International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens

Jeffrey E. Baldwin

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Jeffrey E. Baldwin†

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Introduction

The courts of the United States serve as an attractive forum for foreign

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victims of human rights abuses. In the United States, the vast majority of international human rights plaintiffs bring suit under the Alien Tort Claims Act (ATCA), a statute that vests federal courts with subject matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since 1980, U.S. federal courts have applied the ATCA to a variety of human rights claims and, in 2004, the Supreme Court tentatively approved this approach.

Even if human rights plaintiffs establish subject matter jurisdiction under the ATCA, their claims still face a series of procedural and doctrinal obstacles that can prevent a federal court from adjudicating the merits of the case. Of these many obstacles, the doctrine of forum non conveniens can present a particularly formidable hurdle. The doctrine of forum non conveniens permits a federal court to dismiss a case that otherwise satisfies jurisdiction and venue requirements if an adequate alternative forum exists and the balance of private and public interest factors weigh strongly in favor of the alternative forum adjudicating the case. With regard to ATCA claims, the private and public interest factors often weigh against U.S. federal courts retaining jurisdiction due to the significant foreign element inherently present in such cases.

There is a clear tension between the ATCA, which grants alien plaintiffs access to a U.S. forum for claims alleging violations of the law of nations, and the doctrine of forum non conveniens, which often works to deny alien plaintiffs a U.S. forum. Until recently, U.S. federal courts failed to acknowledge the tension created by the application of forum non con-

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1. Foreign plaintiffs find U.S. courts particularly attractive due to many practical and procedural advantages. Among these advantages are: (1) the wide availability of public interest litigators, (2) contingency fees, (3) punitive damages, (4) the availability of default judgments, (5) liberal pretrial discovery, and (6) the fact that the American legal system does not require the losing party to pay the winner's legal fees. See Beth Stephens, Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, 27 YALE J. INT'L L. 1, 14-15 (2002).


4. See infra Part I.A.

5. Procedural and doctrinal obstacles to ATCA claims include: (1) forum non conveniens, (2) personal jurisdiction, (3) failure to join indispensable parties, (4) the doctrine of international comity, (5) the act of state doctrine, (6) the political question doctrine, and (7) statutes of limitations. See Richard T. Marooney & George S. Branch, Corporate Liability Under the Alien Tort Claims Act: United States Court Jurisdiction over Torts, 12-SUM CURRENTS: INT'L TRADE L.J. 3, 10-11 (2003); Marisa Anne Pagnattaro, Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act, 37 VAND. J. TRANSNAT'L L. 203, 257-61 (2004).

6. See infra Part II.

7. See infra text accompanying notes 56-62.

veniens to ATCA claims. In 2000, the Court of Appeals for the Second Circuit, however, addressed this tension in *Wiwa v. Royal Dutch Petroleum Co.*, a decision that, in the context of certain ATCA claims, arguably alters the balance of the public and private interest factors in the forum non conveniens analysis. *Wiwa* seeks to alleviate the tension between the ATCA and the forum non conveniens doctrine by instructing federal courts to give significant weight to the United States' strong public interest in adjudicating international human rights violations. Although the *Wiwa* approach does not guarantee international human rights plaintiffs a U.S. forum, it does make it easier for such plaintiffs to have their claims heard in U.S. federal court.

Part I of this Note provides the framework for international human rights litigation in U.S. federal courts by briefly discussing the ATCA and the Torture Victim Protection Act (TVPA). Part II then details the doctrine of forum non conveniens as federal courts traditionally apply it. Part III is an overview of recent developments in the U.S. Court of Appeals for the Second Circuit dealing with the interplay of the ATCA and the doctrine of forum non conveniens; it begins with the Second Circuit's *Wiwa* decision and proceeds to detail the Southern District of New York's efforts to apply *Wiwa* to subsequent ATCA cases. In view of both the *Wiwa* decision and the U.S. District Court for the Southern District of New York's subsequent decisions, Part IV attempts to interpret "the *Wiwa* approach" by exploring *Wiwa's* effect on the forum non conveniens analysis and its proper reach. A short conclusion explores *Wiwa's* impact outside of the Second Circuit.

I. International Human Rights Litigation in Federal Courts

A. The Alien Tort Claims Act

The Alien Tort Claims Act that the First Congress enacted in the Judiciary Act of 1789 grants U.S. federal courts subject matter jurisdiction over certain civil actions filed by aliens against U.S. or foreign defendants. To establish jurisdiction under the ATCA, the plaintiff must (1) be an alien, (2) allege a tort, and (3) demonstrate that the defendant committed the tort in violation of the law of nations or a treaty of the United States. The ATCA, however, does not define a "violation of the law of nations." The statute also does not make clear, on its face, whether it independently provides a cause of action for violations of international law or whether it

14. Id.
15. See id.
merely vests federal courts with jurisdiction over claims that are brought under a provision of international law already granting a cause of action. Federal courts left these ambiguities largely unaddressed for almost two hundred years after the statute’s inception.

The U.S. Court of Appeals for the Second Circuit ushered in the modern era of ATCA litigation in 1980 with Filartiga v. Pena-Irala. In Filartiga, the Second Circuit held that a violation of international human rights law can give rise to a cause of action under the ATCA. Clarifying its holding, the Filartiga court stressed that the ATCA does not, by itself, grant new rights to aliens; instead, the ATCA only vests federal courts with the jurisdiction to adjudicate violations of “well-established, universally recognized norms of international law.” Following Filartiga, federal courts across the nation began applying the ATCA to various human rights claims alleging violations of universal and well-established international norms.

