As already noted, Article III of the new Constitution granted the federal judiciary power to hear cases involving ambassadors and

codified at 28 U.S.C. § 1350, has been modified only slightly in the 212 intervening years since its adoption.<sup>34</sup>

Early invocations of § 9 of the Judiciary Act do not shed much light on the intended purpose of the statute, though it was used on at least two occasions to establish jurisdiction in maritime cases<sup>35</sup> and in a dispute involving British subjects whose property in Sierra Leone allegedly was attacked and de-

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other public ministers, as well as disputes involving foreign states and/or citizens thereof. U.S. CONST. art III, § 2. Other portions of the Judiciary Act also point to a federalizing of the power to oversee matters involving foreign citizens. Section 9 of the Judiciary Act gave district courts exclusive jurisdiction over admiralty and maritime causes and seizures under the law of the United States, as well as exclusive jurisdiction over all suits against consuls or vice-consuls. Judiciary Act of 1789 § 9. Section 11 of the Judiciary Act addressed jurisdiction of circuit courts and granted them "alienage jurisdiction"—cognizance over cases with a minimum amount in controversy of \$500 and parties that included a state or a foreign citizen. Judiciary Act of 1789 § 11. Jurisdiction of the Supreme Court was addressed in Section 13, which granted the Court exclusive jurisdiction over all cases against ambassadors and other public ministers, as well as original but not exclusive jurisdiction over suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party. Judiciary Act of 1789 § 13. Without the early version of the ATS, suits brought by a foreign citizen alleging a violation of the law of nations where the amount in controversy was below \$500 would have been relegated to state court. The combined effect of the alienage jurisdiction provision and the early version of the ATS was that federal courts could hear most matters involving foreign citizens that could affect the foreign relations of the United States, but British creditors, who would likely be suing U.S. citizens in contract and for a sum under \$500, were excluded from federal court. See *Casto*, *supra* note 13, at 468 n.4.

34. Slight modifications to § 9(b) occurred in 1878, 1911, and 1948, dealing mostly with how to denote the fact that federal jurisdiction over these matters would not be exclusive. See REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTH-THIRD CONGRESS, § 563 (1878); Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093; H.R. REP. NO. 80-308, app. at 124 (1947) (reviser's notes); see also *Casto*, *supra* note 13, at 468 n.4.

35. See *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (affirming jurisdiction under the ATS and general maritime principles where a French ship captain brought suit to recover the value of slaves allegedly stolen from his vessel at port in the United States); *Moxon v. The Fanny*, 17 F. Cas. 942, 943 (D. Pa. 1793) (recognizing that the court was "particularly vested with authority where an alien sues for a tort only in violation of the laws of nations . . . and this is a case falling under that description" in a dispute involving the capture of an English vessel by a French ship near the United States).

stroyed by U.S. and French citizens.<sup>36</sup> The “modern” era of ATS litigation—in particular, use of the statute as a mechanism to obtain jurisdiction over international human rights claims—was ushered in by the Second Circuit’s groundbreaking decision in *Filartiga v. Peña-Irala* in 1980.<sup>37</sup>

## 2. *Filartiga* and Subsequent Interpretations

In *Filartiga*, a Paraguayan doctor and his daughter sued the former Inspector General of Police from Asunción, Paraguay for the alleged torture and murder of the doctor’s son.<sup>38</sup> The Second Circuit held that in applying the ATS, a “rarely-invoked provision” of federal law,<sup>39</sup> courts “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>40</sup> The court went on to decide that “although there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the [United Nations] charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture.”<sup>41</sup> Judge Kaufman reversed the lower court’s dismissal for want of subject matter jurisdiction<sup>42</sup> and concluded that “an act of torture committed by a state official . . . violates established norms of the international law of human rights and hence the law of nations.”<sup>43</sup>

The sweeping opinion in *Filartiga* recognized federal jurisdiction under the ATS for an ever-growing universe of international human rights claims, and it opened the floodgates to further similar claims in U.S. courts. Most suits brought under

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36. See *Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795). Later, in 1907, the Attorney General observed that the ATS would apply to allegations of Mexican citizens that a U.S. company had diverted the flow of the Rio Grande River, and thus altered the border between the United States and Mexico, in violation of treaty. See *Mexican Boundary-Diversion of the Rio Grande*, 26 Op. Att’y Gen. 250, 251 (1907). The Attorney General concluded that the ATS provided “a right of action and a forum” for citizens of Mexico to sue for damages in the United States. *Id.* at 252.

37. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

38. See *id.* at 878.

39. *Id.*

40. *Id.* at 881.

41. *Id.* at 882.

42. See *id.* at 878.

43. *Id.* at 880.

the ATS since *Filartiga* follow a similar fact pattern: A non-U.S. citizen files suit in federal court alleging brutal acts that took place at the hands of a non-U.S. citizen (usually a current or former member of a foreign government) outside the United States that violated the plaintiff's fundamental human rights.<sup>44</sup> Among recent ATS cases, two are of particular note: *Tel-Oren v. Libyan Arab Republic*<sup>45</sup> and *Kadic v. Karadzic*.<sup>46</sup>

In *Tel-Oren*, representatives of individuals murdered in an armed attack on a civilian bus in Israel in 1978 filed suit against a variety of defendants, including the Palestine Liberation Organization (PLO).<sup>47</sup> Plaintiffs alleged that defendants were responsible for several tortious acts in violation of the law of nations and treaties and that jurisdiction was exercised properly by the federal court under a variety of provisions, including the ATS.<sup>48</sup> Although the District of Columbia Circuit Court of Appeals affirmed the lower court's dismissal, each member of the three-judge panel issued a separate, lengthy opinion stating the reasons for his individual vote.<sup>49</sup> The *Tel-Oren* opinion is noteworthy because it provides detailed analyses of how and when ATS jurisdiction can be sustained, and also because it highlights the significant difference of opinion that exists about the history and proper use of the ATS, even among federal appellate judges.<sup>50</sup>

According to Judge Edwards in *Tel-Oren*, the ATS confers both jurisdiction and a right of action, though, after a discussion of the development of international law, he concluded

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44. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (concerning allegations of torture committed by an official of the former Ethiopian government brought by former Ethiopian prisoners); *Alomang v. Freepport-McMoran, Inc.*, No. 96-2139, 1996 WL 601431 (E.D. La. Oct. 17, 1996) (concerning allegations that defendant company engaged in human rights violations in Indonesia against mine workers); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (concerning charges brought by nine expatriate citizens of Guatemala and one U.S. citizen against a former Guatemalan government official for injuries allegedly caused by Guatemalan military forces).

45. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

46. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

47. *Tel-Oren*, 726 F.2d at 774.

48. See *id.*

49. See *id.*

50. I will not discuss in any depth Judge Robb's concurring opinion in *Tel-Oren*, as his conclusion that the matter was a nonjusticiable political question is not directly relevant to my analysis. See *id.* at 823-27.

that the law of nations may not prohibit politically motivated terrorism, "no matter how repugnant it might be to our own system."<sup>51</sup> While he agreed with the basic structure of analysis set out in *Filartiga*, Judge Edwards concluded that the law of nations does not impose "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."<sup>52</sup> Nevertheless, Judge Edwards recognized an expanding set of offenses actionable under the ATS: "[C]ommentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms—and in the process are defining the limits of section 1350's reach."<sup>53</sup>

In stark contrast to Judge Edwards, Judge Bork determined that the ATS provides only a forum for particular plaintiffs, and that the law of nations or a treaty provision must grant them a cause of action to maintain suit under § 1350.<sup>54</sup> After a review of historical analyses, Judge Bork determined that the intent of the 1789 drafters is unknown, but, at a minimum, "in 1789 there was no concept of international human rights."<sup>55</sup> Judge Bork further resisted a "too sweeping" construction of the ATS that would authorize tort suits for the vindication of any international legal right.<sup>56</sup> Under Judge Bork's reasoning, the ATS's "current function would be quite modest, unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement."<sup>57</sup>

Eleven years after the *Tel-Oren* decision and fifteen years after its decision in *Filartiga*, the Second Circuit revisited the ATS. In *Kadic v. Karadzic*, Croat and Muslim citizens of Bosnia-

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51. *Id.* at 796.

52. *Id.* at 776.

53. *Id.* at 781 (citations omitted).

54. *See id.* at 799. In 1992, and in response to Judge Bork's opinion in *Tel-Oren*, Congress passed the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (1999)). *See* H.R. REP. No. 102-367, at 3-4 (1991), *reprinted in* 4 U.S.C.C.A.N. 84, 86 (1992) (noting that the Act was passed to provide "an unambiguous and modern basis for a cause of action" in light of Judge Bork's opinion in *Tel-Oren*).

55. *Tel-Oren*, 726 F.2d at 813.

56. *Id.* at 812.

57. *Id.* at 816.

Herzegovina brought suit alleging that they were victims of "various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution."<sup>58</sup> The plaintiffs claimed that Radovan Karadzic, acting in his official capacity as head of the Bosnian-Serb military forces, directed the atrocities committed by his troops.<sup>59</sup> In an important decision in the development of international law, the *Kadic* court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."<sup>60</sup> The court ruled that individual conduct—apart from any state action—may violate the law of nations.<sup>61</sup> In particular, the court ruled that private persons may incur individual liability for acts of genocide and war crimes, but that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."<sup>62</sup>

#### B. *The Evolution of Forum Non Conveniens in Scottish and U.S. Law*

The federal doctrine of forum non conveniens has its roots in the Scottish concept of "*forum competens*," dating back to at least 1610.<sup>63</sup> Although early Scottish decisions reported

58. *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995).

59. *See id.* at 237.

60. *Id.* at 239.

61. *See id.*

62. *Id.* at 243.

63. *See Vernor v. Elvies*, 11 Dict. of Dec. 4788 (Scot. Sess. Cas. 2nd Div. 1610). "The Lords will not find themselves Judges betwixt two Englishmen, being in this country not *animo remanendi sed negociandi tantum* . . ." (Roughly translated: [not] with the intention of remaining, but just on business.) For other discussions of the history, development, and application of the forum non conveniens doctrine, see Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947); Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1950); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Joseph Dainow, *The Inappropriate Forum*, 29 U. ILL. L. REV. 867 (1935); Maria A. Mazza, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 FORDHAM INT'L L.J. 577 (1983); Jeremy D. Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U. L. REV. 24 (1973).

under the rubric of *forum competens* appear to have addressed the power of a Scottish court to hear certain disputes where litigants were non-residents,<sup>64</sup> courts soon began to focus on their discretion to dismiss cases properly within their jurisdiction.<sup>65</sup> The confusing use of the phrases "*forum competens*" and "*forum non competens*" to refer to a discretionary act of a competent court in declining jurisdiction where it properly could be extended was dropped in the late 19th century in favor of the phrase "*forum non conveniens*."<sup>66</sup>

64. See, e.g., *Col. Brog's Heir v. \_\_\_\_\_*, 11 Dict. of Dec. 4816, 4816 (Scot. Sess. Cas. 1639); *Anderson v. Hodgson and Ormiston*, 11 Dict. of Dec. 4779, 4779-80 (Scot. Sess. Cas. 1747); see also Braucher, *supra* note 63, at 909.

65. See *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français,"* [1925] Sess. Cas. (H.L.) 332, 361, *aff'd*, [1926] Sess. Cas. (H.L.) 13 (Lord Anderson) ("The plea of *forum non competens*, as originally used, goes the length of asserting that the exercise of jurisdiction (although jurisdiction exists) is entirely incompetent because of the nature of the case."); *Longworth v. Hope*, 3 M. 1049, 1053 (Sess. Cas. 1865) ("[T]he plea usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea has received a wider signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum."); see also *John Palmer Parken and Mandatory v. Royal Exchange Assurance Co.*, 8 D. 365, 369-70 (Sess. Cas. 1846) ("[T]here may be cases in which, although the jurisdiction is undoubted, courts may stay proceedings, in order that the parties may try the question in the tribunals of another country, which are more fitted for the determination of the same. . . . But the propriety of this course does not depend upon want of jurisdiction to entertain the action.").

66. See *Brown v. Cartwright*, 20 Scot. L. Rep. 818, 819 (Sess. Cas. 2nd Div. 1883); *La Société du Gaz de Paris*, [1925] Sess. Cas. (H.L.) at 344 (Lord Justice-Clerk Alness) ("In the earlier cases the plea was thus stated—*forum non competens*. But it was recognized that that was an inaccurate statement of the plea. The plea is open even where the competency of the Court in which it is taken to try the case is indubitable. And so the form of the plea was altered, and it was stated no longer as *forum non competens* but as *forum non conveniens*."). Note, however, that Lord Dunedin was not thoroughly pleased with the emphasis placed on convenience by the new phrase: "In my view, 'competent' is just as bad a translation for '*competens*' as 'convenient' is for '*conveniens*.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'" See *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français,"* [1926] Sess. Cas. (H.L.) 13, 18; see also *Macadam v. Macadam*, 45 Scot. Jurist 525, 526 (Sess. Cas. 2nd Div. 1873); *Prescott v. Graham*, 20 Scot. L. Rep. 573 (Sess. Cas. 1883); WILLIAM M. GLOAG & ROBERT CANDLISH HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND 40 (Alexander B. Wilkinson et al. eds., 9th ed. 1987); Braucher, *supra* note 63, at 909.



The developed doctrine of *forum non conveniens* under Scottish law was articulated in the 1926 case *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"*.<sup>67</sup> Lord Chancellor Cave explained the doctrine as requiring dismissal where, "after giving consideration to the interests of both parties and to the requirements of justice, [it appears] that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court."<sup>68</sup> The appropriate analysis was explained succinctly by Lord Sumner: "The object, under the words 'forum non conveniens' is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends."<sup>69</sup> Although the Scottish doctrine did include convenience as a factor,<sup>70</sup> the underlying concern was broader than simple convenience: The court would make its decision based on which forum would be "preferable for securing the ends of justice."<sup>71</sup>

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67. [1926] Sess. Cas. (H.L.) 13; *see also* *Sim v. Robinow*, 19 R. 665 (Sess. Cas. 1892).

68. *La Société du Gaz de Paris*, [1926] Sess. Cas. (H.L.) at 16-17. In an earlier iteration of this case, Lord Justice-Clerk Alness observed that "it is not enough that the forum is inconvenient from the point of view of the Court, or from the point of view of the defender only, but it must be plain (1) that another forum is open to the parties, and (2) that that other forum is more suitable for the trial of the cause from the point of view of the interests of the parties and for the ends of justice." *La Société du Gaz de Paris*, [1925] Sess. Cas. (H.L.) at 447.

69. *La Société du Gaz de Paris*, [1926] Sess. Cas. (H.L.) at 22.

70. *See id.* at 17.

71. *Id.* at 22. Reflecting on the phrase "more convenient and preferable for securing the ends of justice," Lord Sumner opined that "[t]he true course is to leave out the words 'more convenient and,' because one cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three . . . is of little, if any, importance. If you read it as 'more convenient, that is to say, preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at." *Id.* *See La Société du Gaz de Paris*, [1925] Sess. Cas. (H.L.) at 350 (Lord Justice-Clerk Alness) ("The action is French in its origin, French in its incidents, French in its problems, French in its proof, French in its atmosphere and horizon."); *see also* Barrett, *supra* note 63, at 406-07; B.D. Inglis, *Jurisdiction, the Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws*, 81 LAW Q. REV. 380, 382 n.8 (1965) (observing that "[i]n the Scottish cases the application of the Scottish rule seems to rest largely on the 'ends of justice' rather than the convenience of the parties").

In the United States, maritime jurisdiction law from around the 19th century provides the most direct U.S.-based source of doctrine supporting the later development of forum non conveniens.<sup>72</sup> In its 1885 decision *The Belgenland*, the U.S. Supreme Court explicitly recognized that federal courts enjoy discretion in determining whether to assert jurisdiction over maritime claims involving foreigners, such as suits for collision damages at sea, that “arise under the common law of nations.”<sup>73</sup> Nevertheless, the Court made clear that a factual analysis of each case would be necessary to determine whether the dispute would be governed by the law of a foreign country—as in suits for wages or ill-treatment—in which case it might prove “inexpedient” for the U.S. court to take jurisdiction.<sup>74</sup> In such cases, the Court cautioned, it would be important to obtain the consent of a consul or minister of the foreign country before asserting jurisdiction, “not on the ground that [the trial court] has not jurisdiction, but that, from motives of convenience, or international comity, it will use its dis-

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72. See *Collard v. Beach*, 87 N.Y.S. 884 (N.Y. App. Div. 1904); *Gardner v. Thomas*, 14 Johns. 134 (N.Y. 1817); *Brinley v. Avery*, 1 Kirby 25 (Conn. 1786). The *Gardner* court recognized that U.S. courts “may take cognizance of torts committed on the high seas, on board of a foreign vessel where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the Court to afford jurisdiction or not, according to the circumstances of the case.” *Gardner*, 14 Johns. at 137-38; see also *Mason v. The Blaireau*, 6 U.S. 240, 264 (1804) (“[It has been suggested] that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, [rather] than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it . . . .”); *The Sirius*, 47 F. 825, 827 (N.D. Cal. 1891) (“That the court may, in its discretion, take jurisdiction of the case is not disputed, but it is urged on the part of the claimant that in the present instance such discretion ought not to be exercised in favor of the jurisdiction.”).

73. *The Belgenland*, 114 U.S. 355, 365 (1885); see also *Can. Malting Co. v. Patterson S.S., Ltd.*, 285 U.S. 413 (1932). “Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.” *Id.* at 422-23, 423 n.6.

74. *The Belgenland*, 114 U.S. at 363.

cretion whether to exercise jurisdiction or not."<sup>75</sup> In maritime cases involving the "common law of nations," the existence of jurisdiction was "beyond dispute; the only question [was] whether it [would be] expedient to exercise it."<sup>76</sup>

In later U.S. cases involving torts committed on the high seas, the *Belgenland* decision served as a model for analysis, with courts repeatedly recognizing their discretion to decline hearing cases even though they had jurisdiction over tort claims brought by foreign seamen.<sup>77</sup> Nevertheless, after varying degrees of factual analyses, many of these cases eventually were dismissed on jurisdictional grounds.<sup>78</sup> One of the more interesting aspects of these cases is the frequency with which U.S. courts both sought and factored into their considerations the wishes of foreign consuls or ministers whose countries might have a direct interest in whether the U.S. court exercised jurisdiction.<sup>79</sup> In some of these cases, a treaty was in place decreeing that consuls and consular agents would enjoy exclusive jurisdiction over disputes arising on merchant ships from their nations.<sup>80</sup> The most noteworthy cases, however, are those where the interests or views of the foreign officials were defined and factored into courts' jurisdictional decisions, but

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75. *Id.* In these cases, the foreign consul should be notified, and though the court is not "absolutely bound by [the opinions of consul, it] will always pay due respect to . . . his wishes as to taking jurisdiction." *Id.* at 364.

76. *Id.* at 365-66.

77. *See, e.g.,* *The Paula*, 91 F.2d 1001, 1002 (2d Cir. 1937) ("[T]hat a suit in admiralty between aliens may be entertained or dismissed in the exercise of a sound judicial discretion is clear beyond dispute."); *The Noddleburn*, 30 F. 142 (D. Or. 1887).

78. *See, e.g.,* *The Ferm*, 15 F.2d 887, 888 (E.D.N.Y. 1976) (declining jurisdiction in maritime personal injury case); *The Roxen*, 7 F.2d 739, 741 (E.D. Va. 1925) (same); *The Iquitos*, 286 F. 383, 384-85 (W.D. Wa. 1921) (same); *The Walter D. Wallet*, 66 F. 1011, 1013 (S.D. Ala. 1895) (same).

79. *See* *The Astra*, 34 F. Supp. 152, 154 (D. Md. 1940). After initially rejecting the argument that the court lacked jurisdiction to decide a claim for injuries sustained while at sea, the trial court eventually dismissed the Norwegian plaintiff's claims where the Royal Norwegian Consul General was authorized by Norwegian law and was prepared to assume jurisdiction over the dispute. *See id.*

80. *See, e.g.,* *The S.S. Emmy*, 39 F. Supp. 871, 871-72 (S.D.N.Y. 1940). Courts facing maritime wage and tort claims often resorted to treaties in force to determine whether jurisdiction could be asserted. *See* *The Cambitis*, 14 F.2d 236, 236 (E.D. Pa. 1926) (recognizing that the subject matter of the suit was committed to resolution by consular agents, the court observed that "[t]he want of jurisdiction is not subject to the discretion of the court").

where no treaty was cited mandating deference to the foreign officials.<sup>81</sup> These cases demonstrate a clear concern about international comity and the interests of foreign countries on the part of U.S. courts evaluating jurisdictional issues in disputes involving foreign citizens.

Without clear guidance, lower federal courts<sup>82</sup> struggled to apply the doctrine of *forum non conveniens* before 1947.<sup>83</sup>

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81. *See, e.g., The Ferm*, 15 F.2d at 888. In *The Ferm*, the consul general of Sweden joined in the request that the District Court decline jurisdiction over a suit for personal injuries abroad a Swedish ship on open waters. *See id.* In refusing to hear the case, the court stated that it would “not exercise [its] jurisdiction against the protest of the consul of the country to which the vessel belongs, except under special circumstances of extraordinary hardship.” *Id.*; *see also The Ivaran*, 121 F.2d 445, 445-47 (2d Cir. 1941) (declining jurisdiction over a claim for injuries sustained at sea where the foreign consulate could provide a remedy to plaintiff); *The Sirius*, 47 F. 825, 827 (N.D. Cal. 1891) (noting, in accepting jurisdiction, that “[i]n the present case the British consul has in writing requested the court to adjudicate the cause”). For a general discussion of the use of the doctrine in maritime disputes, *see Bickel, supra* note 63. *See generally The Belgenland*, 114 U.S. 355, 363-64 (1885).

82. Prior to the application of *forum non conveniens* in federal court, it had emerged in jurisdictional disputes in state court. For a discussion of the use of *forum non conveniens* in state court practice, *see Barrett, supra* note 63, at 389-93; Blair, *supra* note 63, at 20-30; Braucher, *supra* note 63, at 911-18.

83. In 1932, the U.S. Supreme Court observed that “[c]ourts of equity and of law . . . occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.” *Can. Maltng Co. v. Patterson S.S., Ltd.*, 285 U.S. 413, 422-23, 423 n.6 (1932); *see also Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 131 (1933) (recognizing that although “no definite rule of general application can be formulated” to address discretionary dismissal in such cases, “it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case”). Nevertheless, lower courts have struggled with this concept. *See, e.g., Momand v. Paramount Pictures Distrib. Co.*, 19 F. Supp. 102, 104 (D. Mass. 1937) (“The facts [sic] that it may be more convenient to parties and will avoid protracted litigation in this court if this case is tried in Oklahoma are circumstances which do not make the jurisdiction of this court dependent upon the exercise of a [sic] discretion.”); *Doyle v. Northern Pac. Ry. Co.*, 55 F.2d 708, 710 (D. Minn. 1932) (“There is nothing in the decisions of the Supreme Court or of the Circuit Court of Appeals which would justify the application of the doctrine of *forum non conveniens*. We are told, in effect, that we have a duty to try cases of which we have jurisdic-

In that year, the U.S. Supreme Court sought to fill this void by creating a standardized process—if not a clear sense of what weights should be assigned under that process—for deciding forum non conveniens cases in *Gulf Oil Corp. v. Gilbert*.<sup>84</sup> In observing that the doctrine allows a court to “resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute,” the Court also recognized that “[w]isely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial” of forum non conveniens.<sup>85</sup> The importance of *Gilbert* is that the Court, for the first time, provided examples of the now-familiar factors to be considered in the forum non conveniens inquiry. From this analysis, the “rare case[ ]” would be identified warranting the court’s invocation of its “power to decline jurisdiction in exceptional circumstances.”<sup>86</sup>

First, the doctrine of forum non conveniens “presupposes at least two forums in which the defendant is amenable to process.”<sup>87</sup> Although an available, alternative forum is a requirement under the doctrine, the *Gilbert* Court observed that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”<sup>88</sup>

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tion . . . I reach the conclusion that I am without power to refuse jurisdiction or to dismiss upon any of the grounds urged by the defendants.”); see also *The Saudades*, 67 F. Supp. 820, 821 (1946) (“[A]n American court may not refuse to try a case brought by an American citizen, unless it feels that injustice would be done by allowing him to proceed in his own court.”). Some lower courts questioned whether the doctrine even existed. See *Sacco v. Baltimore & Ohio R.R. Co.*, 56 F. Supp. 959, 960 (E.D.N.Y. 1944) (observing that although the “so-called doctrine of forum non conveniens” was “theoretically a qualification on jurisdiction,” it had been applied to date only in admiralty and equity cases). *But cf.* *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 55-56 (1941) (Frankfurter, J., dissenting) (referring to the “familiar doctrine of forum non conveniens under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere,” and noting that forum non conveniens is a “manifestation[ ] of a civilized judicial system” and “firmly embedded in our law”).

84. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

85. *Id.* at 507-08.

86. *Id.* at 504, 509.

87. *Id.* at 506-07.

88. *Id.* at 508.

Second, the court should consider both “private interest” and “public interest” factors.<sup>89</sup> Among the private interest factors to be considered are:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.<sup>90</sup>

The Supreme Court also identified a partial list of public interest factors to be considered: the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest “in having the trial of a diversity case in a forum that is at home with the state law that must govern the case”; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>91</sup>

Thirty-three years after *Gilbert*, the Supreme Court revisited forum non conveniens—this time in an international context—and provided its most recent, substantive treatment of the doctrine in *Piper Aircraft Co. v. Reyno*.<sup>92</sup> In *Piper*, the Supreme Court tweaked its forum non conveniens inquiry in a variety of ways, explaining more fully how the doctrine should be applied in appropriate cases. First, the Court ruled that a plaintiff may not defeat a forum non conveniens motion “merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiff[s] than that of the present forum.”<sup>93</sup> Second, the Court emphasized “the need to retain flexibility” in evaluating forum non conveniens factors.<sup>94</sup> In particular, the Court observed that if “central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very

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89. *Id.* at 508-10.

90. *Id.* at 508.

91. *Id.* at 509.

92. *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

93. *Id.* at 247.

94. *Id.* at 249.

flexibility that makes it so valuable.”<sup>95</sup> Third, and possibly most importantly, the Court made clear that although there is ordinarily a “strong presumption” in favor of a plaintiff’s choice of forum, that presumption “applies with less force when the plaintiff or real parties in interest are foreign.”<sup>96</sup> The Court reasoned that this distinction supported the underlying consideration in forum non conveniens analyses, which recognizes that “[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient,” but where the plaintiff is foreign, “this assumption is much less reasonable.”<sup>97</sup>

Lower federal courts have applied the doctrine of forum non conveniens frequently and in a wide variety of contexts since *Gilbert and Piper*,<sup>98</sup> ranging from *In re Union Carbide Corp. Gas Plant Disaster*,<sup>99</sup> where personal injuries caused by an explosion in India were at issue to *Scottish Air International, Inc. v. British Caledonian Group, PLC*,<sup>100</sup> involving complex, international corporate transactions. Although some questions arising in the forum non conveniens analysis remain unsettled, such as the weight to be given the forum choice of a plaintiff living outside the judicial district where suit is filed,<sup>101</sup> courts

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95. *Id.* at 249-50.

96. *Id.* at 255.

97. *Id.* at 255-56.

98. *See, e.g.*, *Capital Currency Exch. v. Nat’l Westminster Bank*, 155 F.3d 603, 609 (2d Cir. 1998) (dismissing antitrust suit on forum non conveniens grounds); *Murray v. British Broad. Corp.*, 81 F.3d 287, 292 (2d Cir. 1996) (same, unfair competition); *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995) (same, intellectual property); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (same, securities); *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1145 (5th Cir. 1989) (same, RICO); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 129-30 (2d Cir. 1987) (per curiam) (same, RICO); *Faber-Plast, GmbH v. Kleinfert*, 997 F. Supp. 846, 848-50 (E.D. Mich. 1998) (same, contract); *In re Silicone Gel Breast Implants Liab. Litig.*, 887 F. Supp. 1469, 1476 (N.D. Ala. 1995) (same, products liability).

99. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987).

100. *Scottish Air Int’l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224 (2d Cir. 1994).

101. The Second Circuit in *Wiwa v. Royal Dutch Co.* reversed the district court’s forum non conveniens dismissal, in part because the lower court “weighed against the plaintiffs that none of them were residents of the Southern District of New York, but did not count in favor of their choice of a U.S. forum that two of them were residents of the United States.” 226 F.3d

have adopted a fairly uniform approach to addressing dismissal motions. For example, courts often make their forum non conveniens dismissals conditional on various factors,<sup>102</sup> including the defendants' agreements to submit to the foreign courts' jurisdictions<sup>103</sup> or their waivers of certain defenses they might otherwise assert in the alternative fora.<sup>104</sup>

C. *The ATS and Forum Non Conveniens in Current Federal Practice: Wiwa v. Royal Dutch Petroleum Co.*

The ATS and forum non conveniens have developed over time to a point of relative stability in today's federal court practice. Although the ATS may have been enacted first as a foreign policy tool to ensure that citizens of other countries would not be forced to sue in state court, and in particular, to

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88, 103 (2d Cir. 2000). The Supreme Court has never addressed this question directly; however, the Second Circuit's approach appears suspect. A decision, for example, to grant deference to the forum choice of a plaintiff resident in a U.S. district far from the one in which trial is set is inconsistent with the Supreme Court's observation that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Piper Aircraft*, 454 U.S. at 255-56. The Ninth Circuit's approach to this issue is more logical and also consistent with *Piper*. In *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, the Ninth Circuit affirmed a Hawaii trial court's decision in a forum non conveniens analysis to grant less deference to the forum choice of plaintiffs not resident in Hawaii than it would have to the forum choice of Hawaii residents. 150 F.3d 1088, 1091-92 (9th Cir. 1998). The court observed that because plaintiffs were not resident in Hawaii, the *Piper* presumption of convenience for choices of home fora did not apply. *See id.* at 1091. Contrary to the *Wiwa* court's holding, the choice of a forum outside the district in which a plaintiff resides should not be considered—without factual analysis or inquiry—to be more convenient for that plaintiff than a forum outside the United States.

102. *See Piper Aircraft*, 454 U.S. at 257 n.25 (suggesting that "district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims"); *Harrison v. Wyeth Labs. Div. of Am. Home Prod. Corp.*, 510 F. Supp. 1, 6 (E.D. Pa. 1980) (conditioning forum non conveniens dismissal on defendant submitting to the jurisdiction of the United Kingdom and providing, at its own expense, all documents, witnesses, or other evidence under its control needed for fair adjudication of plaintiffs' claims).

103. *See, e.g., Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1345, 1349-50 (1st Cir. 1992).

104. *See Winex, Ltd. v. Paine*, No. 89-2083, 1990 WL 121483, at \*9 (E.D. Pa. Aug. 15, 1990) (requiring that defendant submit to the jurisdiction of the foreign court and waive any defenses based on delay as prerequisites to dismissal on forum non conveniens grounds).



address disputes involving foreign ambassadors inside the United States, the statute is seen now by many lower federal courts as conferring jurisdiction in a broad range of international human rights cases.<sup>105</sup> Furthermore, with the Supreme Court's articulation and clarification of the forum non conveniens analysis in *Gilbert and Piper*, a doctrine from Scotland with 400 year-old roots is alive and well in federal court.

The ATS and forum non conveniens are not just stable, independent concepts in federal litigation; with increasing frequency, ATS cases trigger forum non conveniens analyses. This tandem should not be surprising given the significant foreign components of most ATS suits. The plaintiff is always a foreign citizen, because he or she must be, and the defendant is rarely a U.S. citizen. Most importantly, the allegations at issue in the dispute almost always involve activity in a foreign country. This fact leads to the existence of evidence, including relevant documents and witnesses, abroad. ATS suits also involve claims that implicate international relations and require the application of foreign law. All of these foreign aspects to ATS disputes make them amenable to forum non conveniens analyses and, at least theoretically, particularly susceptible to dismissal under the doctrine.

Despite the apparently obvious forum non conveniens arguments that surface as a matter of course in such cases, no federal court yet has taken jurisdiction under the ATS and successfully dismissed the action on forum non conveniens grounds.<sup>106</sup> Perhaps sensing an opportunity to create a protected niche for human rights cases, plaintiffs in two recent lawsuits, as well as at least one commentator, have raised arguments that human rights disputes should never be dismissed under the doctrine. One of the most noteworthy contribu-

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105. Other possible avenues for obtaining jurisdiction over defendants in human rights cases include: (1) 28 U.S.C. § 1331 (2000), which grants federal courts jurisdiction over cases that arise under the U.S. Constitution and laws of the United States; (2) 28 U.S.C. § 1332 (2000), federal court diversity jurisdiction, triggered by the existence of transitory tort jurisdiction in state court and total diversity among the parties; (3) 28 U.S.C. § 1367 (1999), which governs supplemental jurisdiction; and (4) the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (1999)); see also STEPHENS & RATNER, *supra* note 7, at 31-39.

106. See STEPHENS & RATNER, *supra* note 7, at 151.

tions to this debate is the Second Circuit's recent decision in *Wiwa v. Royal Dutch Petroleum Co.*<sup>107</sup>

In *Wiwa*, plaintiffs alleged that they suffered human rights abuses at the hands of Nigerian authorities that acted in conspiracy with defendants, and they sought to establish jurisdiction and recover damages under the ATS.<sup>108</sup> After the district court dismissed plaintiffs' suit on forum non conveniens grounds,<sup>109</sup> the Second Circuit reviewed the propriety of that ruling. In the *Wiwa* decision, the Second Circuit focused its attention on the Torture Victim Protection Act (TVPA),<sup>110</sup> which supplemented the ATS in 1991 and created a federal cause of action in the case of torture or extrajudicial killing committed under the actual or apparent authority of a foreign nation.<sup>111</sup> The *Wiwa* court opined that neither the ATS nor the TVPA has "nullified, or even significantly diminished the doctrine of forum non conveniens." However, the court then proceeded to reverse the district court's dismissal because, *inter alia*, it had not given proper credit in the forum non conveniens analysis to the U.S. policy interest implicit in the TVPA favoring U.S. adjudication of certain human rights claims<sup>112</sup>—a policy interest never before recognized by a federal court.

The Second Circuit committed over three pages to a review of this purported policy,<sup>113</sup> and it reversed a ruling committed to the sound discretion of the trial court,<sup>114</sup> suggesting that it considered the existence of the policy relevant and highly persuasive. In particular, the court opined that the "new formulations of the [TVPA] convey the message that torture committed under the color of law of a foreign nation in

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107. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

108. See *id.* at 91-93.

109. See *id.* at 91-94.

110. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (1999)).

111. See *Wiwa*, 226 F.3d at 104-05; see also Torture Victim Protection Act of 1991.

112. See *Wiwa*, 226 F.3d at 108.

113. *Id.* at 103-06.

114. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981) (observing that a trial court's decision on a forum non conveniens motion "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference").

violation of international law is 'our business'" and that "[i]f in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the [ATS] only for as long as it takes to dismiss the case for forum non conveniens, we will have done little to enforce the standards of the law of nations."<sup>115</sup>

If the Second Circuit's decision in *Wiwa* is followed and applied in future cases, it could have a profound impact on federal court practice. In a surprising reworking of the traditional forum non conveniens analysis that appears to lack clear textual, legislative, doctrinal, or policy-based support, the Second Circuit allocated considerable weight to one side of the balance that courts use in evaluating forum non conveniens motions. The resulting federal approach to human rights disputes would significantly undermine the application of forum non conveniens in most human rights cases and would force individuals and companies with no meaningful connections to the United States into U.S. courts to face broad discovery, class actions, and the possibility of punitive damages.

As the number of ATS suits filed in the United States rises in the years to come, plaintiffs likely will continue to rebut what appears to be a logical and oftentimes sound jurisdictional defense in human rights cases by arguing for a dismantling of the traditional forum non conveniens doctrine. The following section evaluates the arguments presented by the *Wiwa* court and others seeking the explicit or implicit abolition of forum non conveniens in ATS lawsuits.

### III. ABOLISHING FORUM NON CONVENIENS IN ATS SUITS— EVALUATING THE ARGUMENTS

Three main arguments have been raised in support of the position that suits under the ATS should be immune from or

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115. *Wiwa*, 226 F.3d at 106. This pronouncement by the Second Circuit is in apparent direct conflict with its prior observation that the ATS and the TVPA have done nothing to nullify or even to diminish the forum non conveniens analysis, and it betrays what appears to be an underlying hostility of the court to the application of the doctrine in recent human rights cases. With the *Wiwa* decision and the *Texaco* litigation discussed later, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Second Circuit, within the past year, has failed to affirm two trial court dismissals of ATS/TVPA lawsuits on forum non conveniens grounds, despite the fact that those decisions were entrusted to the sound discretion of the trial court.

receive deferential treatment in forum non conveniens analyses: (1) the forum non conveniens doctrine conflicts with the language and legislative intent of the ATS; (2) application of the doctrine in human rights suits would nullify the ATS; and (3) U.S. interests warrant the abolition of forum non conveniens in ATS cases. As discussed below, more careful evaluation of these arguments suggests that they are unpersuasive and, in fact, may overlook important policy considerations supporting retention of the doctrine.

A. *Forum Non Conveniens Does Not Conflict with § 1350's Express Language or Legislative Intent*

An evaluation of the propriety of eliminating forum non conveniens in ATS disputes should begin at the most basic level—statutory language and legislative intent. There is a clear understanding in the federal courts that Congress legislates against a backdrop of common law principles.<sup>116</sup> The Supreme Court has given notice to lower federal courts that they “may take it as given that Congress has legislated with an expectation that the [common law] principle will apply except ‘when a statutory purpose to the contrary is evident.’”<sup>117</sup> According to the Court, “[i]n order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.”<sup>118</sup> One commentator has observed that “[w]hen there is no indication that Congress . . . intended to abolish a well-established common-law doctrine through the passage of a statute, the act will be interpreted in a way that will preserve the common-law doctrine.”<sup>119</sup> Those seeking to undermine forum non conveniens in ATS suits must clear this basic hurdle of statutory interpretation.

As discussed later in this section, the *Wiwa* court hinges its approach to forum non conveniens on the express language and legislative intent of the TVPA, which supplements the ATS. In contrast, others have cited directly the ATS’s wording

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116. See *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998).

117. *Id.* (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)).

118. *United States v. Texas*, 507 U.S. 529, 534 (1993).

119. 3 SUTHERLAND STATUTORY CONSTRUCTION § 61.03 (Norman Singer ed., 5th ed. 1992).

and purpose as supporting their arguments for abolishing the doctrine in human rights cases. In particular, recent litigation against Texaco, Inc. raised these issues.

Two lawsuits were filed against Texaco in the early 1990s that alleged similar facts and subsequently were consolidated for pretrial purposes: *Aguinda v. Texaco, Inc.* and *Ashanga v. Texaco, Inc.*<sup>120</sup> In both cases, plaintiffs alleged that Texaco acted negligently and recklessly as part of its oil exploration and production operations in Ecuador, causing property damage and personal injury to residents of Ecuador and Peru, as well as destruction to the regional environment.<sup>121</sup> Plaintiffs sought jurisdiction under several statutes, including the ATS; as a separate cause of action, plaintiffs also alleged that Texaco violated the ATS.<sup>122</sup>

During pretrial proceedings, Texaco filed a motion to dismiss, in part, on forum non conveniens grounds, which the trial court granted.<sup>123</sup> In their briefing on forum non conveniens, plaintiffs observed the “undeniable tension between a statute which grants a federal forum to plaintiffs and a common law doctrine which may deny them the same forum based upon the purported inconvenience of a defendant” and responded that the express language and legislative intent of the ATS rendered the doctrine of forum non conveniens inapplicable.<sup>124</sup> Relying on a federal court jurisdiction treatise, plain-

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120. See *Jota*, 157 F.3d at 155. The court identified *Aguinda* as Dkt. No. 93 Civ. 7527 and *Ashanga* as Dkt. No. 94 Civ. 9266.

121. See Complaint at 3, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93-7527), available at <http://members.freespeech.org/texacorainforest/case/index.html> (last visited Sept. 29, 2001) [hereinafter *Aguinda* Complaint]; *Jota*, 157 F.3d at 155-56. The caption of the order of the District Court granting Texaco's motion to dismiss spells plaintiff's name incorrectly as *Aquinda* rather than as *Aguinda*. See *Jota*, 157 F.3d at 157 n.5.

122. See *Aguinda* Complaint, *supra* note 121, at 3, 35; *Jota*, 157 F.3d at 159.

123. See *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996). The district court's dismissal was vacated by the Second Circuit Court of Appeals, and the case was remanded for a full weighing of forum non conveniens factors and a determination of whether Texaco would subject itself to the jurisdiction of the courts of Ecuador. See *Jota*, 157 F.3d at 155. On remand, the trial court has reopened the record on the pending forum non conveniens motion and appears poised to deny the motion because of changed political conditions in Ecuador. See *Aguinda v. Texaco, Inc.*, Nos. 93 Civ. 7527 (TSR), 94 Civ. 9266, 2000 WL 122143 (S.D.N.Y. Jan. 31, 2000).

124. Plaintiffs' Reply Brief to the Second Circuit Court of Appeals at 9, 11, *Jota*, 157 F.3d 153 [hereinafter Plaintiffs' Reply Brief]. Despite the *Aguinda*

tiffs argued that forum non conveniens "is inapplicable 'if the language and legislative purpose of a statute reveal a Congress-

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plaintiffs' broad attacks against forum non conveniens in ATS suits, they asked the court to create only a narrow rule whereby the doctrine would be inapplicable in ATS cases where the defendant is a U.S. citizen. *See id.* at 14. Plaintiffs' primary argument for establishing a distinction between U.S. and foreign defendants comes from Federalist No. 80, in which Alexander Hamilton states, in part, that

[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . As the denial or perversion of justice . . . 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 . . . .

THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The *Texaco* plaintiffs appear to interpret Hamilton's reference to "members" of the "Union" as denoting U.S. citizens, with the result being that federal courts must hear claims brought by aliens when the defendant is a U.S. citizen. This interpretation cannot be correct. Federalist No. 80 addresses federal-state relations and, in particular, the extent to which the federal judiciary should have cognizance over claims that might aggravate international relations. *See* THE FEDERALIST NO. 80, *supra*, at 476-77 (noting that "[s]o great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient" for national, rather than state, tribunals to hear all such cases); *see also* D'Amato, *supra* note 14, at 64-65. The "members" of the "Union" to which Hamilton refers are the individual states, not the citizens of the states. The broader concern facing the Founders during this time was not that the act of an individual U.S. citizen would draw the United States into war, but that a rogue decision by a state court might do so. *See supra* notes 15-28 and accompanying text. As James Madison observed, "[i]f we are to be one nation in any respect, it clearly ought to be in respect of other nations." THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961). In fact, no ATS research completed for this article has revealed any particular concern on the part of the Founders that cases involving American defendants were so important to national or international concerns that federal courts must hear such disputes.

Because the *Texaco* plaintiffs do not justify in a meaningful way a difference in treatment of ATS defendants based on nationality, I treat the distinction between U.S. and foreign defendants as immaterial to the general question of whether forum non conveniens should be abolished in ATS disputes. Of course, nationality of the defendant in any forum non conveniens analysis does and should factor into the overall balancing of considerations. *See* *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) ("It is, as Alice said, 'curiouser and curiouser' that defendant would seek to move the action from its home district to a forum more than 3,000 miles away."); *see also Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991); *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981).

sional intent to vest in the plaintiff an absolute power to choose a United States forum.’”<sup>125</sup>

### 1. *Concurrent Federal Jurisdiction Under the ATS*

The *Texaco* plaintiffs did not articulate in detail how the express language of the ATS preempts *forum non conveniens* except to observe, simply, that the ATS “has . . . express language giving plaintiffs access to a federal forum.”<sup>126</sup> Any proposition that the ATS mandates a U.S. forum in federal court is inconsistent with the language and history of the ATS and does not account for the difference between the ATS’s language and the wording of other jurisdictional grants that, arguably, are truly exclusive.

From the outset in 1789, the language of the ATS did not confer exclusive jurisdiction on federal courts.<sup>127</sup> In its initial wording, in fact, the phrase “concurrent with the courts of the several States”<sup>128</sup> was included in the ATS, making it clear that federal courts would share jurisdiction in such cases. Despite the absence of an explicit reference to concurrent jurisdiction in the statute today, it is widely accepted that states retain concurrent jurisdiction over all matters within the scope of the ATS, and aliens are free to pursue claims in state court for torts allegedly committed in violation of international law.<sup>129</sup>

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125. See Plaintiffs’ Reply Brief, *supra* note 124, at 12 (quoting JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 111.76 (3d ed. 2000)). Moore’s treatment of this topic arises in the context of specific venue provisions which, I explain later, do not exist in the ATS or the TVPA. See MOORE ET AL., *supra*, § 111.76.

126. See Plaintiffs’ Reply Brief, *supra* note 124, at 11; see also Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint at 18, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) [hereinafter Plaintiffs’ Memorandum of Law]. Plaintiffs also do not explain why Moore’s reference to a “United States forum” justifies their demand for a “federal forum.” See *supra* note 125.

127. See *Casto*, *supra* note 13, at 508-10; D’Amato, *supra* note 14, at 63; Randall, *Inquiries*, *supra* note 14, at 22-23 (observing that the non-exclusivity of federal jurisdiction in this area may have resulted from a compromise between Federalists, who preferred that all matters involving foreigners be decided at the federal level, and anti-Federalists, who would have rather states address such matters).

128. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1350 (1999)).

129. See *Alomang v. Freeport-McMoran, Inc.*, 718 So. 2d 971 (La. Ct. App. 1998) (reversing trial court’s dismissal on subject matter jurisdiction and

Other provisions of the Judiciary Act of 1789 did grant exclusive jurisdiction to federal courts,<sup>130</sup> indicating that the Act's drafters were aware of their ability to craft exclusive jurisdiction provisions and their intentional choice to avoid such jurisdiction in the case of the ATS.<sup>131</sup> As a result, the ATS allows, but does not mandate or require, suit in federal court, and its express language contains no suggestion that suits under the statute may not be dismissed in appropriate cases.

By way of comparison, some federal courts have held that *forum non conveniens* is precluded when plaintiffs sue under the Jones Act<sup>132</sup> for injury or death to a seaman.<sup>133</sup> In the cases that have barred *forum non conveniens* considerations,<sup>134</sup> courts have focused on the existence of a specific venue provision in the Jones Act, which makes the inapplica-

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venue grounds of a class action suit brought by Indonesian citizens alleging international human rights violations and recognizing subject matter jurisdiction for personal injury claims under Louisiana state law); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 205 n.39 (1997); Casto, *supra* note 13, at 508-09.

130. See *supra* note 33, listing various grants of exclusive jurisdiction in the Judiciary Act of 1789, including the exclusive grants to the federal courts for admiralty and maritime claims, as well as claims against consuls and vice-consuls.

131. Of course, "exclusive" in the context of the Judiciary Act of 1789 meant exclusive of state courts—the drafters were concerned with carving up the cognizance of the federal and state judiciaries and identifying points of overlap and exclusivity. Nevertheless, the fact that the ATS's express wording allows such cases to be brought in state court undermines the argument that ATS claims must be heard by federal courts under all circumstances and, for example, never be dismissed to a foreign forum.

132. See 46 U.S.C. app. § 688(a) (2000).

133. See, e.g., *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *Needham v. Phillips Petroleum Co. of Nor.*, 719 F.2d 1481, 1483 (10th Cir. 1983).

134. See *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699-700 (9th Cir. 1995) (observing that the Jones Act contains a "special provision[ ] mandating venue in the United States district courts"). Cf. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 505 (1947) (explaining that in cases under the Federal Employer's Liability Act (FELA), "plaintiff's choice of forum cannot be defeated on the basis of *forum non conveniens* . . . because the special venue act under which [FELA] cases are brought was believed to require it"); *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 54 (1941) (noting in the related field of suits under FELA that when the statute was enacted "it filled the entire field of venue in federal courts," and that "[a] privilege of venue



bility of the doctrine at least arguable.<sup>135</sup> In Jones Act suits, “[j]urisdiction . . . shall be under the court of the district in which the defendant employer resides or in which his principal office is located.”<sup>136</sup> Congress’s inclusion of the specific districts where Jones Act suits may be brought supports the notion that it intended to eliminate the possibility that such suits would be brought anywhere else—either in another judicial district in the United States or outside the country.<sup>137</sup>

Nevertheless, the forum non conveniens doctrine is so entrenched in federal practice that courts have resisted insulating even federal statutes with specific venue provisions from a forum non conveniens analysis. In fact, the doctrine has been held inapplicable to actions under federal statutes only where there is a specific venue provision and some indication “that Congress implicitly spoke to, and rejected, the application of [the] forum non conveniens doctrine to a suit thereunder.”<sup>138</sup> In undertaking this evaluation, federal courts have found no such congressional intent in suits brought under the United States Copyright Act,<sup>139</sup> U.S. bankruptcy laws,<sup>140</sup> U.S. securities laws,<sup>141</sup> the Lanham Act,<sup>142</sup> the Racketeer Influenced Corrupt Organization Act (RICO),<sup>143</sup> and the Warsaw Convention.<sup>144</sup>

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granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or experience”).

135. Several federal circuits have disagreed with the proposition that Jones Act suits are insulated from forum non conveniens analysis, *see, e.g., In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987), *vacated sub nom. on other grounds*, *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *De Mateos v. Texaco, Inc.*, 562 F.2d 895, 903 (3d Cir. 1977); *Gazis v. Latsis*, 729 F. Supp. 979, 985 (S.D.N.Y. 1990).

136. 46 U.S.C. app. § 688(a) (2000).

137. *See Creative Tech., Ltd.*, 61 F.3d at 699-700.

138. *Id.* at 700 (quoting *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983)); *see also MOORE, supra* note 125, § 111.76.

139. *See Murray v. British Broad. Corp.*, 81 F.3d 287, 290-91 (2d Cir. 1996); *Creative Tech., Ltd.*, 61 F.3d at 699-700.

140. *See Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 829-31 (5th Cir. 1993).

141. *See Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 947-50 (1st Cir. 1991).

142. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977).

143. *See Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (*per curiam*).

In each of these areas, federal courts have dismissed suits on forum non conveniens grounds even though the statutes involved contained provisions specifying the location of proper venue.

Even if specific venue provisions somehow preempt forum non conveniens analyses in general, the ATS speaks only to a general grant of jurisdiction and is silent as to venue,<sup>145</sup> stating only that “district courts shall have original jurisdiction” where the statutory requirements are met.<sup>146</sup> Since 1789, Congress has made no attempt to narrow or expand venue in ATS suits, choosing only to vest in the federal courts the power to hear such disputes if they should be filed anywhere in federal district court. A reasonable construction of the ATS’s text does not appear to reflect a congressional desire to vest such jurisdiction in the federal courts exclusively and absolutely, particularly in the absence of a specific venue provision.

In this way, the ATS is no different from other jurisdictional grants that provide but do not mandate a federal forum. For example, the federal diversity statute states that “district courts shall have original jurisdiction” where the amount in controversy is sufficient and residential diversity exists among the litigants.<sup>147</sup> Under federal question jurisdiction, “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>148</sup> Like the ATS, neither the federal diversity nor the federal question statute contains a venue provision specifying the federal districts in which suit may be brought, and suits relying on the existence of diversity or a federal question as

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144. See *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1162 (5th Cir. 1987), *vacated sub nom. on other grounds*, Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989).

145. Venue in an ATS suit properly is established under 28 U.S.C. § 1391(b), which allows non-diversity suits to be brought in: “(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.” 28 U.S.C. § 1391(b) (2001).

146. 28 U.S.C. § 1350 (1999).

147. 28 U.S.C. § 1332(a) (2000).

148. 28 U.S.C. § 1331 (2000).

the basis for jurisdiction clearly are subject to dismissal on forum non conveniens grounds in appropriate circumstances.<sup>149</sup>

In its analysis of whether a different federal jurisdictional statute precluded a possible dismissal under forum non conveniens, the Eleventh Circuit Court of Appeals observed that "if federal law applies to a case in which a forum non conveniens dismissal has been sought, the court must inquire further to determine if Congress has entrusted the federal courts with a special duty to implement that federal law, a duty mandating that the case should be heard."<sup>150</sup> In the case of the ATS, no part of the statute states or suggests that Congress intended to mandate federal court jurisdiction, requiring that federal courts hear such cases under all circumstances. Had Congress intended such an extreme result, it could have amended the ATS at any point in its 212 year history to insert a specific venue provision or some other clear statement of exclusivity.

## 2. *Wiwa's Textual Approach to the TVPA*

The Second Circuit in *Wiwa* bases its recognition of a "policy favoring receptivity" by U.S. courts of human rights suits under the ATS on the "statutory wording" of the TVPA.<sup>151</sup> The *Wiwa* court relies on the TVPA in its reasoning although plaintiffs in that lawsuit did not plead a violation of the TVPA.<sup>152</sup> Because the *Wiwa* lawsuit was an ATS case,<sup>153</sup> the

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149. As the Supreme Court observed in *Gilbert*, a diversity case, "[i]t is conceded that the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York and empower that court to entertain it. But that does not settle the question whether it must do so." *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 504 (1947).

150. *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983) (rejecting plaintiff's argument that the Carriage of Goods by Sea Act excludes forum non conveniens defenses); *see also Pioneer Prop., Inc. v. Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983) (concluding that "[w]here the purposes of legislation, together with special venue provisions, indicate [legislative intent to confer on plaintiff broad power over choice of forum,] the court should not override the legislative purpose by resort to its discretionary powers under forum non conveniens").

151. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000).

152. *See* First Amended Complaint for Summary Execution; Crimes Against Humanity; Torture; Cruel, Inhuman or Degrading Treatment; Arbitrary Arrest and Detention; Violation of the Rights to Life, Liberty and Security of Person and Peaceful Assembly and Association; Wrongful Death;

court's analysis of the applicability of *forum non conveniens* would have been more persuasive had it addressed the ATS, not the TVPA. By focusing on the TVPA, the *Wiwa* court not only focused on a statute not at issue in the lawsuit, but also relied on a statutory scheme very different from the ATS, thereby weakening the court's reasoning.

In particular, the TVPA is not a jurisdictional grant; it only creates a cause of action. The ATS is also substantively broader than the TVPA, applying to any tort committed in violation of international law by any person, while the TVPA extends only to two acts—torture and extrajudicial killing—and only when the defendant acted “under actual or apparent authority, or color of law, of any foreign nation.”<sup>154</sup> In addition, the ATS limits plaintiffs to “aliens,” while the TVPA does not restrict the nationality of plaintiffs.<sup>155</sup> The TVPA also contains an exhaustion of remedies provision, which is absent from the ATS.<sup>156</sup> While related, the TVPA and ATS are very different statutory provisions, and the *Wiwa* court's reliance on the TVPA in the context of an ATS dispute, without a clear explanation of the TVPA's relevance, is questionable.

Regardless of the wisdom of its approach, the Second Circuit in *Wiwa* identified two textual changes between the ATS and TVPA that supposedly justified a new approach to *forum non conveniens* in human rights disputes: (1) Congress moved from expressly addressing jurisdiction in the ATS to legislating a federal cause of action in the TVPA; and (2) While the ATS concerns itself with a tort “committed in viola-

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Assault and Battery; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Negligence; and Violations of the Racketeer Influenced and Corrupt Organizations Act at 19-20, *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (1997) (KMW) (HBP).

153. See *id.* (noting that plaintiffs' claims arise under the ATS, among other sources of law, but with no reference to the TVPA).

154. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (1999)); see also 28 U.S.C. § 1350 (1993).

155. See Torture Victim Protection Act § 2(a); see also *Wiwa*, 226 F.3d at 105.

156. See Torture Victim Protection Act § 2(b). But see S. REP. NO. 102-249, at 9-10 (1991) (noting that, “as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually *prima facie* evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred”).

tion of the law of nations," the TVPA creates a substantive right to damages under U.S. law.<sup>157</sup> Neither of these factors justifies the court's novel interpretation of the ATS.

Although the TVPA does create a cause of action by its wording, most federal courts since *Filartiga* have recognized that same cause of action under the ATS.<sup>158</sup> Indeed, the House and Senate Judiciary Committee reports considering the TVPA indicate that the Act was intended to "establish an unambiguous . . . basis for a cause of action that has been successfully maintained under" the ATS.<sup>159</sup> This point also was observed by Senator Specter, the TVPA's sponsor, on the Senate floor when he noted that "a cause of action for torture in a foreign country has existed under 28 U.S.C. § 1350 and was recognized under *Filartiga* in 1980."<sup>160</sup> While there may have been valid reasons for passing the TVPA—which are discussed more in the following section—that litigants lacked a statutory cause of action for pursuing human rights claims in U.S. court prior to the TVPA's enactment was not one of those reasons. The TVPA's focus on substantive rights is not a novel departure from established ATS case law.

The wording change from the ATS's discussion of a violation of the law of nations to the TVPA's grant of damages under U.S. law is, once again, a development more of form than substance. To the extent the ATS provides a private right of action, as found by the *Filartiga* court, the same damages now available under the TVPA have been available in U.S. court under the ATS since 1980.<sup>161</sup> Indeed, it has been argued

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157. See *Wiwa*, 226 F.3d at 105.

158. See STEPHENS & RATNER, *supra* note 7, at 7-8. See generally *id.* at 2, 9-12 (discussing *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)).

159. S. REP. NO. 102-249, at 4; H.R. REP. NO. 102-367, at 3 (1991).

160. 138 CONG. REC. S4,176, at S4,177 (1992) (statement of Sen. Specter).

161. International law has been seen as a part of U.S. law since at least the Supreme Court's decision in *The Paquete Habana*, 175 U.S. 677 (1900). However, the notion that customary international law forms a part of this country's post-*Erie* federal common law has been challenged recently by Professors Bradley and Goldsmith. See Curtis A. Bradley & Jack C. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). While this area of law may be unsettled now, others have criticized the position of Professors Bradley and Goldsmith and their approach to the domestic legal status of customary international law. See, e.g., Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L.

that the TVPA, if anything, represents a congressional narrowing of international human rights incorporated into federal law, given the breadth of the *Filartiga* decision and the limited focus of the TVPA on only two specific torts in violation of the law of nations: torture and extrajudicial killing.<sup>162</sup> While creation of an explicit federal statutory cause of action for torture and extrajudicial killing certainly makes clear that Congress concurred with the result in *Filartiga*, the additional language of the TVPA overlaps to a great extent with the ATS and appears largely symbolic.

While the *Wiwa* court's reliance on textual changes between the TVPA and ATS does not further its argument, more careful scrutiny of the text of the TVPA may undercut the court's conclusion. The TVPA contains a provision requiring that plaintiffs suing under the Act must have exhausted available and adequate remedies in the country where the alleged abuse took place.<sup>163</sup> This exhaustion provision can be seen as analogous to a narrow, limited version of forum non conveniens that reflects a clear congressional preference for litigating human rights suits outside the United States. Although the Senate Judiciary Committee considering the TVPA believed that "in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred,"<sup>164</sup> defendants may nevertheless "rais[e] nonexhaustion of remedies as an affirmative de-

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REV. 463 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

162. See Curtis A. Bradley & Jack C. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 363-68 (1997). The TVPA further restricts the *Filartiga* approach by including an exhaustion provision and a statute of limitations, as well as requiring that the prohibited acts be committed under color of foreign law. See Torture Victim Protection Act of 1991, §§ 2(a)-(c), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (1999)); see also 28 U.S.C. § 1350 (1993); Bradley & Goldsmith, *supra*, at 365. The TVPA does allow for suit by a U.S. citizen, which is not recognized under the ATS; however, U.S. citizens are almost never plaintiffs in international human rights disputes.

163. Torture Victim Protection Act of 1991, § 2(b).

164. S. REP. NO. 102-249, at 9-10; see also H.R. REP. NO. 102-367, at 5.

fense.”<sup>165</sup> If the defendant can demonstrate that remedies existed in the local country that the claimant did not use, “the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.”<sup>166</sup>

The House Judiciary Committee observed that the exhaustion provision “ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.”<sup>167</sup> The purpose and operation of the exhaustion provision as voiced by the House and Senate Judiciary Committees appear largely to mirror those of *forum non conveniens*; accordingly, those seeking to undermine *forum non conveniens* in this context face a heightened burden of justification.

Although similar to one another in some respects, the TVPA’s exhaustion provision does not override or replace the doctrine of *forum non conveniens*.<sup>168</sup> Apart from the absence of any textual or legislative history supporting such a replacement, the exhaustion provision in the TVPA is not as broad as *forum non conveniens*. In particular, even if a TVPA plaintiff has exhausted local remedies in the country where the alleged abuse took place, a third country might still provide the most appropriate and convenient forum for litigating the dispute.<sup>169</sup> In such a case, the TVPA’s exhaustion provision

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165. S. REP. NO. 102-249, at 10.

166. *Id.*

167. H.R. REP. NO. 102-367, at 5.

168. While there is no support for the proposition that the TVPA’s exhaustion provision should trump the common law doctrine of *forum non conveniens*, if it were held to do so, such a ruling should not impact the consideration of how *forum non conveniens* should be applied in ATS suits, absent the amendment of the ATS to include an exhaustion provision similar to the TVPA’s.

169. This, in fact, was the very question confronted by the federal courts in the *Wiwa* litigation. Although the alleged abuse occurred in Nigeria, defendants sought dismissal on *forum non conveniens* grounds to England, the home state of incorporation for Shell Transport and Trading Co., P.L.C., one of the named defendants. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92, 99-103 (2d Cir. 2000).

should not be interpreted to block consideration of a forum non conveniens motion seeking dismissal to a third country.

Even if the *Wiwa* court's reliance on the TVPA in an ATS lawsuit is appropriate, its arguments are unpersuasive and fail to address the textual differences between the provisions, including the relevance of the TVPA's exhaustion language. The court appears to be straining to read into the evolution of § 1350's text a "more direct recognition that the interests of the United States are involved" in human rights cases.<sup>170</sup> This strained interpretation is necessary for the *Wiwa* court because the most direct recognition of the U.S. interests it struggles to locate—an explicit statutory identification of such interests—conspicuously is absent from both the ATS and the TVPA.

### 3. Congressional Policy Behind the ATS and the TVPA

Because the express language of § 1350 does not justify the elimination of or, in fact, any modification to forum non conveniens in human rights cases, the analysis could end there.<sup>171</sup> Although an inquiry into legislative history might be gratuitous in this case, courts do address such history when interpreting some statutes,<sup>172</sup> and those advocating the curtailment of forum non conveniens in human rights cases—including

170. *Id.* at 105.

171. See *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law) . . ."); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . ."); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."); *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885) ("[T]he rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation.")

172. See, e.g., *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the Statute, is available, there certainly can be no 'rule of law' which



ing the *Wiwa* court—have relied on § 1350's history; accordingly, I address legislative intent below.

In the *Texaco* litigation, the plaintiffs contended that the ATS's legislative intent supported their position that forum non conveniens should not apply to such disputes.<sup>173</sup> Any argument that relies heavily on the underlying purpose or legislative history of the ATS faces an uphill battle, given the lack of any actual legislative history for the Judiciary Act of 1789 and disagreement among scholars about the true purpose of the ATS.<sup>174</sup> Nevertheless, the *Texaco* plaintiffs made two main arguments about the Act's legislative intent in support of their position.

They argued first that the Second Circuit had "instructed that the central purpose of the ATS was to 'open[ ] the federal courts[ ]' to aliens' cognizable claims."<sup>175</sup> This is undoubtedly true, but it does not advance plaintiffs' theory. Section 9 of the Judiciary Act of 1789 granted federal courts concurrent jurisdiction over suits by aliens alleging tort violations of U.S. treaty or international law.<sup>176</sup> However, the Second Circuit's common sense statement about the purpose of the ATS does

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forbids its use, however clear the words may appear on 'superficial examination.'" (citation omitted).

173. See Plaintiffs' Memorandum of Law, *supra* note 126, at 16-19; Plaintiffs' Reply Brief, *supra* note 124, at 12-14.

174. Competing schools of thought certainly exist with respect to the history and original purpose of the ATS. In addition to the more classical version reviewed in Part II (and outlined in more detail by other authors, *see generally* Casto, *supra* note 13; Randall, *Inquiries*, *supra* note 14); compare Swecney, *supra* note 14 (positing that § 9 of the Judiciary Act of 1789 was intended to cover jurisdiction in a narrow category of prize cases, where the legality of capture was not at issue and the case was one in which an alien seaman sued solely for a tort) with Burley, *supra* note 14 (arguing that jurisdiction under the ATS originally developed from the Framers' understanding of a general obligation to redress certain violations of international law, regardless of where the violations occurred or who the victims were, and this obligation flowed not to individual states, but to the community of civilized nations as a whole).

175. Plaintiffs' Reply Brief, *supra* note 124, at 11 (quoting *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)); Plaintiffs' Memorandum of Law, *supra* note 126, at 16 (providing more of the *Filartiga* quote: The "central purpose of the Alien Tort Claims Act [was] to 'open[ ] the federal courts [to aliens] for adjudication of . . . rights . . . recognized by international law'").

176. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1350 (1999)).

not address whether federal courts must maintain jurisdiction in all such cases—which was the particular issue concerning the Texaco plaintiffs. Further, the Second Circuit's broad interpretation of the ATS in *Filartiga* cannot be used to support the notion that forum non conveniens should be abolished in such cases because in *Filartiga* the Second Circuit explicitly ruled that the "critical question" of forum non conveniens should be considered by the trial court on remand.<sup>177</sup>

The *Texaco* plaintiffs also contended that the legislative history of the TVPA supported their position on ATS jurisdiction. In particular, they cited comments made by Senators Simpson and Grassley on November 26, 1991, relating to "the 'overriding problem' . . . that [the TVPA] provide[s] a federal forum for all injured aliens and thus render[s] unavailable the forum non conveniens defense."<sup>178</sup> Presumably, because Congress allegedly designed the TVPA to negate forum non conveniens, a similar congressional intent should be read into its predecessor, the ATS.

The Second Circuit in *Wiwa* also relied on the TVPA's legislative history in seeking to justify its novel interpretation of forum non conveniens in ATS cases. In particular, the court cited the U.S. Congress in observing that "universal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong."<sup>179</sup> According to the *Wiwa* court, this statement expresses "a policy of U.S. law favoring the adjudication of such suits in U.S. courts."<sup>180</sup> The Second Circuit then opined that if U.S. courts take jurisdiction over human rights cases only long enough to dismiss them on forum non conveniens grounds, "we will have done little to enforce the

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177. *Filartiga*, 630 F.2d at 890 ("[W]e do not reach the critical question of forum non conveniens, since it was not considered below. In closing, however, we note that the foreign relations implications of this and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the fifty states.").

178. Plaintiffs' Reply Brief, *supra* note 124, at 13; Plaintiffs' Memorandum of Law, *supra* note 126, at 19.

179. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

180. *Id.*

standards of the law of nations.”<sup>181</sup> Recourse to the TVPA’s legislative history to justify curtailment of forum non conveniens in ATS litigation proves unconvincing.

In their pleadings, the *Texaco* plaintiffs obscured the full, true statements of Senators Simpson and Grassley. Nowhere in their minority statement do the senators state, as the *Texaco* plaintiffs imply they do, that the TVPA would provide a federal forum for all injured aliens, thereby making forum non conveniens unavailable.<sup>182</sup> In fact, nothing in the majority or minority congressional Judiciary Committee reports specifically addresses the applicability of forum non conveniens to TVPA suits. Senators Simpson and Grassley do state that “[t]he principle behind the common law doctrine of forum non conveniens, which prevents parties from having their dispute adjudicated in a forum with which they have no connection, describes our overriding problem with [the TVPA].”<sup>183</sup> The senators went on to note that “the United States is not the appropriate forum for a foreign national to hold a foreign defendant to answer for action which occurred far from the United States.”<sup>184</sup> Senators Simpson and Grassley do not appear to have stated that the TVPA will preclude forum non conveniens considerations, but simply that concerns underlying the doctrine are the very concerns they had with the TVPA.

The argument from the *Texaco* and *Wiwa* litigations that the TVPA precludes or even disfavors forum non conveniens considerations is inconsistent with the clear legislative history of the TVPA.<sup>185</sup> In particular, the *Texaco* plaintiffs and the *Wiwa* court appear to have overlooked important general congressional debates on the statute.<sup>186</sup> On Tuesday, March 3,

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181. *Id.*

182. See Plaintiffs’ Reply Brief, *supra* note 124, at 13; Plaintiffs’ Memorandum of Law, *supra* note 126, at 19.

183. S. REP. NO. 102-249, at 14 (1991) (minority views of Sens. Simpson and Grassley).

184. *Id.*

185. The *Texaco* plaintiffs are not alone in their failure to credit the explicit legislative intent behind the TVPA. See *infra* notes 239-65 and accompanying text for a discussion of Professor Boyd’s interpretation of the role of forum non conveniens in TVPA disputes.

186. Within the “last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history,” *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring), general floor debates appear to be the most scorned. See Schweg-

1992, Senator Grassley—who later co-authored the minority opinion in the Senate Judiciary Committee Report—engaged in a colloquy with Senator Specter about the purpose and effect of the legislation.<sup>187</sup> Senator Grassley began his questioning by asking Senator Specter about the wisdom of providing federal court jurisdiction in cases that lack meaningful connections to the United States.<sup>188</sup> Later, Senator Grassley asked the following questions: “Will courts retain their discretion to decline jurisdiction over lawsuits under [the TVPA]? Will they be able to dismiss such suits in favor of a more convenient forum in another country?”<sup>189</sup> Senator Specter—the co-sponsor of the TVPA—responded unequivocally: “The answer to both questions is yes. Nothing in this legislation is intended to or does affect the doctrine of *forum non conveniens*, which remains applicable to any lawsuit brought under this act.”<sup>190</sup> Senator Simpson—who joined Senator Grassley in authoring the minority opinion in the Senate Judiciary Committee Report—later expressed his understanding of the effect of the TVPA on the application of *forum non conveniens*:

My primary concern was with the possibility that foreign nationals could come to our courts and file lawsuits against other foreign nationals when neither party has any real connection to the United States. If U.S. courts are free to exercise their discretion and refuse to entertain these suits under the doctrine of

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mann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) (opining that “to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its most important functions”). Nevertheless, House and Senate Judiciary Committee reports do not speak directly to the application of *forum non conveniens* in TVPA cases—though they certainly do not suggest the doctrine’s abolition. Accordingly, and to the extent recourse to legislative history is a valuable exercise at all, general floor debates are the next most helpful source of information. In preparing this article, no research has uncovered any legislative history for the TVPA expressly or implicitly contradicting the comments by Senator Specter, the Act’s sponsor, discussed in this section.

187. See 138 CONG. REC. S4,176-78 (statements of Sens. Grassley and Specter).

188. See *id.* at S2,667 (statement of Sen. Grassley).

189. *Id.* at S4,177.

190. *Id.* (statement of Sen. Specter) (emphasis added).

forum [non conveniens], as the distinguished Senator from Pennsylvania has indicated, then that concern has been addressed.<sup>191</sup>

The intended effect of the TVPA on the doctrine of forum non conveniens, as understood by the congressmen who introduced and voted on the TVPA legislation, could not be clearer: Forum non conveniens was understood to be fully applicable to TVPA suits, and the doctrine was intended to be unaffected by passage of the Act.

The arguments advanced by the *Texaco* plaintiffs and the *Wiwa* court relating to § 1350's legislative intent do not take account of the great weight of scholarship, research, and existing legislative history. As addressed in more detail in Part II, it appears reasonable to conclude that the drafters of the Judiciary Act of 1789, motivated by a concern that forcing aliens into state courts might antagonize international relations, intended to create the option for aliens to sue in federal court for torts committed in violation of the law of nations. Accordingly, § 9 of the Judiciary Act of 1789 was just one part of a broader attempt to give the federal government at least concurrent jurisdiction over matters potentially affecting foreign relations. But even given these concerns, the drafters of § 9 did not vest exclusive jurisdiction over such suits in the federal courts, signaling their vision that some suits cognizable under § 9 would be pursued in jurisdictions other than federal court.

With respect to the TVPA, contrary to the assertions of the *Wiwa* court, congressional enactment of the statute was designed to accomplish a variety of goals, none of which involved establishing a U.S. forum or cause of action that would not be subject to traditional forum non conveniens arguments.<sup>192</sup>

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191. *Id.* (statement of Sen. Simpson). The TVPA does not require that defendants be "foreign nationals," only that they act under actual or apparent authority of a foreign nation, and Senator Specter's explanation that nothing in the TVPA was intended to or did affect the application of the doctrine of forum non conveniens was not limited to the subset of TVPA cases involving foreign defendants (or, for that matter, cases involving foreign plaintiffs). *See id.* at S4,176 (statement of Sen. Specter).

192. The clear language of the TVPA suggests that it is not a jurisdictional grant. Instead, it provides only a cause of action for any individual subject to torture or extrajudicial killing committed by a person acting under actual or apparent authority, or under color of law, of any foreign nation. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992)

Legislative history of the TVPA reflects a congressional desire to “provide [an explicit] means of civil redress to victims of torture,”<sup>193</sup> thereby fulfilling what was considered to be a U.S. obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).<sup>194</sup> Congress also indicated that it was seeking to add to the remedies available under the ATS and to the class of plaintiffs that might avail itself of those remedies, recognizing the need to provide a “clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.”<sup>195</sup>

Perhaps most of all, in enacting the TVPA, Congress was responding specifically to Judge Bork’s concurring opinion in *Tel-Oren*, in which he “questioned the existence of a private right of action under [the ATS], reasoning that separation of powers principles required an explicit—and preferably contemporary—grant by Congress of a private right of action before the U.S. courts could consider cases likely to impact on U.S. foreign relations.”<sup>196</sup> According to both Judiciary Committees, “[t]he TVPA would provide such a grant.”<sup>197</sup>

The known legislative history of § 1350 does not support, and even undercuts, the Texaco plaintiffs’ arguments and the conclusions of the *Wiwa* court. Most strikingly, in its discussion of the purpose of the TVPA, the *Wiwa* court does not account for the clear legislative history of the TVPA, which rejects any possibility that forum non conveniens would be affected in any way by the Act.

### B. *Forum Non Conveniens Does Not Nullify the ATS*

Other arguments have been presented suggesting that retaining forum non conveniens in ATS cases would nullify the Act because the balance of convenience factors would be

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(codified as amended at 28 U.S.C. § 1350 (1999)). *But see* RATNER & ABRAMS, *supra* note 129, at 207 n.52 (observing that it is unclear whether the TVPA “is jurisdictional or merely provides a cause of action” that gives rise to ATS or federal question jurisdiction).

193. S. REP. NO. 102-249, at 3 (1991); H.R. REP. NO. 102-367, at 3 (1991).

194. *See* S. REP. NO. 102-249, at 3; H.R. REP. NO. 102-367, at 3.

195. H.R. REP. NO. 102-367, at 3.

196. S. REP. NO. 102-249, at 4-5; H.R. REP. NO. 102-367, at 4.

197. S. REP. NO. 102-249, at 5; H.R. REP. NO. 102-367, at 4.

“heavily weighted against foreign plaintiffs.”<sup>198</sup> It has been argued that this is of particular concern because forum non conveniens dismissals would “undermin[e] the federal statutory scheme which encourages aliens to seek civil redress in U.S. courts for wrongs occurring on foreign soil.”<sup>199</sup> Most recently, the *Wiwa* court hinted at the problem of nullification when it observed that U.S. courts would do little to enforce international law standards if they were to take jurisdiction over ATS cases only long enough to dismiss them on forum non conveniens grounds.<sup>200</sup>

Even without a substantive analysis of this argument, it appears clear that the existence of this doctrine as a tool for use by defendants in ATS suits will not result in such cases being thrown out of federal court *en masse* on forum non conveniens grounds. Since the modern era of litigation under the ATS began over twenty years ago with *Filartiga*, scores of cases have been filed seeking jurisdiction under the ATS;<sup>201</sup> however, only two trial courts have dismissed an ATS lawsuit on forum non conveniens grounds<sup>202</sup>—the *Wiwa* decision was reversed

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198. Kathryn L. Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 48 (1998). In the recent litigation brought by Holocaust survivors and the heirs of Holocaust victims, plaintiffs also raised this argument in response to defendants' forum non conveniens motion. See Plaintiff's Mem. of Law in Opposition to Defendants' Motion to Dismiss on Forum Non Conveniens Grounds; Motion to Dismiss on Abstention Grounds; and Motion in the Alternative to Stay All Proceedings in These Cases at 3 n.7, *In re Holocaust Victim Assets Litig.*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000) (No. 96-4849). These suits were filed in the Eastern District of New York and were consolidated for pretrial purposes in *In re Holocaust Victim Assets Litig.*, No. 96-4849 (E.D.N.Y.) (consolidated with No. 96-5161 and No. 97-461). For a more detailed discussion of these proceedings, see *infra* notes 377-92 and accompanying text. The author was an associate at Wilmer, Cutler & Pickering from 1996 to 1998 and assisted in the representation of the defendants in *In re Holocaust Victim Assets*.

199. Boyd, *supra* note 198, at 48. Reflecting what appears to be the initial purpose of the statute, the ATS does not require that the alleged tort in violation of U.S. treaty or international law have occurred on “foreign soil.” This is also true of the TVPA.

200. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

201. For a summary compilation of some of the more important cases filed under the ATS, see STEPHENS & RATNER, *supra* note 7, at 239-44.

202. See *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996); see also *Wiwa*, 226 F.3d at 88 (discussing the District Court's decision to dismiss).

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on appeal,<sup>203</sup> and the *Texaco* decision was remanded for reconsideration by the trial court.<sup>204</sup> Although the feared banishment of ATS cases, as a broad class, from federal court has not materialized, the argument continues to be made that forum non conveniens will eliminate most ATS cases from the federal docket. A more critical consideration of the issue suggests that this concern is unwarranted.

Forum non conveniens requires a fact-specific, case-by-case analysis that does not lend itself well to generalized predictions about how the doctrine might play out in broad categories of cases. The doctrine requires that trial courts inquire into the existence of an adequate alternative forum for litigation outside the United States, as well as whether various private and public interest factors justify dismissal.<sup>205</sup> While certain documentary evidence in traditional human rights disputes may be located abroad, other tangible evidence very well could be in the plaintiff's possession (or possibly the defendant's) and located in the United States.<sup>206</sup> Where multiple plaintiffs sue a defendant under the ATS, the fact that each plaintiff will provide oral testimony and is located in the United States also should weigh against dismissal. In addition, U.S. courts might choose to use deposition testimony if witnesses cannot travel from a foreign country.<sup>207</sup>

In what appears to be a recent trend, corporations frequently are facing suit under the ATS.<sup>208</sup> Where the defen-

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203. See *Wiwa*, 226 F.3d at 88.

204. See *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

205. See *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft v. Reyno*, 454 U.S. 235, 241 n.6, 255 n.22 (1981).

206. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (noting that documents relevant to plaintiffs' claims might be located in the National Archives in Washington, D.C.). Even where private interest factors might favor dismissal in a particular case, some courts faced with a suit brought by individuals against a large corporation have determined that the corporation is situated better to bear the costs associated with moving documents and witnesses to the United States. See, e.g., *Wiwa*, 226 F.3d at 107.

207. *Bodner*, 114 F. Supp. 2d at 132.

208. See, e.g., *Aguinda v. Texaco, Inc.* and *Ashanga v. Texaco, Inc.*, discussed *supra* notes 120-25 and accompanying text; *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329 (JFK), 2000 WL 1225789 (S.D.N.Y. Aug. 28, 2000); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997). While application of the ATS to corporate activities may appear to be a recent trend, one of the earliest discussions of the ATS occurred in this context. In an opinion in 1907, the U.S. Attorney General expressed his belief that the ATS pro-



dant is a U.S. company—as is permissible under the ATS—significant documentary evidence likely will be located in the United States.<sup>209</sup> Relevant corporate witnesses also may be present in the United States. Even when the defendant company is not based in the United States, it may have U.S. offices,<sup>210</sup> and it is possible that evidence relating to the ATS plaintiff's claims could be found in the United States.

In the area of public interest factors, it is true that dismissal would always relieve the congestion of federal courts and reduce the burden on U.S. juries; however, this is so in each case where *forum non conveniens* is raised as a defense, not just in ATS disputes. Because the *forum non conveniens* doctrine requires weighing of various private and public interest factors, concerns about juries and dockets should not trump other considerations.<sup>211</sup> However, where other factors point toward dismissal as a preferable outcome, it might be appropriate, for example, to dismiss an extremely complex ATS dispute scheduled for a jury trial in a heavily congested federal court.

Even if all of the relevant private and public interest factors point toward dismissal in an ATS case—the usual human rights scenario, according to some<sup>212</sup>—federal courts will not dismiss unless an adequate alternative forum exists outside the United States.<sup>213</sup> The adequacy prong has proven to be a sig-

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vided jurisdiction in the United States for Mexican nationals to sue a U.S. company for its alleged modification to the boundary between Mexico and the United States. See *Mexican Boundary-Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250 (1907).

209. See *Jota*, 157 F.3d at 159 (recounting, but expressing no view on, plaintiffs' argument that, because they challenged Texaco's conduct in the United States, documents and witnesses would be more accessible in a U.S. court).

210. See *Bodner*, 114 F. Supp. 2d at 132.

211. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 249-50 (1981) (observing that "[i]f central emphasis was placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable").

212. See *Boyd*, *supra* note 198, at 48 ("[D]iscretionary dismissal pursuant to *forum non conveniens* [is] likely to occur sooner, rather than later, in human rights cases.").

213. See *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 506-07 (1947); *Piper Aircraft*, 454 U.S. at 254 n.22.

nificant impediment to many defendants seeking dismissal under the doctrine.

In undertaking this analysis, federal courts have been instructed by the Supreme Court that an alternative forum generally will be found adequate when the defendant is amenable to process in the other jurisdiction.<sup>214</sup> In general, courts should not give “conclusive or even substantial weight” to the possibility that substantive law in the alternative forum would be less favorable to the plaintiff,<sup>215</sup> unless the alternative forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>216</sup> The Court illustrated this point by noting that dismissal would not be appropriate, for example, where the alternative forum does not permit litigation of the subject matter of the dispute.<sup>217</sup>

Opponents of forum non conveniens have argued that “[d]efendants in human rights cases have a reasonably good chance to show that an adequate alternative forum exists, even though often the country where the alleged abuses took place will not be an adequate forum due to a corrupt legal system or the presence of forces of violence which may pose a threat to the plaintiff.”<sup>218</sup> This assertion is inconsistent with numerous federal decisions in a wide range of cases in which forum non conveniens motions were denied because adequate alternative fora were lacking.<sup>219</sup>

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214. *Piper Aircraft*, 454 U.S. at 254 n.22.

215. *Id.* at 247.

216. *Id.* at 254.

217. *See id.* at 254 n.22.

218. Boyd, *supra* note 198, at 62. Ironically, the Second Circuit in *Wiwa* seized on the opposite extreme to justify its ruling, namely, that human rights victims often have no forum in which to file suit. *See Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 105-06 (2d Cir. 2000). Of course, if the availability of such fora is limited, the creation or recognition of a U.S. forum for human rights plaintiffs might be appropriate. However, the lack of foreign fora does not justify a modification of forum non conveniens to favor retaining ATS cases in the United States. Instead, the availability or lack of an adequate alternative forum is already a consideration in the forum non conveniens analysis, and an appropriate forum must exist outside the United States before any case can be dismissed on forum non conveniens grounds.

219. Outside the area of forum non conveniens, federal courts frequently have acknowledged the inadequacies of foreign fora. *See, e.g., Bhatnagar v. Surrenda Overseas Ltd.*, 52 F.3d 1220, 1228-30 (3d Cir. 1995) (ruling that extreme delay in India’s judicial proceedings could render it inadequate as an alternative forum); *McDonnell Douglas Corp. v. Islamic Republic of Iran*,

In human rights cases brought under the ATS, federal judges have evaluated carefully and rejected inadequate fora outside the United States.<sup>220</sup> In *Eastman Kodak Co. v. Kavlin*, for example, the plaintiff company brought an ATS suit against its Bolivian distributor alleging that the plaintiff's employee was imprisoned wrongfully in Bolivia.<sup>221</sup> In response to the defendant's forum non conveniens argument, the plaintiff contended that the Bolivian court system was too corrupt to serve as an adequate alternative forum.<sup>222</sup> Noting an "apparent lack of redressibility for individual litigants" and the "easily manipulable" justice system in Bolivia, the trial court agreed with the plaintiff and refused to dismiss the case on forum non conveniens grounds.<sup>223</sup>

In another example, a former Ghanaian trade counselor filed suit against a state-employed security officer alleging acts of torture in Ghana, and the Southern District of New York was confronted with a motion to dismiss on forum non conveniens grounds.<sup>224</sup> The plaintiff in *Cabiri v. Assasie-Gyimah* argued that he would be in personal danger if he returned to Ghana to pursue an action there against the defendant, who was then a Commander in the Ghanaian Navy and the Deputy

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758 F.2d 341, 346 (8th Cir. 1985) (determining that plaintiff corporation would be deprived of its day in court because litigation in Iran would be so difficult and inconvenient); *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429, 433 (5th Cir. 1962) (concluding that Cuba did not constitute an available forum for Cuban political refugees), *vacated by* 376 U.S. 779 (1964); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 286-88 (S.D.N.Y. 1999) (finding that the "Liberian judicial system was not fair and impartial and did not comport with the requirements of due process"), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

220. In forum non conveniens contexts other than human rights cases, courts also have evaluated freely the adequacy of alternative fora. *See, e.g.*, *Hatzlachh Supply Inc. v. Tradewind Airways Ltd.*, 659 F. Supp. 112, 114-15 (S.D.N.Y. 1987) (refusing to dismiss contract case to Nigeria where that country's legal system was "at a minimum quite suspect"); *Can. Overseas Ores Ltd. v. Compania de Acero del Pacifico*, 528 F. Supp. 1337, 1341-43 (S.D.N.Y. 1982) (rejecting defendant's forum non conveniens argument and noting "serious questions" about whether the Chilean judiciary was independent, as well as the possibility that the military junta could amend or rescind constitutional provisions by decree).

221. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1080-83 (S.D. Fla. 1997).

222. *See id.* at 1084.

223. *Id.* at 1086-87.

224. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

Chief of National Security.<sup>225</sup> The trial court agreed, observing that the “plaintiff is highly unlikely to obtain justice in Ghanaian courts” and that he would “unnecessarily [be] put in harm’s way” if forced to return to Ghana for trial.<sup>226</sup> Because no adequate alternative forum existed in which suit could be brought, the court rejected the defendant’s *forum non conveniens* motion.<sup>227</sup>

Most recently, the Second Circuit considered the possibility of dismissing ATS and TVPA claims of Bosnia-Herzegovina residents against Radovan Karadzic under the doctrine of *forum non conveniens* in *Kadic v. Karadzic*.<sup>228</sup> The plaintiffs alleged that Karadzic-led troops committed various atrocities, including rape, forced prostitution, forced impregnation, torture, and summary execution.<sup>229</sup> In sustaining jurisdiction under the ATS, the Second Circuit also addressed whether dismissal on *forum non conveniens* grounds would be appropriate.<sup>230</sup> The court observed that “no party has identified a more suitable forum, and we are aware of none.”<sup>231</sup> Clearly determining that an adequate alternative forum was not available, the court concluded that “it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs’ claims” even if other factors pointed toward dismissal.<sup>232</sup>

Concern about the adequacy of an alternative forum was evident even in the *Filartiga* litigation. On remand, the district court considered arguments that Paraguayan courts would not serve as adequate fora for litigation of plaintiffs’ claims.<sup>233</sup> In reevaluating the pending *forum non conveniens* motion after remand, the trial court observed that the merits of the motion “depend[ed] on whether the courts of Paraguay are not only more convenient than this court but as available and prepared to do justice.”<sup>234</sup> Noting that the defendant had “submitted

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225. *See id.* at 1191, 1199.

226. *Id.* at 1199.

227. *See id.*

228. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

229. *See id.* at 236-37.

230. *See id.* at 250.

231. *Id.* at 250.

232. *Id.* at 250-51.

233. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

234. *Id.*

nothing to cast doubt on plaintiffs' evidence showing that further resort to Paraguayan courts would be futile," the district court retained jurisdiction.<sup>235</sup>

It seems clear that federal courts considering *forum non conveniens* motions can and do engage in factual inquiries to determine whether dismissal is appropriate given the unique circumstances of each dispute. While cases brought under the ATS often may involve elements that weigh in favor of granting defendants' motions, that fact does not lead accurately to the conclusion that such lawsuits are more likely to be dismissed than other categories of cases. Instead, courts must engage in a thorough evaluation of all relevant factors, including whether a truly adequate alternative forum exists. Given the highly fact-intensive nature of the *forum non conveniens* inquiry and given ATS defendants' overwhelming failure in practice to persuade federal judges to grant their motions to dismiss, it seems inaccurate to describe the *forum non conveniens* doctrine as being unfairly slanted against ATS lawsuits.

However, even if the doctrine were slanted against ATS suits, this would not nullify the ATS any more than dismissing a suit brought under any other jurisdictional statute would nullify that statute.<sup>236</sup> Instead, the *forum non conveniens* doctrine identifies the rare case that should be dismissed to a foreign court without inquiry into what a plaintiff's jurisdictional basis was for filing in federal court. That certain cases will be dismissed under the doctrine does not eviscerate ATS jurisdiction. It simply means that ATS plaintiffs, like all plaintiffs in federal court, must demonstrate that their disputes involve sufficient connection to the United States for U.S. courts to retain jurisdiction when confronted with a *forum non conveniens* motion. ATS jurisdiction remains an available option

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235. *Id.*

236. *Forum non conveniens* would nullify the ATS only if courts were to base their decisions to dismiss such cases solely on the fact that they were brought by an alien alleging a tort in violation of international law—the statutory requirements for establishing jurisdiction under the ATS. In the limited number of ATS cases initially dismissed on *forum non conveniens* grounds, this is clearly not the case. See, e.g., *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996), *vacated and remanded*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

open to those plaintiffs who can demonstrate such connection.<sup>237</sup>

While it seems clear that forum non conveniens does not place an unusually onerous burden on ATS plaintiffs, it is undeniably true that the prototypical ATS lawsuit has very little connection to the United States. There is good reason to approach with care and deliberateness the claims of a non-U.S. citizen brought in federal court when most, if not all, relevant documents and witnesses are located abroad, all of the actions giving rise to the suit took place outside the United States, complex foreign law is likely to apply, and the defendant is likely to be a foreign citizen resident abroad. In such cases, the doctrine of forum non conveniens provides a useful check on the possible overextension of federal court subject matter jurisdiction in cases with few meaningful ties to the United States.

C. *U.S. Interests in Human Rights Litigation Do Not Trump Forum Non Conveniens*

The final major argument raised by those seeking to undermine forum non conveniens in ATS lawsuits is that compelling U.S. interests present in human rights litigation warrant abolition or significant curtailment of the doctrine. In *Wiwa*, the Second Circuit's decision contains a strong undercurrent of concern about U.S. interests—in particular, policies that the court finds in § 1350 “favoring receptivity by our courts” to ATS suits.<sup>238</sup> Further, in a recent article, Professor Kathryn Boyd identifies and analyzes similar interests that, she maintains, justify abolition of forum non conveniens in ATS suits.<sup>239</sup>

In particular, Professor Boyd argues that the stage has been set for rejecting the doctrine in human rights cases because “[t]he notion that a legislative creation of a right of action must not be defeated by the common law doctrine of convenience has been made in contexts other than human rights

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237. For example, the increasing trend of suing U.S. companies under the ATS appears to bode well for plaintiffs seeking to resist forum non conveniens motions. As explained in the text, a U.S.-based company could face more difficulty justifying dismissal under the forum non conveniens criteria.

238. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 105 (2d Cir. 2000).

239. Boyd, *supra* note 198, at 75-83.

cases,"<sup>240</sup> and she cites "areas such as antitrust, securities regulation, environmental, or employment laws" as examples of "the legislature . . . intend[ing] to override the common law forum non conveniens doctrine."<sup>241</sup> Next, she argues that compelling interests present in the adjudication of human rights claims in U.S. courts—such as the intrinsic value of fundamental human rights norms and the need for the United States to influence and enforce such norms—place ATS cases into the category of disputes that should not be dismissed under the doctrine.<sup>242</sup>

### 1. *Categorical Policy Exceptions to the Application of Forum Non Conveniens*

Federal courts, as a general rule, do not recognize wholesale, categorical exceptions to the traditional doctrine of forum non conveniens where important policy interests are at stake, and there does not appear to be any sound justification for them to do so. Although Professor Boyd cites a variety of cases in support of her contention that certain statutory protections have been interpreted by courts as exhibiting the legislature's intent to override forum non conveniens,<sup>243</sup> these cases are not compelling.

Most of the cases cited by Professor Boyd are complaints brought under the Jones Act.<sup>244</sup> As addressed in Part III.A.,<sup>245</sup> the Jones Act contains a specific venue provision mandating that trial "shall be under the court of the district in which the defendant employer resides or in which his principal office is located."<sup>246</sup> The circuits currently are split on whether that specific venue provision precludes consideration of forum non

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240. *Id.* at 75.

241. *Id.*

242. *See id.* at 78-83.

243. *See id.* at 75 n.189.

244. *See id.* (citing *Demateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977)). *See generally* *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987); *Needham v. Phillips Petroleum Co. of Nor.*, 719 F.2d 1481 (10th Cir. 1983); *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976).

245. *See* general discussion of Jones Act jurisdiction, *supra* notes 132-37 and accompanying text.

246. 46 U.S.C. app. § 688(a)(2000).

conveniens factors in Jones Act cases,<sup>247</sup> but it is certainly true that some courts have held that it does.<sup>248</sup> However, for the courts that do reject categorically forum non conveniens in Jones Act cases, the existence of specific venue is practically—if not actually—the only reason cited to justify their decisions.<sup>249</sup> Because the ATS does not contain a specific venue provision,<sup>250</sup> cases interpreting the applicability of forum non conveniens in Jones Act disputes are inapplicable to an analysis of the same question in ATS cases.

Outside the unrelated and inapplicable area of specific venue, federal courts have not identified special statutory protections or policy considerations that are so overridingly im-

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247. Compare *Zipfel*, 832 F.2d at 1487 (holding that dismissal of a Jones Act case for forum non conveniens is precluded) with *De Mateos v. Texaco, Inc.*, 562 F.2d 895, 903 (3d Cir. 1977) (rejecting argument that Jones Act suits are insulated from forum non conveniens arguments).

248. One of the cases cited by Professor Boyd in her 1998 article is *Antypas*, 541 F.2d at 307. In *Antypas*, the Second Circuit undertook a factual review of the district court's dismissal on forum non conveniens grounds and determined, contrary to the decision of the trial court, that "contacts between the transaction involved and the United States [are] substantial." *Id.* at 310. However, the Second Circuit also observed that the Jones Act applied to the dispute and that "[w]here the Jones Act applies, this Court has held that a district court has no power to dismiss on grounds of forum non conveniens." *Id.* Regardless of the court's reasoning in overturning the grant of dismissal, in 1983, the Second Circuit declared its previous position, that forum non conveniens did not apply in Jones Act cases, to be in error. See *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983). Since 1983, courts within the Second Circuit have considered forum non conveniens arguments in Jones Act cases and, on occasion, have dismissed cases on such grounds. See, e.g., *Doufexis v. Nagos S.S., Inc.*, 583 F. Supp. 1132, 1133-34 (S.D.N.Y. 1983) (concluding, in granting defendants' motion for dismissal on forum non conveniens grounds, that "Greece is a more convenient and available forum for the litigation of this action").

249. See, e.g., *Creative Tech., Ltd. v. Aztech System PTE, Ltd.*, 61 F.3d 696, 699-700 (9th Cir. 1995) (ruling that specific venue provision in Jones Act precluded forum non conveniens analysis); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (noting that if the American law—i.e. the Jones Act—applied to a dispute, forum non conveniens arguments would be unavailable); *Needham v. Phillips Petroleum Co. of Nor.*, 719 F.2d 1481, 1483 (10th Cir. 1983) (same); see also Timothy P. O'Shea, Note, *The Jones Act's Specific Venue Provision: Does It Preclude Forum Non Conveniens Dismissal?*, 14 *FORDHAM INT'L L. J.* 696, 714-19 (1990-91).

250. See 28 U.S.C. § 1350 (1993). It should also be noted, for the sake of completeness, that, like the ATS, the TVPA does not contain a specific venue provision.



portant as to trump the traditional forum non conveniens analysis. Although Professor Boyd cites lawsuits brought under the Employee Retirement Income Security Act (ERISA)<sup>251</sup> and RICO<sup>252</sup> as evidence that federal courts have overridden forum non conveniens when important national policy interests were at stake,<sup>253</sup> these cases do not prove her point. In neither of the cases cited did the district court hold, as a matter of law, that forum non conveniens is inapplicable in ERISA or RICO actions; instead, the courts undertook the standard forum non conveniens analysis specified in *Gilbert* and *Piper* to determine whether those particular lawsuits should be dismissed.<sup>254</sup> The existence of the ERISA and RICO claims was just one factor considered by those courts in their forum non conveniens analyses. Furthermore, although some courts may refuse to dismiss RICO or ERISA claims after a full weighing of relevant considerations, at least two circuits have explicitly rejected the argument that the forum non conveniens doctrine does not apply to RICO claims as a matter of law.<sup>255</sup>

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251. *Lawford v. N.Y. Life Ins. Co.*, 739 F. Supp. 906 (S.D.N.Y. 1990).

252. *Gen. Envtl. Sci. Corp. v. Horsfall*, 753 F. Supp. 664 (N.D. Ohio 1990).

253. See *Boyd*, *supra* note 198, at 75 n.189.

254. See *Lawford*, 739 F. Supp. at 919-20; *Horsfall*, 753 F. Supp. at 674. Both the *Lawford* and *Horsfall* courts did raise the existence of the ERISA and RICO claims as part of their forum non conveniens analyses. In *Lawford*, the court noted during its consideration of defendant's motion that "plaintiff's ERISA claim would be lost if plaintiff were required to bring his action in Canada." *Lawford*, 739 F. Supp. at 920. However, the court made this observation in the overall context of a full forum non conveniens analysis and concluded "the Court cannot find that Canada is a substantially more appropriate forum in this action." *Id.* Similarly, in *Horsfall*, the trial court observed that "the interest of the United States in a uniform application of RICO" was one of the "most weighty" of the "various conflicting interests involved" in the forum non conveniens consideration. *Horsfall*, 753 F. Supp. at 674. Accordingly, in both cases, the existence of ERISA or RICO claims was just one factor in the broader forum non conveniens analysis and did not mandate categorical rejection of defendants' motions to dismiss. The Second Circuit in *Wiwa* undertook a similar analysis to determine the weight that should be given in the forum non conveniens analysis to plaintiffs' invocation of the ATS, as well as to the existence of the TVPA. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-08 (2d Cir. 2000).

255. See *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144-45 (5th Cir. 1989). The *Kempe* court could find no legislative history for RICO disclosing "that Congress intended directly or by fair inference to suggest that RICO would be immune from the doctrine's operation." *Id.* at

Indeed, federal courts often have ruled that cases implicating sensitive national interests brought under various federal statutes need not be resolved in a federal judicial forum. For example, in addition to the forum non conveniens context discussed above, federal courts have dismissed RICO lawsuits under choice of forum provisions<sup>256</sup> and ERISA claims pursuant to the Princess Lida doctrine.<sup>257</sup> In the antitrust context, forum non conveniens has been used to support dismissal,<sup>258</sup>

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1144. The court went on to determine that, even though RICO claims would not be enforceable in Bermuda, the case should be dismissed on forum non conveniens grounds because "even without the RICO count, Bermuda permits litigation in its courts" of other claims raised by plaintiffs. *Id.* at 1145; *see also* Transunion Corp. v. PepsiCo., Inc., 811 F.2d 127, 130 (2d Cir. 1987) (per curiam) (observing that "[a] review of the legislative history of RICO . . . discloses no mandate that the doctrine of forum non conveniens should not apply").

256. *See, e.g.*, Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998).

257. *See, e.g.*, Dailey v. Nat'l Hockey League, 987 F.2d 172, 178-79 (3d Cir. 1993).

258. *See, e.g.*, Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 609-12 (2d Cir. 1998) (concluding "that antitrust suits are subject to dismissal under the forum non conveniens doctrine" and, in fact, dismissing an antitrust suit on such grounds); *see also* Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 947-50 (1st Cir. 1991) (suggesting that international transfers under the doctrine of forum non conveniens should be allowed in antitrust suits).

In her 1998 article, Professor Boyd makes the point that "[u]ntil recently, courts have followed the reasoning that unique federal interests outweighed convenience in antitrust actions." Boyd, *supra* note 198, at 77. She cites a 1989 amendment to the Clayton Act as providing, for the first time, the opportunity for forum non conveniens analyses where foreign regulatory interests are particularly strong. *See id.* "Without Congress explicitly ending judicial deference to antitrust, courts would likely have continued to exempt antitrust actions from application of the forum non conveniens doctrine." *Id.* at 77-78. The "amendment" to the Clayton Act that Professor Boyd references is the Foreign Trade Antitrust Improvements Act of 1989, S. 50, 101st Cong. § 102 (1989). This proposed amendment died in committee and never became law. *See* S. REP. NO. 102-17, at 54 (1991). For a history of the Foreign Trade Antitrust Improvements Act of 1989, *see* <http://thomas.loc.gov/>.

Nevertheless, courts are now split on whether forum non conveniens may be considered in antitrust disputes. Some courts have held that the doctrine cannot be applied in such cases. They rely on a variety of reasons, including the existence of a specific venue provision in the Clayton Act, *see* Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890 (5th Cir. 1982); the fact that the Clayton Act imposes quasi-penal obligations, and foreign coun-

and other antitrust suits have been referred to binding arbitration for resolution.<sup>259</sup> Federal courts also have ordered that suits under U.S. securities laws be resolved in arbitration<sup>260</sup> and in foreign countries pursuant to both forum selection clauses<sup>261</sup> and the doctrine of forum non conveniens.<sup>262</sup> Although forum non conveniens, choice of law, and arbitration clause analyses are not identical, national interests play an important role in each. Clearly, it cannot be said that U.S. courts overridingly are concerned with resolving, within the U.S. court system, all suits implicating important U.S. interests.

Nevertheless, because federal courts or the U.S. Congress could identify categories of dispute that must be heard in U.S. courts because of the important U.S. interests at stake, it is worth considering whether adjudication of international human rights cases triggers such important policy interests.

## 2. *Policy Considerations Favor Judicial Discretion*

### a. Forum Non Conveniens as a Gatekeeper

International law has been recognized and applied by federal courts for over one hundred years.<sup>263</sup> Early concepts of international law focused on the interrelationships among sovereign states, and although the law governing state relations still serves as the bedrock of international law, its reach has been extended to provide for the protection of individuals and

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tries will not enforce our penal laws, *see id.* at 891; and the notion that anti-trust laws embody a congressional purpose to encourage suits filed in U.S. court to vindicate a national policy against monopolies, *see Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983). However, as the *National Westminster* case demonstrates, other courts have explicitly rejected the proposition that antitrust suits should be insulated from forum non conveniens analyses. *See Nat'l Westminster Bank PLC*, 155 F.3d 603.

259. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

260. *See Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

261. *See Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993).

262. *See Alfadda v. Fenn*, 159 F.3d 41 (2d Cir. 1998); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993).

263. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

the prohibition against certain conduct committed by individuals.<sup>264</sup>

When applying and interpreting international law, U.S. courts look to the existence of applicable treaties or any other controlling executive or legislative act or judicial decision, as well as to the "customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators."<sup>265</sup> In the area of human rights, the applicable substantive law is generally customary law, as many of the treaties covering relevant behavior either have not been signed or ratified by the United States or may not be self-executing or have accompanying implementing legislation.<sup>266</sup> Customary international law norms, known as *jus dispositivum*,<sup>267</sup> are derived from the consent of states; they are the "general and consistent

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264. See LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 139-40 (1992). ATS case law clearly holds that individuals may be found to have violated customary international law, such as in the case of *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Most recently, the Second Circuit recognized that individuals may commit certain violations of customary international law even where no state action is present. See *Kadiz v. Karadzic*, 70 F.3d 232, 241-43 (2d Cir. 1995) (ruling that genocide and war crimes required no state action). The body of laws regulating principally how nations treat their citizens has been labeled "new customary international law" by Professors Bradley and Goldsmith. See Bradley & Goldsmith, *supra* note 162, at 327.

265. *The Paquete Habana*, 175 U.S. at 700.

266. See Paul C. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 479-80 (Louis Henkin & John Lawrence Hargrove eds., 1994). Even where the United States has ratified an international human rights treaty, it usually enters various "reservations, understandings, and declarations that severely limit the impact of ratification." *Id.* at 479. Such reservations have questionable impact under international law, but to the extent they are effective, the result on the treaties' effectiveness can be significant. See LIESBETH LIJNZAAD, *RESERVATIONS TO U.N.-HUMAN RIGHTS TREATIES: RATIFY AND RUIN?* 3 (1995). In addition, reliance on treaties as a basis for creating human rights obligations creates an "ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many States largely untouched." Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. OF INT'L L.* 82, 82 (1992).

267. See David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 *YALE J. INT'L L.* 332, 351 (1988).

practice of states followed by them from a sense of legal obligation."<sup>268</sup>

In some instances, norms of customary international law applied in human rights cases rise to the level of *jus cogens*, or peremptory norms of international law that are "accepted and recognized by the international community of states as a whole as [norms] from which no derogation is permitted."<sup>269</sup> Although customary international law and *jus cogens* are related,<sup>270</sup> *jus cogens* does not depend on the consent of the state in question and is considered binding on all nations, as it represents "values taken to be fundamental by the international community."<sup>271</sup> *Jus cogens* norms "enjoy the highest status within international law"<sup>272</sup> and "prevail over and invalidate international agreements and other rules of international law in conflict with them."<sup>273</sup>

Regardless of the international status of customary international law or even *jus cogens*, U.S. courts are under no obligation to adjudicate each and every case alleging a violation of such norms.<sup>274</sup> Even though *jus cogens* norms are non-dero-

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268. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]. According to the International Court of Justice, a norm must meet two requirements before being considered customary international law: (1) the norm must be reflected in consistent state practice, and (2) the norm must be adhered to out of a sense of legal obligation. See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44-46 (Feb. 20).

269. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332); see also *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994).

270. *Siderman de Blake*, 965 F.2d at 714.

271. Klein, *supra* note 267, at 351.

272. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988).

273. RESTATEMENT, *supra* note 268, § 102 cmt. k.

274. Countries face similar issues in the adjudication of customary international law norms in both the civil and criminal contexts. Although countries generally are not understood to be obligated to exercise criminal jurisdiction in cases of alleged human rights violations, the concept of *aut dedere aut judicare*—extradite or prosecute—arises in various multinational treaties focused on securing cooperation in the suppression of certain kinds of criminal conduct. See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE—THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995). See generally M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 217-21 (1999). While the position has been

gable—that is, they cannot be abrogated by agreement of states or set aside by unilateral state action<sup>275</sup>—no tenet of international or domestic law mandates that U.S. courts take jurisdiction over such matters and render judgments on the merits, without considering traditional common law, statutory, and constitutional defenses to jurisdiction.<sup>276</sup>

Indeed, human rights cases raising customary international law issues often implicate sensitive political and foreign affairs considerations, the resolution of which must precede a U.S. court taking jurisdiction over such a matter.<sup>277</sup> In such cases, federal courts may be required to determine whether

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taken that customary international law obligates states either to extradite or to prosecute in the absence of an applicable treaty to that effect, state practice does not support this assertion, even in the case of gross violations of human rights. See BASSIOUNI & WISE, *supra*, at 20-25, 43-46; see also Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity—Are States Taking National Prosecutions Seriously?*, in III INTERNATIONAL CRIMINAL LAW 227, 229-30 (M. Cherif Bassiouni ed., 2d ed. 1999) (observing that even where international agreements obligating states to either prosecute or extradite suspected criminals are in place, the principle *aut dedere aut judicare* is followed inconsistently in practice). The existence of a *forum non conveniens* motion in a civil human rights dispute provides an interesting parallel to the criminal context. In a case where even *jus cogens* norms are at issue, a U.S. court is under no domestic or international obligation to adjudicate the civil dispute; however, when entertaining a *forum non conveniens* motion, the court essentially is adopting *aut dedere aut judicare*—the court will either deny the motion and adjudicate the claims or it will dismiss the case to a foreign country where the case, in all likelihood, will be heard and resolved.

275. See RESTATEMENT, *supra* note 268, § 702 cmt. n. (recognizing that international agreements violating *jus cogens* are void); BASSIOUNI & WISE, *supra* note 274, at 52.

276. The underlying jurisdictional legitimacy of the ATS may be traced to the concept of universality, which recognizes that certain offenses, due to their very nature, affect all states and, accordingly, constitute violations against mankind. BASSIOUNI, *supra* note 274, at 228-29; see also Klein, *supra* note 267, at 342. While the ATS may represent a jurisdictional grant allowing U.S. courts to hear disputes of universal concern, the doctrine of universal jurisdiction simply allows states to grant jurisdiction in appropriate cases; it does not mandate jurisdiction. See SUNGA, *supra* note 264, at 114 (“International law does not import a mandatory obligation upon State authorities to undertake prosecution.”). For a thorough treatment of the concept of universal jurisdiction, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

277. See generally Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 551-59 (1997) (discussing the role of the Foreign Sovereign Immunities

judicial abstention is appropriate under the political question doctrine or whether a defendant is amenable to suit under the Act of State doctrine or the Foreign Sovereign Immunities Act.<sup>278</sup> Complex notions of international comity also may overlie such determinations.<sup>279</sup> In each of these analyses, federal courts use doctrines or principles of domestic or international law to identify *which* claims alleging violations of customary international law or *jus cogens* the courts appropriately should entertain.

Forum non conveniens, like the political question doctrine, the Act of State doctrine, and the Foreign Sovereign Immunities Act, serves an important gatekeeper function to ensure that only appropriate cases are heard by the federal courts, regardless of the nature of the substantive claim at issue.<sup>280</sup> Forum non conveniens allows federal judges to avoid the inconveniences and difficulties associated with adjudicat-

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Act, head-of-state immunity, and the Act of State doctrine in human rights litigation brought under the ATS).

278. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992). In *Siderman de Blake*, plaintiffs alleged that Argentina had tortured one of its citizens in violation of *jus cogens* norms. *Id.* at 702, 714-19. Plaintiffs argued that because *jus cogens* norms trump other concepts of international law, their allegation of official torture trumped any notion of sovereign immunity. See *id.* at 718. However, the Ninth Circuit Court of Appeals disagreed, noting that the deciding factor was not customary international law but, instead, the Foreign Sovereign Immunities Act (FSIA), an affirmative act of Congress. See *id.* Accordingly, the court analyzed plaintiffs' claims through the prism of the FSIA and determined that, although plaintiffs alleged *jus cogens* violations, the FSIA did not contain an exception to sovereign immunity for such alleged behavior. See *id.* at 719.

279. International comity first was defined by the Supreme Court as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Difficult comity issues often arise in international human rights disputes. See, e.g., *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (evaluating comity arguments in suit involving alleged environmental and personal injuries relating to oil work in Ecuador); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 432 (D.N.J. 1999) (granting motion to dismiss in part on international comity grounds in case involving claims that defendant employed slave labor during World War II).

280. *Jus cogens* norms may trump other aspects of international law, see RESTATEMENT, *supra* note 268, § 102 cmt. k, but they should not be interpreted

ing a dispute with attenuated connections to the United States if an adequate alternative forum exists outside the United States and relevant interest factors support dismissal. Without access to the doctrine, unnecessary burdens would be imposed on the U.S. court system and the parties involved: Courts might be forced to interpret and apply complex foreign law and make rulings on large volumes of documents written in languages other than English; parties could become subject to inconsistent legal obligations imposed by U.S. and foreign courts and could be required to produce witnesses from foreign countries who might not speak English and not understand the U.S. legal system; and factfinders could be burdened with deciding cases with no meaningful ties to their home federal districts, states, or nation.

Forum non conveniens serves a further gatekeeping role by helping to ensure, along with other jurisdictional doctrines mentioned above, that domestic litigation does not unnecessarily disrupt U.S. foreign policy. Because ATS suits require a U.S. court to sit in judgment of claims that often involve significant foreign governmental elements, they result in an increased likelihood of straining international relations. Even where doctrines primarily focused on such concerns are inapplicable for various reasons,<sup>281</sup> forum non conveniens allows

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to override domestic law considerations, including those relating to a court's power to decline exercising jurisdiction in appropriate cases.

281. Because human rights lawsuits usually involve claims of foreign sovereign involvement in the alleged abuse, such suits raise a disproportionate risk of disrupting U.S. foreign relations. *See, e.g.*, STEPHENS & RATNER, *supra* note 7, at 270-71 (reflecting concern of President Bush that suits under the TVPA might pose "a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States"). Retaining forum non conveniens is particularly important because foreign relations concerns might not be addressable in human rights litigation through other means, such as the Act of State or political question doctrines. *See, e.g.*, Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 353 (C.D. Cal. 1997). *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 457 (1964) (White, J., dissenting) (observing that under the Act of State doctrine "reasons for nonreview . . . lose much of their force when the foreign act of state is shown to be a violation of international law"); Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (noting that "it would be a rare case in which the act of state doctrine precluded suit under section 1350" and that the Supreme Court in *Sabbatino* was careful to apply the doctrine only in a context—expropriation of an alien's property—



judges to exclude from federal court the subset of internationally sensitive suits with overriding foreign components, thereby reducing the risk of disrupting international relations.

Protection of U.S. interests—including the conservation of scarce judicial resources and maintenance of international political stability—requires that federal courts be given flexibility to identify cases more appropriately resolved in other fora or through other means, regardless of the subject matter or jurisdictional basis at issue.

b. National Priorities Reflected in the ATS and the TVPA

In the *Wiwa* decision, the Second Circuit ruled that the TVPA reflects a U.S. interest favoring domestic adjudication of ATS disputes.<sup>282</sup> Professor Boyd agrees and argues that, given the broad construction of the ATS in *Filartiga*, dismissing such suits on forum non conveniens grounds “would be antithetical to U.S. interests and principles.”<sup>283</sup>

As demonstrated earlier, the idea that U.S. interests favor domestic adjudication of human rights claims is not reflected in the express language or known legislative intent of the ATS or the TVPA. This is damaging particularly to the *Wiwa* court’s rationale given the Supreme Court’s instruction that to undermine an established common law doctrine, a statute

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in which world opinion was “sharply divided,” rather than where “controlling legal principles exist”); STEPHENS & RATNER, *supra* note 7, at 270-71 (expressing President Bush’s opinion that unnecessary international friction resulting from TVPA suits could be avoided by “sound construction of the Statute and the wise application of relevant procedures and principles”).

Concern over foreign relations has led most countries to allow adjudication of human rights claims against foreign government officials only in the context of criminal suits, which are under the control of the executive branch. See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2168 (1999). As observed by Professors Bradley and Goldsmith, the United States may be alone in allowing civil suits by foreign plaintiffs against foreign governmental officials for human rights violations that took place on foreign soil. See *id.* In some instances—such as the *Kadic* litigation against Radovan Karadzic—human rights lawsuits may be consistent with U.S. interests; however, nothing in the ATS guarantees such consistency as human rights plaintiffs pursue their own agendas against alleged abusers. See *Kadic*, 70 F.3d 232.

282. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105-06 (2d Cir. 2000).

283. *Id.*

must "speak directly" to the specific issue in question.<sup>284</sup> In the absence of any clear legislative recognition of such national interests, federal judges should be hesitant to inject into statutory interpretation their personal views of what U.S. interests should exist. Failure to do so raises concerns about judicial rulings from judges that are both unpredictable and anti-democratic.

(i) U.S. Involvement in International Human Rights Initiatives

Any U.S. interest evidenced by § 1350 is best seen in the overall context of this country's attitude toward international human rights obligations. While it is true that the United States has assisted in the general development of human rights norms,<sup>285</sup> it lags far behind the rest of the developed world (and a sizable portion of the under-developed world) in signing, ratifying, and implementing major human rights initiatives.<sup>286</sup> Among the international treaties the United States has failed to ratify are agreements addressing economic, social, and cultural rights,<sup>287</sup> the rights of women,<sup>288</sup> the rights of children,<sup>289</sup> and a leading treaty addressing the laws of war.<sup>290</sup> In cases where the United States has ratified a human

284. See *supra* notes 116-19 and accompanying text.

285. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995).

286. See Panel Discussion, *The United States: Human Rights Leader or Laggard?*, 11 PACE INT'L L. REV. 261, 265-71 (1999) (statement of Kenneth Roth); see also Hoffman & Strossen, *supra* note 266, at 479-80. Hoffman and Strossen note that "[o]f the more than forty international human rights treaties to which the United States could be a party, it has ratified only a handful altogether, and only one of the major international human rights treaties, the International Covenant on Civil and Political Rights." *Id.* at 480.

287. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

288. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1981, 1249 U.N.T.S. 13.

289. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989).

290. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. In addition, the United States has not ratified an important international agreement addressing the use of anti-personnel land mines, see Convention on the Prohibition of the Use, Stock-

rights treaty, such as the Convention Against Torture,<sup>291</sup> the United States often declares that the treaty is non-self-executing—thereby precluding private rights of action unless implementing legislation is enacted—and enters various declarations or reservations to limit the scope and dilute the power of the agreement.<sup>292</sup> Ratification of human rights initiatives under such terms has been labeled “specious, meretricious, and hypocritical.”<sup>293</sup>

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piling, Production and Transfer of Anti-Personnel Mines and Their Destruction, *opened for signature* Dec. 3, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999), *ratification status available at* <http://untreaty.un.org/english/bible/englishinternetbible/parti/chapterxxvi/treaty7.asp#participant> (last visited Sept. 17, 2001), and it opposed the establishment of the International Criminal Court, *see* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999, *ratification status available at* <http://untreaty.un.org/english/bible/englishinternetbible/parti/chapterxxviii/treaty10.asp#participant> (last visited Sept. 17, 2001). For a general discussion of the United States’s ineffective participation in international human rights initiatives, *see* Panel Discussion, *supra* note 286, at 265-71 (statement of Kenneth Roth).

291. Convention Against Torture, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. 1/39/51 (1984) (reprinted in 23 I.L.M. 1027 (1984)).

292. Among other reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States limited the definition of “cruel, inhuman or degrading treatment or punishment” to “cruel and unusual” punishment under the U.S. Constitution and expressly noted its opinion that international law does not prohibit the use of the death penalty. *See* U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36, 198 (1990); *see also* U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. 14,326 (1994); U.S. Reservations, Declarations, and Understandings, International Convention on the Prevention and Punishment of the Crime of Genocide, 132 CONG. REC. 22,584 (1986). For analyses critical of the United States’s approach to treaty reservations, understandings, and declarations, *see* M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993); Henkin, *supra* note 285; William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277 (1995). For a contrary view, *see* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); Madeline Morris, *Few Reservations About Reservations*, 1 CHI. J. INT’L L. 341 (2000).

293. Henkin, *supra* note 285, at 341. Such narrow interpretations of human rights treaties also may restrict ATS jurisdiction. For a tort to trigger

Although the United States may be committed to the development of international human rights law, that commitment at least is balanced, if not outweighed, by a long-standing, deeply held U.S. desire to avoid international entanglements.<sup>294</sup> These competing goals mean that while the United States may actively encourage compliance with international law and has taken steps to ensure that U.S. actions largely are consistent with recognized human rights standards, its commitment to leading the human rights movement has limits. Embroiling U.S. courts in foreign disputes contested by for-

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jurisdiction under the ATS, the conduct must violate "well established, universally recognized norms of international law." *Filatiga v. Peña-Irala* 630 F.2d 876, 888 (2d Cir. 1980). Multinational treaties or conventions would appear to be generally good reflections of such well established or widely recognized norms of behavior. However, the precise contours of the use of treaties in this context have not been explored yet. For example, it is unclear whether a plaintiff in U.S. court may rely on a multinational human rights treaty that the United States has not ratified as evidence of "well established" norms of conduct supporting ATS jurisdiction. It is also not clear what the effect on ATS jurisdiction would be where the United States ratified the treaty as a whole but entered reservations to the agreement either objecting to the particular provision relied on by the ATS plaintiff for jurisdictional purposes or explicitly stating that the treaty would have no direct effect in U.S. court. It appears inherently "illegitimate for courts to apply as domestic law a [customary international law] of human rights based almost exclusively on human rights treaties that the political branches have taken pains to ensure do *not* apply as domestic law." Bradley & Goldsmith, *supra* note 281, at 2168.

294. Concern over becoming unnecessarily embroiled in international affairs has its roots in the founding of the United States. See *supra* notes 15-34 and accompanying text. Notwithstanding President Clinton's executive order in 1998 that led to the creation of an Interagency Working Group on Human Rights Treaties, there has been little measurable improvement in the U.S. commitment to international human rights initiatives since that time. See HUMAN RIGHTS WATCH, *WORLD REPORT 2001*, available at <http://www.hrw.org/wr2k1/>. Even where the United States takes what appear to be important steps in the area of international human rights, significant questions about its commitment to international initiatives may remain. Before leaving office, President Clinton signed a multinational treaty that would establish an International Criminal Court for the trial of war criminals. See Steven L. Meyers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1. However, Jesse Helms, Chairman of the Senate Foreign Relations Committee, has voiced his vehement opposition to this initiative. According to Sen. Helms, "[t]his decision will not stand," and he will make "reversing" President Clinton's signing "one of [his] highest priorities" in the new Congress to protect U.S. citizens "from this international kangaroo court" and "global Star Chamber." *Id.*

eign parties where U.S. interests are not clearly at issue may exceed those limits and create unnecessary international entanglements.

(ii) Policy Interests Underlying the ATS and the TVPA

To the extent *Filartiga* and its progeny are accurate interpretations of the scope of the ATS in modern litigation, it seems clear that some U.S. national interest is expressed through application of the ATS. Contrary to the suggestions of the *Wiwa* court and Professor Boyd, however, that national interest is in providing the possibility of a federal forum to appropriate plaintiffs, not the guarantee of such a forum. What we know about the historical context of the ATS and the concerns occupying the minds of the drafters of the Judiciary Act of 1789 compels this interpretation. Nothing in the language or known legislative intent of the ATS supports an argument that Congress intended to mandate or even prefer jurisdiction under the statute, and federal courts' interpretation of the ATS—with the lone exception of *Wiwa*—has never suggested such a result.

U.S. interests underlying the TVPA are much clearer, largely because legislative history exists for that act. As explained in the House and Senate Judiciary Committee reports on the TVPA, Congress felt the Act was necessary, despite the existence of the ATS, for a variety of reasons: (1) to expand the class of plaintiffs that could bring suit for human rights violations to include U.S. citizens; (2) to give special attention to the international torts of official torture and summary execution; (3) to carry out the intent of the Convention Against Torture; and (4) to make clear that Congress agreed with the broad *Filartiga* interpretation of the ATS and rejected Judge Bork's narrow concurring opinion in *Tel-Oren*.<sup>295</sup> Absent from the text or legislative history of the TVPA is any congressional statement that the Act reflected or was intended to carry out a U.S. interest in providing a mandatory forum for human rights litigation.

Despite the *Wiwa* court's pronouncement that domestic adjudication of human rights claims is preferred, in part, because the TVPA makes such claims "our business," the court

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295. See S. REP. NO. 102-249, at 3-5 (1991); H.R. REP. NO. 102-367, at 3-5 (1991); see also *supra* notes 54-57 and accompanying text.

did not distinguish the U.S. interests underlying the TVPA from those furthered by any other statutory cause of action. Presumably, every federal statute reflects some U.S. national interest, and the Second Circuit in *Wiwa* did not explain meaningfully why the TVPA reflects special U.S. interests. This is noteworthy because in a variety of cases, federal courts have ruled that suits brought pursuant to federal statutes implementing other important national interests must be resolved outside of federal court.<sup>296</sup> The *Wiwa* court's emphasis on the U.S. interests behind the TVPA is particularly troubling given the absence of congressional language identifying such interests in the relevant House and Senate Judiciary Committee reports.

The *Wiwa* court also opined that a U.S. policy interest exists favoring domestic adjudication of human rights suits because, according to Congress, "universal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong."<sup>297</sup> Even had Congress made this statement,<sup>298</sup> the Second Circuit's observation did not take account of basic forum non conveniens law. The forum non conveniens analysis already requires that an adequate alternative forum exist before allowing dismissal. To the extent a TVPA or ATS plaintiff "cannot sue in the place where the torture occurred,"<sup>299</sup> or where "the victim would be endangered merely by returning to that place,"<sup>300</sup> an adequate alternative forum does not exist in the country of alleged torture, and forum non conveniens will not allow dismissal to that country. Given the threshold alternative forum inquiry, there is no need to ascribe added weight to the possibility that a plaintiff may not be able to return to her home country to sue as part of the interest balancing component of the forum non conveniens inquiry. Nor is there any need to make the creation of

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296. See *supra* notes 256-62 and accompanying text.

297. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 106 (2d Cir. 2000).

298. This attribution to Congress is inaccurate. The full quote from the House Judiciary Committee report in the TVPA is as follows: "These universal principles [against torture and summary execution] provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world." H.R. REP. NO. 102-367, at 3.

299. *Wiwa*, 226 F.3d at 106.

300. *Id.*

a domestic forum in such situations a national interest when the forum non conveniens doctrine already assigns weight to that factor.

Contrary to the observations of the *Wiwa* court, congressional history of the TVPA specifically identifies a U.S. interest that is in tension with mandating a federal court forum in all cases. In particular, the legislative history of the TVPA highlights the intent to “[s]trike[ ] a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts.”<sup>301</sup> To facilitate this balance, “the bill recognizes as a defense the existence of adequate remedies in the country where the violation ‘allegedly occurred,’”<sup>302</sup> which ensures that “U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred.”<sup>303</sup> Nonexhaustion of local remedies is an affirmative defense under the TVPA, and a TVPA claim also is subject to defenses under the Foreign Sovereign Immunities Act and the doctrines of diplomatic and head-of-state immunity.<sup>304</sup> Most importantly, any assertion that the TVPA reflects U.S. interests favoring domestic adjudication of human rights claims is in direct conflict with the Act’s clear legislative intent: “Nothing in [the TVPA] is intended to or does affect the doctrine of forum non conveniens, which remains applicable to any lawsuit brought under this act.”<sup>305</sup>

Given the language, history, and policies underlying § 1350, there appears to be no persuasive argument that Congress intended to create a mandatory forum and cause of action not subject to the usual docket management and immunity-based defenses. Accordingly, any U.S. policy interests reflected in the ATS and the TVPA should not be interpreted to override established common law doctrines. In the case of forum non conveniens, such interests should be considered in the overall balancing of relevant factors;<sup>306</sup> however, the ques-

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301. H.R. REP. NO. 102-367, at 4.

302. *Id.*

303. *Id.* at 5.

304. *Id.*

305. See 138 CONG. REC. 4,177 (1992) (statement of Sen. Specter); see also *supra* notes 182-97 and accompanying text.

306. The U.S. interests referenced here are interests the United States has in serving as the forum for human rights litigation generally and inform an

tion remains as to how heavily such interests should be weighted in the *forum non conveniens* analysis. This is an important consideration because assigning an inappropriate weight to U.S. policy interests as reflected by the ATS and the TVPA could yield the same result as either failing to consider such interests at all or making ATS/TVPA suits immune from *forum non conveniens* analyses.

When faced with a *forum non conveniens* motion in a suit under the ATS, federal courts recognizing only a jurisdictional component to the ATS (as opposed to any substantive aspect) should find that no significant U.S. policy interests are at stake. When the ATS serves only a jurisdictional function, it is indistinguishable from other simple grants of federal court jurisdiction—such as federal question or diversity jurisdiction—and as a result, should be accorded no significant weight in the balancing process. If the federal court recognizes a substantive component to the ATS, or if the TVPA is relied on in addition to the ATS, courts should attach the same weight to plaintiffs' invocation of the ATS/TVPA as they would to reliance on any other federal statutory cause of action.<sup>307</sup>

Absent an express—preferably textual—congressional recognition of a heightened U.S. policy interest favoring domestic adjudication of human rights claims, federal courts should attach a relatively uniform weight to the invocation of any statutory cause of action, including suits under the ATS/TVPA. This approach is fully consistent with the words chosen by Congress in § 1350. If it intends to favor domestic adjudication of ATS claims or to attach heightened U.S. interests to such lawsuits, Congress can amend § 1350 to make such intent clear.

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analysis of whether *forum non conveniens* should ever be available in ATS disputes. The specific U.S. and foreign national interests implicated by any particular dispute are a separate matter for consideration and go to whether a particular lawsuit, based on its individual facts and circumstances, should be heard in federal court. See *infra* notes 343-46 and accompanying text.

307. A case may even be made for attaching less weight to an ATS/TVPA suit than to a suit brought under a detailed, comprehensive regulatory scheme such as U.S. antitrust law. In stark contrast to the voluminous, detailed antitrust laws, the TVPA has a much more modest scope, extending only to torture and extrajudicial killing committed under color of foreign law. While certainly important, the TVPA cannot be said to reflect a broad U.S. interest in combating a wide array of human rights abuses committed by various types of defendants.



c. Declining Jurisdiction and the Development of Customary International Law

The United States, as a member of the international community, has a national interest in assisting the development of customary international law norms. In an increasingly interdependent world, the United States, like all other advanced industrial democracies, is moving more toward multilateralism.<sup>308</sup> Global interdependence means that, if the United States wishes to advance any national policy with a foreign component, it must do so in cooperation with other countries.<sup>309</sup> Because the appropriate use of *forum non conveniens* in human rights suits is consistent with a global approach to the development of customary international law—and will advance, not hinder, that development—a prudent application of the doctrine should be encouraged in ATS litigation.

By definition, customary international law is deduced from, among other things, “the general usage and practice of nations”<sup>310</sup> and requires the “general assent of civilized nations” to become binding.<sup>311</sup> In ATS lawsuits, usage and practice of other countries is particularly important because, under that statute, courts “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>312</sup> Only when an inquiry into the practice, customs, and judicial decisions of the international community demonstrates that the “defendant’s alleged conduct violates ‘well established, universally recognized norms of international law’ . . . as opposed to ‘idiosyncratic legal rules’” will

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308. See Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT’L L. 291, 294 (2000).

309. See *id.* (“In other words, in an interdependent world, governments must increasingly trade away a certain amount of unilateral policy discretion in order to achieve the domestic policy objectives to which they collectively aspire.”).

310. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

311. *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)). But see Bradley & Goldsmith, *supra* note 162, at 328 (arguing that the new customary international law applicable to human rights disputes is not created by the “accretion of [state] practices” but rather represents a more “purposive creation of custom” that does not reflect the actual current practice of states).

312. See *Filartiga*, 630 F.2d at 881.

jurisdiction under the ATS be established.<sup>313</sup> Regardless of the number of U.S. federal courts that pass judgment on a particular behavior and determine that it *should* violate customary international law, that behavior will not become an actual violation absent official practice by other nations exhibiting a similar disapprobation. Indeed, U.S. courts have encountered this obstacle when evaluating whether certain alleged conduct violates customary international law and can be used as the basis for ATS jurisdiction.

In a recent example, Indonesian citizens brought suit under the ATS and the TVPA alleging genocide and other human rights violations committed by domestic mining companies in *Beanal v. Freeport-McMoran, Inc.*<sup>314</sup> One of the claims reviewed by the Fifth Circuit Court of Appeals in *Beanal* was plaintiffs' contention that the defendant mining companies had engaged in environmental abuses that violated international law.<sup>315</sup> In evaluating whether "environmental torts" could be considered violations of the law of nations, the Fifth Circuit observed that breaches of international law occur only where "the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern,"<sup>316</sup> and that ATS jurisdiction applies only to "shockingly egregious violations of universally recognized principles of international law."<sup>317</sup> The Fifth Circuit determined that the evidence mustered by the plaintiffs to demonstrate an international consensus in the area of environmental torts showed only "a general sense of environmental responsibility and state[d] abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute in-

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313. *Kadic v. Karadzic*, 70 F.3d 232, 238-39 (2d Cir. 1995) (quoting *Filartiga*, 630 F.2d at 881, 888). In *Filartiga*, the Second Circuit explained that "[i]t 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 violation within the meaning of the [ATS]." *Filartiga*, 630 F.2d at 888.

314. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163-64 (5th Cir. 1999).

315. *See id.* at 166-67.

316. *Id.* at 167 (quoting *Filartiga*, 630 F.2d at 888).

317. *Id.* (quoting *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)).

ternational environmental abuses or torts.”<sup>318</sup> Accordingly, the lower court’s ruling that the plaintiffs had failed to demonstrate a violation of international law caused by defendants’ mining operations was upheld.<sup>319</sup>

Regardless of the egregious nature of the alleged conduct in *Beanal* and regardless even of how violative of U.S. law the alleged conduct might have been, the Fifth Circuit could not find that customary international law was violated.<sup>320</sup> Had judicial practice and governmental decrees in other countries reflected a clear record of punishing environmental torts and

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318. *Id.*

319. *See id.* Other examples of U.S. courts struggling to define the contours of customary international law include the lower court’s evaluation of plaintiffs’ § 1350 claim of “cultural genocide” in *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 373 (E.D. La. 1997), the district court’s consideration of free speech rights under the ATS in *Guinto v. Marcos*, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986), and a California court’s review of “cruel, inhuman or degrading treatment” allegations in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987). Outside of these examples, a variety of questions exist as to the precise limits of international law, including the extent of liability of non-state actors under customary international law norms. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995) (evaluating whether a private individual could be found to have committed violations of the law of nations for acts of genocide, war crimes, torture, and summary execution); *see also* RESTATEMENT, *supra* note 268, § 702 (indicating that a “state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the 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”) (emphasis added); *Beanal*, 969 F. Supp. at 371 (observing that, according to the list of offenses in the Restatement recognized by the community of nations to be of universal concern, genocide “is the only relevant offense for which universal jurisdiction exists and no state action must be proven”). These and other areas of law are ripe for consideration and development by the courts of the United States and other countries.

320. *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). In *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), the court considered plaintiffs’ claims that environmental torts were actionable under the ATS. *See id.* at \*6-7. The court noted various domestic statutes aimed at governing hazardous wastes that would prohibit the alleged conduct if it had occurred in the United States. *See id.* at \*7. The court found these statutes to be “relevant as confirming United States adherence to international commitments to control such wastes,” but deferred judgment on the applicability of § 1350 to such claims pending further discovery. *Id.*

a widespread desire that such torts *should* be found to violate international law norms, perhaps the court's decision in *Beanal* would have been different. As it was, state practice and usage had not developed sufficiently for the judges to identify norms of customary international law.<sup>321</sup>

Appropriate use of *forum non conveniens* in human rights disputes will assist the necessary development of an international consensus in appropriate cases. In particular, foreign courts can help establish *opinio juris*, which is a necessary prerequisite to the development of new customary international law norms.<sup>322</sup> A suit will not be dismissed on *forum non conveniens* grounds unless there is an adequate alternative forum available outside the United States.<sup>323</sup> Although federal courts have been rightly cautious in creating a checklist for determining what constitutes such a forum, an adequate alternative forum, at the very least, is one that can exercise its power over the defendant, will hear the subject matter of the dispute, and is capable of providing a satisfactory remedy.<sup>324</sup> When human rights cases are dismissed to foreign courts, those courts and judges are provided an opportunity to evaluate the evidence and to add their voices to the international appraisal of the conduct in question. In this way, the creation of a more accurate and complete picture of international norms and practice is facilitated—and the faster other coun-

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321. See *Beanal*, 197 F.3d at 167. For recent discussions of using the ATS to pursue environmental claims, see Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 V.A.J. INT'L L. 545 (2000); Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93 (2000).

322. *Opinio juris* refers to the fact that a state follows a particular practice out of a sense of legal obligation. See RESTATEMENT, *supra* note 268, § 102 cmt. c.

323. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.").

324. See David Epstein, *An Examination of the "Adequacy of the Alternative Forum" Factor in Forum Non Conveniens Determinations*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION (FOURTEENTH SOKOL COLLOQUIUM) 295, 296 (Jack L. Goldsmith ed., 1997) [hereinafter SOKOL COLLOQUIUM].

tries are urged to participate, the faster additional customary international law norms may develop.<sup>325</sup>

Allowing a true multinational approach to the development of customary international law also would help address what appears to be a U.S. centricity in the area of global human rights norms. Most rights considered important under U.S. law, as well as almost all rights that the United States criticizes other countries for violating, are held to be part of customary international law; however, rights generally not recognized by this country conveniently are considered not to be a part of customary international law.<sup>326</sup> International input toward the development of human rights norms will assist in the creation of standards of conduct more reflective of the global approach to these issues.

Ensuring a collective approach to the treatment of human rights cases also will assist in the enforcement of customary international law norms. Enforcement has been identified as the "weak link" in both the international legal system in general and international human rights law in particular.<sup>327</sup> By allowing foreign countries to develop their own internal procedures and substantive bodies of law in the area of human rights even, and perhaps especially, where a U.S. court could take jurisdiction over the dispute, the United States increases the possibility that adequate foreign adjudicatory and enforcement mechanisms will be in place for future disputes—per-

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325. The U.S. House of Representatives Judiciary Committee voiced its support for the proposition that the dismissal of certain human rights disputes brought in federal court may assist in the development of customary international law norms. In the legislative history of the TVPA, the House Judiciary Committee recognized that requiring TVPA plaintiffs to show exhaustion of local remedies as a prerequisite to filing suit in federal court not only would help U.S. courts avoid unnecessary burdens, but also would "encourage the development of meaningful remedies in other countries." H.R. REP. NO. 102-367, at 5-6 (1991).

326. See Simma & Alston, *supra* note 266, at 94-95. ("In the final resort it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine.")

327. Louis Henkin, Lecture, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 41 (1995).

haps disputes over which a U.S. court could not take jurisdiction. In this way, a federal court's decision to decline jurisdiction could improve significantly international enforcement capabilities in human rights disputes. To the extent the international enforcement net could be tightened in the area of human rights, a more stable international legal order would be created, thereby furthering U.S. interests.

Lest the argument be raised that federal courts should not shirk their duty to adjudicate cases raising complex international legal issues, it should be recalled that *forum non conveniens* dismissals are appropriate only in "rare cases"<sup>328</sup> and only under the most compelling circumstances. In most cases, when dismissal on *forum non conveniens* grounds is not appropriate, U.S. courts are free to judge the conduct in question and to survey the global legal community to determine whether any customary international legal standard has been violated or, perhaps, whether recent developments in state practice and usage merit the recognition of new norms of customary international law. Under this multinational scenario, U.S. courts would work cooperatively with judicial bodies and governments across the world to identify and establish standards of international conduct, and the United States would be an equal—not a dominating—player in the process.

Beyond the importance of developing and enforcing norms of customary international law, allowing courts in other countries the opportunity to take the lead in adjudicating certain human rights claims is critical to deterring human rights abuses. As has been observed, "[t]he courts of a single state, of course, cannot provide even a partial solution to the problem of providing redress to victims of gross human rights violations. Other states should be encouraged to enact legislation . . . to enable their courts to provide similar redress against human rights violators found within their jurisdiction."<sup>329</sup> Surely those committing human rights abuses around the world would be more deterred by local governmental and judicial steps taken to prohibit and even to criminalize their behavior than by the seemingly much more remote and distant possibility that, one day, a U.S. court might

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328. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 509 (1947).

329. Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 *HUM. RTS. Q.* 216 (1993).

issue a default judgment<sup>330</sup> against them on which the plaintiffs likely would never be able to collect.<sup>331</sup>

#### D. *Wiwa v. Royal Dutch Petroleum Co.: A Reprise*

By recognizing a new U.S. policy interest favoring domestic adjudication of ATS cases, the Second Circuit's decision in *Wiwa* results in the de facto abolition of forum non conveniens in virtually all human rights cases, at least within the Second Circuit. The justifications advanced by the *Wiwa* court and others seeking to undermine application of the doctrine in ATS disputes, while perhaps well-intentioned insofar as they seek to provide extra protection to human rights plaintiffs, do not withstand critical scrutiny. A review of the express language and known legislative history of § 1350 demonstrates that no clear intent to override forum non conveniens exists—making *Wiwa* inconsistent with Supreme Court case law on how to interpret a statute and common law doctrine together. Legislative history of the TVPA is also directly inconsistent with the *Wiwa* court's rationale, as well as that of commentators: Forum non conveniens was intended to remain available in human rights cases and be unaffected by passage of the Act.

The continued availability of forum non conveniens in ATS cases will not eviscerate the ATS—as should be clear from the fact-intensive nature of the forum non conveniens inquiry and the reality that no federal district court yet has dismissed successfully an ATS lawsuit pursuant to the doctrine. In addition, no policy consideration at issue in human rights litigation identified by the *Wiwa* court or others warrants dismantling forum non conveniens.

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330. Most defendants in human rights litigation in U.S. courts, if they ever make an appearance, flee at some point during the pendency of the matter. See RATNER & ABRAMS, *supra* note 129, at 205; STEPHENS & RATNER, *supra* note 7, at 3.

331. See STEPHENS & RATNER, *supra* note 7, at 3 (reporting that victorious human rights plaintiffs in U.S. court have been unsuccessful in securing “the millions of dollars awarded” to them). Beyond the United States's interest in assisting the development of customary international law norms, it has a significant interest in encouraging stability in international politics. Michael Byers, *International Law and the American National Interest*, 1 CHI. J. INT'L L. 257, 257 (2000). Pursuing a multinational approach to the development and enforcement of human rights norms in countries across the world would appear to be an important part of ensuring such stability.

While there are no reasonable justifications to abandon the doctrine in ATS cases, compelling reasons exist for its retention. Prudent applications of forum non conveniens in ATS lawsuits further U.S. interests in encouraging the global development of human rights law and avoiding unnecessary antagonism of international relations. The doctrine also plays a unique role in federal court docket management, allowing courts to evaluate the extent to which litigation filed in a federal court has sufficient connection to that forum to justify retaining the case. Although personal jurisdiction analyses at times<sup>332</sup> may look to the contacts that the defendant has had with a particular forum in order to determine whether there is a constitutional basis for haling the defendant into that court, such analyses involve extremely broad, generous criteria and do not touch on whether the federal court should retain jurisdiction over the case. Regardless of the jurisdictional bases claimed by plaintiffs, the doctrine of forum non conveniens helps to identify cases with few meaningful connections to the

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332. In the area of personal jurisdiction, general contacts with a forum may be relevant to determining whether a court constitutionally may exert its authority over a defendant. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court ruled that a defendant must have certain minimum contacts with a forum so as not to offend "traditional notions of fair play and substantial justice." *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). However, these minimum contacts are relevant only "if [the defendant] be not present within the territory of the forum." *Id.* In *Burnham v. Superior Court of California*, the Supreme Court affirmed a lower court's ruling that due process was satisfied with respect to personal jurisdiction where a defendant was present in the forum state—even temporarily—and served personally with process there. 495 U.S. 604, 628-29 (1990) (Brennan, J., concurring). In his plurality opinion, Justice Scalia observed that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* at 610. While a minimum contacts analysis may take the place of physical presence as the basis for jurisdiction, it would be "unfaithful to both elementary logic and the foundations of [the Court's] due process jurisprudence" to assert that a defendant's mere presence in a jurisdiction is not sufficient to establish jurisdiction. *Id.* at 619. As long as courts continue to accept jurisdiction over a defendant because it exercised—even for a brief moment—power over him, the availability of forum non conveniens is "logically necessitate[d] . . . to mitigate potentially unfair results." Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1279 (1986); see also Morley, *supra* note 63, at 27-30.



United States that more appropriately would be heard in an alternative forum.

The *Wiwa* court and others have contended that human rights plaintiffs have significant difficulties in finding an available forum and usually choose to file suit in U.S. court only as a last resort.<sup>333</sup> In many instances, this is true; however, such plaintiffs also receive significant procedural and substantive benefits by pursuing their claims in the United States. When suing in federal court, plaintiffs enjoy the advantage that “the trier of fact will be a jury that is ‘prone to award fabulous damages.’”<sup>334</sup> U.S. courts also allow extraordinarily broad pretrial discovery—broader than any other country<sup>335</sup>—limited only by the requirement that requests be “reasonably calculated to lead to the discovery of admissible evidence.”<sup>336</sup> While individuals sued for alleged human rights abuses may not fear broad discovery in U.S. courts, corporate defendants likely will have a very different perspective.<sup>337</sup> In addition, U.S. plaintiffs have

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333. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105-06 (2d Cir. 2000); S. REP. NO. 102-249, at 9-10 (1991). In discussing the TVPA, the Senate Judiciary Committee observed that human rights defendants usually have more substantial assets outside the United States, and it is usually easier to prove the “jurisdictional nexus” in a foreign country. S. REP. NO. 102-249, at 9. Accordingly, the committee believed that a plaintiff’s suit under the TVPA should be considered “virtually prima facie evidence” that the plaintiff has exhausted all local remedies where the alleged abuse occurred. *Id.* at 9-10.

334. Russell J. Weintraub, *The United States as a Magnet Forum and What, if Anything, to Do About It*, in SOKOL COLLOQUIUM, *supra* note 324, at 216 (quoting *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (Eng. C.A. 1982) (Denning, M.R.)). “Whatever the reason, U.S. juries are likely to award more money for various categories of damages than juries or courts in other countries.” *Id.* at 217.

335. *Id.* at 218-19.

336. FED. R. CIV. P. 26(b)(1).

337. Companies are being sued for human rights violations with increasing frequency. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 353-54 (1993) (involving claims against foreign hospital and government relating to plaintiff’s alleged detention and torture); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 111 (5th Cir. 1988) (addressing claims under the ATS that corporations conspired with the Saudi government to jail and torture plaintiff); *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996) (involving charges that defendant damaged the environment in Ecuador as a result of oil exploration activities). Companies, with potentially voluminous documents in the United States and across the world, rightly will be concerned about the potential broad scope of U.S. discovery and related document production.

access to lawyers that represent them on a contingency fee basis and may not require them to pay for court or other administrative costs if the plaintiffs do not prevail in their litigation. U.S. courts also apply broad personal jurisdiction and venue provisions and make available a powerful tool for plaintiffs—the class action. Plaintiffs (or their lawyers) also know that suing a defendant not resident in the United States on human rights claims likely will result in a default judgment, thus avoiding a protracted, expensive, time-consuming contested case on the merits.<sup>338</sup>

None of this is to say that foreign human rights plaintiffs are seeking to reap unfair advantages by suing in the United States or that they should be denied the usual benefits enjoyed by other plaintiffs in U.S. court; indeed, an underlying theme of this article is that ATS and other human rights plaintiffs should be treated like any other plaintiffs filing suit in the United States. At the same time, given all of the advantages that inure to any plaintiff by choosing a U.S. forum over a foreign forum, it is perhaps disingenuous to argue that human rights plaintiffs would prefer to not file suit in U.S. court and do so reluctantly, “only as a last resort.”<sup>339</sup>

#### IV. FORMALLY RECOGNIZING SOVEREIGN INTERESTS IN THE FORUM NON CONVENIENS ANALYSIS

Although forum non conveniens is a useful and important tool that should remain available in human rights litigation, the Supreme Court first articulated the doctrine’s test

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338. Most ATS suits result in default judgments; however, those defaults have occurred at various stages of litigation, from the failure to file an answer to the failure to appear for a deposition. See STEPHENS & RATNER, *supra* note 7, at 175. If the defaulted defendant does not have assets to enforce against in the United States, enforcement of the U.S. judgment in a foreign country may be possible in rare circumstances. See *id.* at 220-24. Even if no monetary recovery is possible, human rights victims receive the satisfaction that comes from a judicial acknowledgment that they have been wronged; such an acknowledgment likely serves other purposes as well, including denying the perpetrator a safe haven and deterring future, similar conduct. See *id.* at 234; Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.11 (1991).

339. S. REP. NO. 102-249, at 9 (1991) (arguing that human rights plaintiffs do choose to file suit in a U.S. court “only as a last resort”).

over fifty years ago<sup>340</sup>—at a time when international human rights matters were not the subject of federal litigation. Since then, important changes have occurred in American culture, federal practice, and international relations, justifying a reappraisal of the *forum non conveniens* factors.<sup>341</sup> In observing that the *forum non conveniens* factors it identified did not constitute an exhaustive list of considerations that appropriately could be considered by a trial court, the Supreme Court recognized that the test is malleable to account for future developments relevant to the *forum non conveniens* inquiry.<sup>342</sup>

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340. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The factors eventually articulated by the *Gilbert* Court began to be developed in the nineteenth century in Scotland and were tested and applied by lower federal courts before 1947. See *supra* notes 63-81 and accompanying text.

341. One of the general criticisms that has been levied against use of the *forum non conveniens* doctrine is that modes of communication and methods of international travel have advanced significantly since 1947. As a result, it is unreasonable and improper to attach a significant weight to the difficulty of moving documents and witnesses from one country to another. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) ("One may wonder whether the entire doctrine of *forum non conveniens* should not be reexamined in the light of the transportation revolution that has occurred [since 1947]."). As the Second Circuit has observed, "advances in modern telecommunications and jet travel may further circumscribe a district court's discretion in dismissing a suit on the ground of *forum non conveniens*." *Overseas Programming Cos. v. Cinematographische Commerzanstalt*, 684 F.2d 232, 232 n.1 (2d Cir. 1982) (and cases cited therein). It is true that international travel, overnight delivery of documents, faxes, e-mails, and videotaped depositions have all reduced the inconveniences associated with international litigation; however, such inconveniences still exist to one degree or another, particularly in cases where voluminous documents must be transported to the United States and translated from a foreign language or where significant numbers of relevant witnesses are located abroad. To the extent modern modes of communication and transportation would render a lawsuit in the United States involving foreign documents and witnesses less inconvenient than such a suit would have been fifty years ago, those new technologies should be factored into the *forum non conveniens* consideration. See *Manu Int'l, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65 (2d Cir. 1981) (identifying "much recent sentiment in this Circuit for evaluating the *forum non conveniens* factors in light of the increased speed and ease of travel and communication"). However, as long as inconveniences exist associated with litigating international matters, the *forum non conveniens* doctrine should remain an available tool to both litigants and federal courts.

342. The Court in *Gilbert* avoided establishing a rigid *forum non conveniens* test and noted that "[w]isely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of rem-

### A. Governmental Concerns in Human Rights Litigation

The new breed of federal human rights litigation implicates a variety of considerations that may not surface in other disputes or are present to a less significant extent. One issue arising frequently in ATS lawsuits is the existence of important sovereign interests of the United States and/or foreign countries. Given the relevance of these interests to determining which forum is the most appropriate for resolving a human rights dispute, the doctrine of *forum non conveniens* formally should recognize sovereign interests as a factor to be identified and weighed in the overall balancing of considerations. More specifically, federal courts should weigh the sovereign interests associated with the particular litigants, claims, and national and international implications raised by each human rights dispute—much as they do in other contexts, such as choice of law,<sup>343</sup> antisuit injunctions,<sup>344</sup> and international abstention.<sup>345</sup> An evaluation of national interests implicated by a particular ATS lawsuit is a process separate and distinct from weighing—as discussed in Part III.C.—U.S. policy interests underlying § 1350 to determine whether *forum non conveniens* ever should be available in such disputes. To facilitate a consideration of sovereign interests triggered by particular human rights lawsuits, federal courts formally should request state-

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edy.” *Gilbert*, 330 U.S. at 508; *see also* *Piper Aircraft v. Reyno*, 454 U.S. 235, 249 (1981) (recognizing the Court’s decisions that “repeatedly emphasized the need to retain flexibility” in the *forum non conveniens* inquiry).

343. *See, e.g.*, *Schexnider v. McDermott Int’l, Inc.*, 817 F.2d 1159, 1161-62 (5th Cir. 1987); *Zacaria v. Gulf King 35, Inc.*, 31 F. Supp. 2d 560, 563 (S.D. Tex. 1999); *Solano v. Gulf King 55, Inc.*, 30 F. Supp. 2d 960, 962-64 (S.D. Tex. 1998).

344. National interests and international comity concerns frequently arise in the antisuit injunction context. *See, e.g.*, *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1352-55 (6th Cir. 1992); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937-39 (D.C. Cir. 1984); *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler*, 412 F.2d 577, 578-79 (1st Cir. 1969).

345. *See, e.g.*, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 554-68 (1987) (Blackmun, J., concurring in part and dissenting in part); *Turner Entm’t Co. v. Degeto Film, GmbH*, 25 F.3d 1512, 1519-21 (11th Cir. 1994); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 50-51 (D.D.C. 2000); *Madanes v. Madanes*, 186 F.R.D. 279, 285-86 (S.D.N.Y. 1999).

ments of interest from both the U.S. government and the government of the alternative forum.<sup>346</sup>

Formal weighing of national interests will require federal courts to recognize explicitly what has been implicit in the forum non conveniens inquiry before now: The doctrine does not concern itself solely with convenience. Instead, forum non conveniens looks broadly to where litigation appropriately should be heard and would serve "the ends of justice"; to achieve this result, courts inquire into a variety of factors, which include convenience concerns. However, the Supreme Court has always acknowledged in the forum non conveniens inquiry that there is a "local interest in having localized controversies decided at home."<sup>347</sup> Only under a strained interpretation of "convenience" could this factor be considered directly relevant to weighing the relative conveniences of trying a lawsuit in one forum as opposed to another.<sup>348</sup>

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346. Admittedly, federal courts have not been unanimous in their adoption of sovereign interest balancing tests in other contexts. Although, as discussed later in this section, some courts readily have balanced national interests of the United States and other countries, various other courts have rejected such balancing. See, e.g., *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 551-54 (Blackmun, J., concurring) (recognizing, in the context of a Hague Evidence Convention analysis, that the Executive "is best equipped to determine how to accommodate foreign interests along with our own"); *Reinsurance Co. of Am., Inc. v. Admin. Asigurarilor de Stat*, 902 F.2d 1275, 1284 (7th Cir. 1990) (Easterbrook, J., concurring) (stating that he "would be at sea" if forced to weigh competing national interests in the area of inconsistent obligations regarding whether to produce or protect relevant information); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (describing sovereign interest balancing test in securities fraud case as "difficult to apply and . . . inherently unpredictable"); *Laker Airways Ltd.*, 731 F.2d at 948-51 (rejecting proposition that the court should balance sovereign interests in the context of determining whether to assert prescriptive jurisdiction and noting that it was "ill-equipped to 'balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate'" (citation omitted)).

347. *Gilbert*, 330 U.S. at 509; *Piper*, 454 U.S. at 241 n.6 (quoting *Gilbert*, 330 U.S. at 509).

348. It might be argued that a strong local interest in litigation might make a U.S. court faced with a complex lawsuit involving foreign litigants and requiring application of foreign law more willing to incur the inconveniences associated with trying the case in the United States. Such a case would not be more convenient for the court—the difficulties associated with the case would remain; the court would simply decide to endure the inconveniences because of a strong local interest. However, regardless of whether local interests are directly relevant to a convenience consideration or

Scottish courts wrestling with the scope and application of the doctrine before the Supreme Court's decision in *Gilbert* focused not just on convenience, but also—and arguably to a greater extent—on the broader question of which forum would be preferable for “securing the ends of justice.”<sup>349</sup> One Scottish judge even observed that “[t]he proper translation” of *conveniens* in the plea “is ‘appropriate.’”<sup>350</sup> U.S. courts, while focusing on convenience in the analysis, also have noted that determining where trial would serve “the ends of justice” is the ultimate goal of a *forum non conveniens* inquiry.<sup>351</sup> The existence or absence of strong national interests appears to be highly relevant to a court's determination of which forum would serve the ends of justice. In fact, U.S. courts informally have weighed sovereign interests as part of jurisdictional considerations in international cases for over one hundred years.<sup>352</sup>

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whether the *forum non conveniens* inquiry encompasses more than solely convenience issues, local and national interests in the litigation remain relevant to, and should be considered in, the *forum non conveniens* analysis.

349. See *La Société du Gaz de Paris v. La Société Anonyme de Navigation “Les Armateurs Français,”* [1926] Sess. Cas. (H.L.) 13, 22. Lord Justice Clerk Alness noted that a *forum non conveniens* plea would be granted where another forum was open to the litigants and where “that other forum is more suitable for the trial of the cause from the point of view of the interests of the parties and for the ends of justice.” *La Société du Gaz de Paris v. La Société Anonyme de Navigation “Les Armateurs Français,”* [1925] Sess. Cas. (H.L.) 332, 347. In fact, the Lord Justice observed that although in some earlier cases “mere convenience or expediency” may have been the criterion for decision, the proper analysis was “broader.” *Id.* Although Scottish courts did not usually explain in detail what “justice” factors were relevant outside of “convenience” concerns, judges did address in the *forum non conveniens* analysis both the law to be applied and “relation” of the lawsuit to the chosen forum. See, e.g., *id.* at 348.

350. See *id.* at 18 (Lord Dunedin); see also Blair, *supra* note 63, at 1 (observing that Anglo-American law recognizes *forum non conveniens* when a cause “may be more appropriately tried elsewhere”).

351. *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 528 (1947) (explaining that the doctrine of *forum non conveniens* “resists formalization and looks to the realities that make for doing justice”); Barrett, *supra* note 63, at 415, 421 (noting that the basic consideration in *forum non conveniens* should be “whether the ends of justice might better be served by trial elsewhere”) (citation omitted).

352. See *supra* notes 340-42 and accompanying text.

In particular, courts on occasion have evaluated sovereign interests as part of their forum non conveniens analyses.<sup>353</sup> For example, in *Harrison v. Wyeth Laboratories*,<sup>354</sup> the district court considered forum non conveniens arguments in the context of a products liability case. The pharmaceutical products in question were manufactured, marketed, and sold in the United Kingdom, and as part of its consideration, the court inquired into the relative interests of the fora in question.<sup>355</sup> In observing the strong foreign interests involved in the case, the court opined that “[q]uestions as to the safety of drugs marketed in a foreign country are properly the concern of that country; the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries.”<sup>356</sup> The court particularly was focused on allowing the United Kingdom to develop and impose its own laws in the area of drug safety: “Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug’s merits, and which will tip the balance for it one way or the other. The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.”<sup>357</sup>

Trial courts have weighed national interests in other forum non conveniens contexts, including suits involving RICO and other claims in an international data-communications dispute,<sup>358</sup> Securities Act claims arising from a failed computer

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353. Even outside the formal context of forum non conveniens, federal courts have, for over one hundred years, evaluated the existence and importance of national interests in deciding whether to retain jurisdiction over disputes involving foreign litigants. See, e.g., *The Belgenland*, 114 U.S. 335, 363-65 (1885). See generally *supra* notes 72-81 and accompanying text.

354. *Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1 (E.D. Pa. 1980).

355. See *id.* at 1-4 (holding that “[t]he local interest in having this localized issue decided at home is strong”).

356. *Id.* at 4.

357. *Id.* The court granted defendant’s forum non conveniens motion but imposed on it various conditions, including that it must submit to jurisdiction in the United Kingdom. See *id.* at 4-5.

358. See *Winex, Ltd. v. Paine*, Civ. A. No. 89-2083, 1990 WL 121483, at \*7 (E.D. Pa. Aug. 15, 1990) (granting a conditional dismissal on forum non conveniens grounds, in part because “England has an interest in seeing that shareholder subscription and service agreements, executed in London and governed by English law, are properly interpreted and enforced”).

medicine venture,<sup>359</sup> claims stemming from a gas plant disaster,<sup>360</sup> wrongful death allegations in a lawsuit stemming from a helicopter crash,<sup>361</sup> and a suit brought under U.S. antitrust laws,<sup>362</sup> as well as others.<sup>363</sup> The Supreme Court's own decision in *Piper Aircraft Co. v. Reyno* demonstrated that national interests are an appropriate consideration in forum non conveniens inquiries.<sup>364</sup> In that case, the Court evaluated various public interest factors in a wrongful death lawsuit stemming from an airplane crash in Scotland<sup>365</sup> and observed that "Scotland has a very strong interest in this litigation."<sup>366</sup> The Court concluded that the "American interest in this accident is simply not sufficient to justify" the inconveniences of trial in the United States.<sup>367</sup>

While federal human rights jurisprudence is not as developed as other substantive areas, a few courts have considered sovereign interests in these cases as well, while evaluating mo-

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359. See *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 129 (S.D.N.Y. 1986) (noting that "the community in Israel has a greater interest in this dispute than the New York community").

360. See *In re Union Carbide Gas Plant Disaster*, 634 F. Supp. 842, 863-64 (S.D.N.Y. 1986) (recognizing the "immense interest[s]" that India had in serving as the forum for litigating claims involving a plant licensed and regulated by the Indian government).

361. See *Dahl v. United Techs. Corp.*, 632 F.2d 1027 (3d Cir. 1980) (considering both the U.S. interest in certifying all aircraft as safe that are manufactured for sale in the United States, as well as the Norwegian interest in applying a domestic statute passed to cover precisely the fact pattern found in *Dahl*).

362. *Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 817 (D.D.C. 1983) (recognizing the existence of strong public interest factors where the Sherman Act, "our charter of economic liberty," was in jeopardy of being "emasculated").

363. See, e.g., *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) (observing in the context of a suit by an equity investor in an airline, that "Great Britain has a more substantial interest because the litigation involves the right to a seat on the board of directors of a Scottish corporation"); *DeYoung v. Beddome*, 707 F. Supp. 132, 139 (S.D.N.Y. 1989) (recognizing that "the interest of Canada in having controversies relating to one of its major corporations decided at home is substantial" and granting defendants' motion to dismiss on comity and forum non conveniens grounds in suit brought by the Canadian company's stockholders).

364. See *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

365. See *id.* at 238.

366. *Id.* at 260.

367. *Id.* at 261.



tions to dismiss. In *Eastman Kodak Co. v. Kavlin*,<sup>368</sup> the trial court considered whether to dismiss an ATS suit brought for alleged wrongful imprisonment in Bolivia.<sup>369</sup> In weighing the various forum non conveniens factors, the court observed that plaintiffs' claims would require the court to "sit in judgment upon the alleged corruption of a nation's entire legal system."<sup>370</sup> Considering the relative sovereign interests was clearly important to the trial court: "If Bolivia's courts do not have a surpassingly greater interest in their own integrity than do the American courts, then the public interest factor is meaningless."<sup>371</sup> U.S. and foreign national interests have been raised in several other human rights cases, often where forum non conveniens is considered in combination with other doctrines such as international comity<sup>372</sup> and the political question doctrine.<sup>373</sup>

International human rights disputes often involve either claims of direct governmental involvement in the abuses or allegations that trigger significant foreign governmental interests. When the actions of a sitting foreign government are questioned, that country's sovereign interests clearly are implicated. Moreover, when claims of human rights abuse are levied against former governmental officials, the foreign country may have a significant domestic interest in serving as the forum for litigation aimed at correcting past governmental

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368. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997).

369. *See id.* at 1080-82.

370. *Id.* at 1084.

371. *Id.*

372. *See Jota v. Texaco, Inc.*, 157 F.3d 153, 159-61 (2d Cir. 1998). In *Jota*, the court addressed the changing attitude of the government of Ecuador vis-à-vis litigation of plaintiffs' claims in the United States. *See id.* The Second Circuit remanded the matter for the trial court to reevaluate its findings that "exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources" and that "the Republic of Ecuador has expressed its strenuous objections to the exercise of jurisdiction by this Court." *Id.* at 160.

373. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995). In *Kadic*, the Second Circuit evaluated various statements of interest or opinions submitted by the U.S. government, including the opinion that the defendant was not immune from suit as an invitee of the United Nations. *See id.* The Solicitor General and the Department of State also expressed their opinion that "[a]lthough there might be instances in which federal courts are asked to issue rulings under the [ATS] or [TVPA] that might raise a political question, this is not one of them." *Id.*

wrongs.<sup>374</sup> Similarly, where the alleged abuse is committed by a non-state actor—for example, in certain cases of genocide or war crimes<sup>375</sup>—foreign states may have an important national interest in helping to restore peace and instilling confidence in the international community that the countries can manage their own domestic affairs and administer justice impartially. In these cases, foreign countries may have significant interests in helping to further the development of customary international law norms by adjudicating human rights disputes within their borders. Such interests should be factored into a forum non conveniens analysis.

The federal court considering a forum non conveniens motion in a human rights case also should consider the U.S. interests, if any, in the particular litigation. The executive branch may feel that the allegations of abuse largely raise issues of domestic concern to the foreign country, and that the foreign country is ready, willing, and able to adjudicate the plaintiff's claims. The U.S. government also might hold the opinion that domestic adjudication of a foreign dispute unnecessarily could threaten sensitive international relations. In these instances, U.S. interests in the stability of the international legal and political order might warrant dismissal. Alter-

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374. The importance of allowing a foreign government the opportunity to adjudicate claims against a prior regime goes beyond internal concerns for that country. Such resolution of claims is good for the broader international community and the international legal order. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2594 (1991) (observing in particular that “[p]reeminent values underlying the international legal order are best served if a government whose predecessors committed crimes against humanity assumes responsibility for punishment. Prosecution under these circumstances reconciles international law’s insistence on the one hand that crimes against humanity must not escape punishment, and its concern on the other hand to respect national sovereignty”). Similar concerns hold true in the civil context. There exists the possibility that a corrupt foreign state that has perpetrated abuse may argue strenuously for dismissal, citing its sovereign interests in serving as a forum for litigation, with the real motivation of avoiding international embarrassment resulting from a U.S. trial. In such a case, as in all others, the U.S. court should weigh all relevant forum non conveniens factors and evaluate the appropriateness of dismissal, based on the totality of the evidence before it.

375. The Second Circuit in *Kadic* determined that certain violations of customary international law, including genocide and war crimes, could be committed in the absence of state involvement. See 70 F.3d at 241-43.

natively, the U.S. government might feel strongly that U.S. interests are consistent with those of the plaintiff because the ATS defendant, for example, is a U.S. corporation. In such a case, strong U.S. interests could weigh in favor of providing a U.S. forum for the dispute.

Formally incorporating sovereign interests into the forum non conveniens analysis would not require the judiciary to encroach into the realm of foreign policy constitutionally delegated to the executive branch.<sup>376</sup> While federal courts should request statements of interest from the countries involved, those countries are under no obligation to respond; if they do, the identified interests simply would be considered in the overall balancing of factors. By doing so, courts would not identify or articulate foreign policy goals or national interests of the United States; they only would weigh the interests provided to them as part of a broader analysis. In this broad analysis, courts would consider interests that are centrally important to whether they should retain jurisdiction over particular disputes, and that are not evaluated adequately through means other than forum non conveniens.

### B. In re Holocaust Victim Assets

A recent ATS lawsuit considered by the Eastern District of New York provides a good example of the importance of evaluating sovereign interests in the context of a forum non conveniens analysis. Beginning in 1996, several individual suits later consolidated for pretrial purposes under the name *In re*

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376. In *Klinghoffer v. S.N.C. Achille Lauro*, the Second Circuit considered arguments by the PLO that a suit against it for participation in the Achille Lauro hijacking raised "foreign policy questions and political questions in a volatile context lacking satisfactory criteria for judicial determination." 937 F.2d 44, 49 (2d Cir. 1991). However, the court observed that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Second Circuit concluded that, although the issues before it arose "in a politically charged context," the suit was not transformed from "an ordinary tort suit into a non-justiciable political question." *Id.* In *Baker v. Carr*, the Supreme Court acknowledged that courts have authority to address disputes that implicate foreign and international relations issues. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (observing that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

*Holocaust Victim Assets*<sup>377</sup> were filed against three Swiss financial institutions alleging that the banks conspired with Nazi Germany during World War II in furtherance of Germany's war crimes, crimes against peace, and crimes against humanity.<sup>378</sup>

The plaintiffs in *In re Holocaust Victim Assets* sought jurisdiction in part, under the ATS and alleged a variety of tort and contract claims, including negligence, breach of fiduciary duty, conspiracy, and breach of contract, as well as damages of \$20 billion.<sup>379</sup> In response, the defendant banks filed various motions to dismiss or stay the litigation, including a motion to dismiss on forum non conveniens grounds.<sup>380</sup> The parties traded arguments about relevant private and public interest factors, as well as whether Swiss courts could provide an adequate alternative forum for the litigation. One factor that the litigants argued over at length was the weighing of relative sovereign interests that the United States and Switzerland had in serving as the forum for resolving plaintiffs' claims. Although *In re Holocaust Victim Assets* was settled before Judge Korman had an opportunity to evaluate the litigants' forum non conveniens arguments, reviewing the sovereign interests at play in

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377. By the time the court approved the settlement in this action, four separate actions had been consolidated under Master Docket No. 96 Civ. 4849: *Sonabend v. Union Bank of Switz.*; *Trilling-Grotch v. Union Bank of Switz.*; *Weisshaus v. Union Bank of Switz.*; and *World Council of Orthodox Jewish Cmty.s., Inc. v. Union Bank of Switz.* See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (mem. and order approving settlement agreement) [hereinafter Korman Order].

378. The litigants in *In re Holocaust Victim Assets* reached a settlement before Judge Korman issued a ruling on any of defendants' motions to dismiss or stay the litigation. In exchange for the withdrawal of all of plaintiffs' claims, the defendants agreed to pay \$1.25 billion. See Korman Order, *supra* note 377, at 142; see also John M. Goshko, *Swiss Banks Agree to Holocaust Pact; \$1.25 Billion Settlement for Victims, Heirs*, WASH. POST, Aug. 13, 1998, at A1. Judge Korman formally approved the settlement on July 26, 2000. See Korman Order, *supra* note 377, at 140.

379. See Korman Order, *supra* note 377, at 141; Am. Compl. ¶ 35-62, *Weisshaus v. Union Bank of Switzerland*, No. 96-4849 (E.D.N.Y., filed Jan. 24, 1997); *French Banks Named in Lawsuit*, WALL ST. J. EUR., Dec. 19, 1997, available at 1997 WL-WSJE 17301519.

380. See Memorandum of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. 96-4849) [hereinafter Defendants' Forum Non Conveniens Mem.].

that case provides a useful look at how such interests might arise and be evaluated in future disputes.

The Swiss interests in serving as the forum for the litigation were relatively clear. The Swiss government recently had undertaken and supported a variety of initiatives "to investigate and redress injuries to Holocaust victims arising from the war years," including the creation of a Swiss Historical Inquiry Committee to investigate (without the usual constraints of Swiss bank secrecy laws) the fate of all assets that entered the country during World War II and belonged to victims of the Holocaust.<sup>381</sup> Switzerland also had endorsed and pledged cooperation with an independent, international forensic investigation effort led by Paul Volcker, former Chairman of the Board of Governors of the Federal Reserve System.<sup>382</sup>

Importantly, Switzerland appeared to have a significant national interest in serving as the forum for litigation because plaintiffs' allegations went beyond the three private Swiss bank defendants and sought "an examination of the Swiss Government's neutrality and foreign policy decisions during [World War II]."<sup>383</sup> In their complaints, plaintiffs alleged that Switzerland "had close ties to the Nazi Regime which were knowingly used and exploited to further the war objectives of that Regime" and that Switzerland had "collaborated and acted in complicity with and aided and abetted the activities of the Nazi Regime," including the commission of war crimes, crimes against humanity, and genocide.<sup>384</sup> Because of these and similar allegations, the Swiss government took a keen interest in resolving all outstanding claims. The chief of the Swiss govern-

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381. Defendants' Forum Non Conveniens Mem., *supra* note 380, at 25-26. However, plaintiffs maintained that the Swiss government's failure to undertake any investigation into these issues in the previous fifty years undercut its argument. See Plaintiff's Mem. of Law in Opposition to Defendants' Motion to Dismiss on Forum Non Conveniens Grounds; Motion to Dismiss on Abstention Grounds; and Motion in the Alternative to Stay All Proceedings in These Cases at 19 n.24, *In re Holocaust Victim Assets Litig.*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000) (No. 96-4849).

382. See Defendants' Forum Non Conveniens Mem., *supra* note 380, at 26. The defendants also maintained that litigation in the United States, with the extraordinary discovery burdens placed on defendants, would disrupt and derail the important work of these internationally supported endeavors. See *id.* at 28-29.

383. *Id.* at 29.

384. *Id.* at 29 n.54 (quoting Friedman Compl. ¶¶ 50, 208).

ment's task force on Holocaust-related issues underscored his country's important national interest in the dispute: "[N]othing is more important to the people and Government of Switzerland than establishing the complete truth in this matter as swiftly and humanely as possible. We are fully aware that nothing less than our reputation as an honorable country and reliable friend is at stake."<sup>385</sup>

While important Swiss interests appeared to be at stake in *In re Holocaust Victim Assets*, U.S. interests in the litigation were somewhat less apparent. One clear U.S. interest was the existence of some U.S. citizens as named plaintiffs in the lawsuits; however, not all named plaintiffs were citizens of the United States. The plaintiffs also claimed important U.S. interests in the dispute as evidenced by congressional hearings held to address the fate of assets belonging to Holocaust victims, the work of Undersecretary of State-Designate Stuart Eizenstat, appointed by President Clinton to head the Administration's efforts on Holocaust asset issues, on the same issue, and various hearings at the state level into related bank activities.<sup>386</sup>

However, in contrast to their Swiss counterparts, U.S. government officials did not stress the existence of strong U.S. interests in the litigation; instead, Undersecretary Eizenstat observed that, in addressing the claims against defendants, "[c]onfrontation would be counterproductive, it would be a set-back. It would be a way of saying that despite all of the efforts that [the Swiss] have made over the last several months, that those efforts, far from being admired and rewarded, were being punished."<sup>387</sup> At the very least, the U.S. Administration did not endorse litigation in U.S. court as the appropriate method for resolving the plaintiffs' claims.<sup>388</sup>

While a proper, complete forum non conveniens analysis would take into consideration a variety of different considera-

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385. *Id.* at 28 (quoting *The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Financial Services*, 104th Cong. 31, 32 (1996) (statement of Swiss Special Ambassador Thomas Borer)).

386. *See id.* at 21.

387. *Id.* at 30-31 (quoting Marcus Kabel, *U.S. Says Swiss Bank Boycott Would Be Wrong Move*, REUTERS WORLD SERV., Jan. 30, 1997).

388. *See id.* at 30.

tions,<sup>389</sup> the existence of strong, unique Swiss national interests in *In re Holocaust Victim Assets* made a compelling case for dismissal. The lawsuits fundamentally questioned not only the activities of three Swiss banks, but also the extent to which Switzerland, as a country, collaborated and conspired with Nazi Germany during World War II. Absent a clear indication that Swiss courts could not or would not administer justice properly in this matter,<sup>390</sup> it appears that modern-day Switzerland would have had a strong national interest in serving as the forum for evaluating its predecessor government's actions—and those of Swiss banks fifty years ago—and in holding persons and institutions found to be responsible accountable for their actions within the Swiss legal system.

Regardless of how national interests would have played out in *In re Holocaust Victim Assets*, there appears to have been a lack of full information provided to Judge Korman about the existence of U.S. interests. During oral argument on the defendants' forum non conveniens motion, the litigants disagreed strongly about whether the United States had a stake in the litigation.<sup>391</sup> By formally requesting a statement of interest

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389. With respect to the other forum non conveniens considerations, the defendant banks argued that because all of the challenged conduct occurred in Switzerland, the vast majority of relevant witnesses and documents were located in Switzerland, and the documents—totaling at least hundreds of thousands of pages—would need to be translated from German, French, Italian, or Romansch to be understandable in a U.S. court. See Defendants' Forum Non Conveniens Mem., *supra* note 380, at 12-16. The defendants also pointed out that Swiss law would likely apply to most claims, and litigation of the dispute in U.S. court would create significant administrative burdens. See *id.* at 16-21. Finally, the banks maintained that Swiss courts were open and available to the plaintiffs and would provide an adequate alternative forum. See *id.* at 31-38.

390. Federal courts previously have found Switzerland to constitute an adequate alternative forum in forum non conveniens analyses. See *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978) (finding Switzerland's courts to be adequate fora); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 515 n.32 (S.D.N.Y. 1982) (same); Defendants' Forum Non Conveniens Mem., *supra* note 380, at 31-32 nn.59 & 60.

391. During oral argument on defendants' motions to dismiss or stay the litigation, Judge Korman inquired into the existence of U.S. governmental interests:

THE COURT: . . . Can I ask you, does the United States Government have an interest in the subject matter of this litigation?

[COUNSEL FOR DEFENDANTS]: I think that [U]ndersecretary Eisenstadt has indicated that the United States does have

from the United States, Judge Korman would have eliminated any question about whether the U.S. government had failed to express an interest in the litigation simply because it had not been asked by the court. In fact, Judge Korman wondered aloud during oral argument why the U.S. government had not communicated its position on the litigation directly to him, clearly suggesting confusion over whether the U.S. government had no significant interest in the lawsuits or whether it simply was waiting to express those interests until it was asked by the judge.<sup>392</sup>

*In re Holocaust Victim Assets* highlights at least two points relevant to the resolution of forum non conveniens motions in future human rights lawsuits. First, given the unique allegations, litigants, and context of every suit, significant sovereign interests may exist that can and should be factored into the

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an important interest. But he has indicated that that interest would be best served by resolving these issues in a cooperative rather than a confrontational way and his comment in testimony before Congress and elsewhere suggests that [U]ndersecretary Eisenstadt . . . and the U.S. Government [do not] think that class action litigation in the New York court is the right way to proceed.

[COUNSEL FOR PLAINTIFFS]: I don't mean to interrupt at all but there is a peripheral issue with regard to Mr. Eisenstadt and [forum non conveniens]. . . . Mr. Eisenstadt officially informed us that it is the official position of the United States State Department at this time that it has no interest in this litigation.

Transcript of Civil Cause for Oral Argument Before the Honorable Edward R. Korman, United States District Judge on July 31, 1997 at 116-17, *In re Holocaust Victim Assets Litig.*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000) (Nos. 96-4849, 96-5161, 97-461).

392. Judge Korman was obviously troubled during oral argument with whether and under what circumstances the U.S. government would express any interest it had in the litigation:

THE COURT: Why haven't I heard from anybody in the government of the United States directly about what the position is of the government of the United States?

[COUNSEL FOR DEFENDANTS]: Because you haven't asked. . . .

THE COURT: But the government only asserts its interest when it's requested?

[COUNSEL FOR DEFENDANTS]: The government may volunteer or it may not. No inference can be drawn from the fact that they haven't volunteered. But if the viewpoint of the United States is important to the Court, the Court may and should ask.

*Id.* at 24-25.



forum non conveniens analysis. Second, when a federal judge is attempting to weigh relevant forum non conveniens factors, like Judge Korman in *In re Holocaust Victim Assets*, he or she would be well-served by formally requesting statements of interest from the governments in question. Such requests would not only provide the judge with the most accurate identification of relevant national interests, but also would eliminate any confusion that otherwise might exist from a country's silence in the absence of being asked.

## V. CONCLUSION

On September 24, 2000, Vojislav Kostunica defeated incumbent Slobodan Milosevic in the election for the Yugoslav presidency.<sup>393</sup> When Milosevic finally and grudgingly conceded power in early October, his thirteen-year reign of mismanagement, suppression, and violence in Yugoslavia was brought to an end.<sup>394</sup> Even before being stripped of power, Mr. Milosevic was a wanted man on the international scene. Several years ago, the International Criminal Tribunal for the Former Yugoslavia issued an indictment for Milosevic, charging him with crimes against humanity during his reign, including murder, deportation, and persecution, as well as violations of the laws and customs of war, particularly in connection with his conduct in the Serbian province of Kosovo before and during NATO bombing raids in 1999.<sup>395</sup> After receiving encouragement from the United States<sup>396</sup> and other countries, the Yugoslav government extradited Milosevic to the Hague, where he currently faces various charges, including allegations of genocide.<sup>397</sup>

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393. See Peter Finn & R. Jefferey Smith, *Kostunica and Milosevic Allies Set to Sign Joint Power Accord*, WASH. POST, Oct. 16, 2000, at A24.

394. See Dusan Stojanovic, *Serbs Hope for New Democracy*, A.P. ONLINE, Oct. 26, 2000, at <http://ptg.djnr.com/ccroot/asp/publib/story.asp>.

395. See Press Release, The International Court of Justice, Statement of Justice Louise Arbour, Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (May 27, 1999); R. Jefferey Smith & Ellen Nakashima, *Serb Leader Hints at Milosevic Trial*, WASH. POST, Oct. 13, 2000, at A24.

396. Steven A. Holmes, *\$100 Million Voted for Serbia, but with War-Crimes Strings*, N.Y. TIMES, Oct. 26, 2000, available at <http://www.nytimes.com/2000/10/26/world/26AID.html>.

397. See Keith B. Richburg, *Milosevic, U.N. Judge Spar: Genocide Count to be Filed*, WASH. POST, Aug. 31, 2001, at A18.

As of the writing of this article, no civil case has been filed in U.S. court against Milosevic since his electoral defeat;<sup>398</sup> however, that may change in the near future as survivors of the Milosevic brutality and relatives of those killed or tortured by his forces emerge from the shadows of his repressive reign. The procedural and substantive advantages that such plaintiffs would enjoy in U.S. court likely will draw some of them to the United States. In addition, the expansive interpretation of the ATS by federal courts, as well as the existence of the TVPA, make the United States a particularly attractive magnet for alien plaintiffs seeking to sue Milosevic. However, if and when such cases are filed in federal court, they should be approached with caution.

Suits brought by citizens of Yugoslavia against Milosevic for violence committed in that country appear to be particularly well suited for resolution in the courts of Yugoslavia. The democratic overthrow of Milosevic signals the desire of the Yugoslav people and its new government to move past the violence and repression of their former leader. The country as a whole may have a strong national interest in serving as the forum for meting out justice to Milosevic on behalf of his victims.<sup>399</sup> President Kostunica recently voiced this concern: "Justice [for Milosevic] is very important because we have been living for a long time with something that is contrary to justice. . . . [The trial of Milosevic] should be in [the] hands [of

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398. On May 17, 1999, *John Doe v. Slobodan Milosevic*, No. 99-CV-11058 (D. Mass. filed May 17, 1999) (WESTLAW, Massachusetts, District Court, Docket), was filed in U.S. District Court for the District of Massachusetts. The lawsuit was filed by two Kosovo Albanians and alleged genocide and other war crimes committed by Milosevic and his fellow Yugoslav leaders. See Dave Howland, *Two Kosovo Albanians File Lawsuit Against Yugoslav Leaders for Assets*, A.P. ONLINE, May 25, 1999, at <http://ptg.djnr.com/ccroot/asp/publib/story.asp>. The lawsuit was based, in part, on the ATS and the TVPA. See *id.* Milosevic and the other defendants apparently have defaulted in that suit. If Milosevic had answered the *John Doe* suit, the trial court likely would have been forced to dismiss the lawsuit on grounds of sovereign immunity. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992); *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1099-103 (9th Cir. 1990) (ruling that an individual acting in his official governmental capacity is protected under the Foreign Sovereign Immunities Act); see also 28 U.S.C. § 1605(a)(7) (1994) (providing a very narrow exception to sovereign immunity for certain acts of human rights abuse occurring within the scope of a foreign governmental official's employment).

399. See generally Orentlicher, *supra* note 374.

Yugoslavia's citizens] and not the hands of foreigners."<sup>400</sup> As long as Milosevic and his allies do not retain control over any aspects of Yugoslavia's court system<sup>401</sup> and those courts are free from corruption and bias and provide basic justice, a persuasive case seems to exist for allowing Yugoslav tribunals to resolve such claims.

Beyond possible suits involving Milosevic, all indications are that the number of human rights suits filed in federal court will continue to increase in the years to come, and most of those suits are likely to be brought under the ATS.<sup>402</sup> As repressive rulers are overthrown across the globe and as multinational corporations face increased scrutiny into their treatment of indigenous peoples and the environment, human rights suits in the United States will flourish. In some ATS lawsuits to come, like many cases in the past, dismissal on forum non conveniens grounds may not be appropriate for a variety of reasons, including the inability of human rights plaintiffs to obtain a fair trial in an alternative forum. However, eliminating the possibility of invoking forum non conveniens in ATS cases is an additional step that is both unnecessary and unwise. The continued existence of the doctrine in ATS cases furthers important U.S. interests, and it ensures that courts will be empowered to exclude cases with few meaningful ties to this

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400. Marc Lacey, *Bush Links Aid to Yugoslavia to the Extradition of Milosevic*, N.Y. TIMES, May 10, 2001, at A14.

401. In the recent past, concern has existed about the control over power and media that Milosevic continued to exert, even after his electoral defeat. See Peter Finn & R. Jefferey Smith, *Kostunica and Milosevic Allies Set to Sign Joint Power Accord*, WASH. POST, Oct. 16, 2000, at A24; R. Jefferey Smith & Peter Finn, *How Milosevic Lost His Grip*, WASH. POST, Oct. 15, 2000, at A01. For the courts of Yugoslavia to be considered adequate alternative fora, at a minimum, Milosevic and his allies would have to be shown not to control or exercise any meaningful influence over the Yugoslav court system.

402. Examples of potential human rights abuses around the world, particularly those perpetrated by government agents, appear to be virtually endless. Recently, in the Ivory Coast, former military ruler Gen. Robert Guei was driven from power by civilian mobs protesting Guei's decision not only to call a national election but also to ban his main rival—Alassane Ouattara—from participating in the election. See Charlayne Hunter-Gault, *Ivory Coast Officials Promise to Investigate Massacre*, CNN ONLINE, Oct. 28, 2000, at <http://www.cnn.com/2000/WORLD/africa/10/28/ivorycoast.bodies.02/index.html>. Subsequent to Guei's departure, Ivory Coast officials found a mass grave of more than fifty bodies, believed to be the remains of Ouattara's supporters who summarily were executed by military officials. See *id.*

country, regardless of the substantive claim at issue. At the same time, proper application of the doctrine ensures that plaintiffs are not unfairly prejudiced because, even where private and public interest factors point toward dismissal, cases will not be excluded from federal court where courts in a foreign country are incapable of administering justice. To facilitate the proper evaluation of considerations in the *forum non conveniens* context, U.S. courts would be well-served by formally recognizing sovereign interests in the weighing of factors and by explicitly requesting statements of interest from the countries in question.

While courts should take care that hard cases do not make bad law,<sup>403</sup> the same must hold equally true for emotionally compelling ones. Justice Holmes referred to these disputes as "great cases":

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words.<sup>404</sup>

Human rights suits frequently allege some of the most horrendous, inhumane, and unconscionable conduct imaginable. In these extreme cases, the easy and immediate reaction may be to demand that the perpetrators face justice in the United States because U.S. justice must be best; however, the appropriate role of U.S. courts in such foreign disputes is much more nuanced. Where U.S. courts recognize, pursuant to well-established doctrines, that disputes with significant foreign components can and should be resolved outside U.S. borders, the United States plays a more powerful role in the cases that are retained, while at the same time it allows other coun-

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403. *United States v. Clark*, 96 U.S. 37, 49 (1877) (quoting *E. India Co. v. Paul*, 7 Moo. P.C.C. 111).

404. *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (White, J., dissenting).

tries the opportunity to influence the development of international law in meaningful ways.