With its 2004 decision in Sosa v. Alvarez-Machain, the Supreme Court of the United States handed down its first—and at this point its only—decision dealing directly with the ATCA. Rejecting an expansive view, the Court found that the ATCA is a jurisdictional statute that does not create a statutory cause of action. However, the Court also found that, at the time of its enactment, the jurisdiction established by the ATCA empowered federal courts “to hear claims in a very limited category defined by the law of nations and recognized at common law.” In rare instances, therefore, the law of nations, which is incorporated into federal common law, can provide a domestic cause of action for ATCA litigants.

Sosa stresses, however, that only a very limited number of claims are actionable under the ATCA. According to the Court, the ATCA applies only to claims that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable” to the torts that the First Congress recognized as violating the law of nations when it enacted the statute. Offenses against the law of nations that were recognized in 1789 include violations of safe conducts, infringement of the rights of ambassadors, and piracy.
recognized in 1789.\textsuperscript{28} Under this standard, present-day courts may recognize new causes of action based on modern international norms that have evolved since 1789, but they may do so only with great caution and in rare circumstances.\textsuperscript{29} Regrettably, \textit{Sosa} does not supply lower courts with much guidance on how to apply its standard; the opinion does not even provide an example of a modern norm which would meet the standard's requirements.\textsuperscript{30}

Ultimately, despite its cautionary language and a vague yet strict standard for recognizing new causes of action, \textit{Sosa} seems to have left most of the previous, lower-court precedents on the ATCA intact.\textsuperscript{31} Post-\textit{Sosa}, foreign victims of egregious human rights violations may still use the ATCA to seek redress in U.S. federal courts.

B. The Torture Victim Protection Act

In 1992, Congress passed the Torture Victim Protection Act (TVPA), which supplements the ATCA and, in cases of torture and extrajudicial killing, creates a private cause of action in federal court against an individual who acts under the authority or color of law of any foreign nation.\textsuperscript{32} In enacting the statute, Congress intended to codify the holding of \textit{Filartiga}.\textsuperscript{33} Despite many similarities between the ATCA and the TVPA, there are several key differences. For example, the TVPA contains an exhaustion of remedies provision that, unlike the ATCA,\textsuperscript{34} requires the plaintiff to exhaust "all adequate and available remedies in the place in which the conduct giving rise to the claim occurred."\textsuperscript{35} Notwithstanding these differ-

\textsuperscript{28} Id. at 732.
\textsuperscript{29} See id. at 729 ("[J]udicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").
\textsuperscript{30} Under the facts of \textit{Sosa}, which involved arbitrary detention, the Court surveyed international law and concluded that unlawful detention for less than one day, followed by transfer to lawful authorities and prompt arraignment, is not a violation of any binding norm of international human rights law. See id. at 734–38. However, this holding is very narrow and fact-specific; it is unclear whether long-term, unlawful detention would create a private right of action under the ATCA.
\textsuperscript{31} See \textit{Sarei v. Rio Tinto}, 456 F.3d 1069, 1077 (9th Cir. 2006) (concluding that the principles of law that governed the lower court's pre-\textit{Sosa} analysis remain sound post-\textit{Sosa}); Beth Stephens, "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts, 70 BROOK. L. REV. 533, 534–35 (2005).
\textsuperscript{33} See Beth Van Schaack, \textit{Unfulfilled Promises: The Human Rights Class Action}, 2003 U. CHI. LEGAL F. 279, 332 (2003). In enacting the TVPA, Congress also intended to fulfill the United States' obligations under the recently ratified UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which required signatories to make torture a crime under their domestic law. See id.
\textsuperscript{34} See \textit{Sarei}, 456 F.3d at 1089-100 (holding that the ATCA does not require the exhaustion of local remedies in foreign courts).
\textsuperscript{35} 28 U.S.C. § 1350 (2000). Other differences between the ATCA and the TVPA include: (1) the TPVA does not grant jurisdiction but only creates a cause of action, (2) the TVPA extends only to torture and extrajudicial killing, (3) the TVPA has a state actor requirement, and (4) both aliens and U.S. citizens may sue under the TVPA but only aliens may sue under the ATCA. See Short, supra note 16, at 1035.
ences, both the Senate and House committees stressed when enacting the TVPA that the ATCA remains a viable means of addressing human rights violations and that alien plaintiffs can still opt to bring torture claims under the ATCA instead of the TVPA.  

II. The Doctrine of Forum Non Conveniens

The doctrine of forum non conveniens is a discretionary doctrine that enables courts to dismiss cases that, even though jurisdiction and venue are proper, would greatly inconvenience the defendant, the judicial system, or both.  

Supreme Court jurisprudence has laid out the contours of the doctrine in federal courts. Under the Supreme Court's decisions, a federal court must apply a two-part test to determine whether dismissal is proper, first, inquiring into the existence of an adequate alternative forum and second, weighing various private and public interest factors.

As a threshold matter, a federal court must determine whether the defendant has proposed an adequate alternative forum in which to litigate the case. An adequate forum is simply one that offers a remedy for the claim and will treat the plaintiff with a basic level of fairness. A change in substantive law that will negatively impact the plaintiff's potential recovery generally does not render an alternative forum inadequate and is not given substantial weight in the forum non conveniens analysis. However, if the remedy in the alternative forum is "so clearly inadequate or unsatis-

36. See H.R. REP. No. 102-367(I), at 3 (1991) ("[The ATCA] has other important uses and should not be replaced."); S. REP. No. 102-249, at 4 (1991) ("[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATCA]. Consequently, that statute should remain intact.").

37. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). A federal court has jurisdiction when it has (1) competency to hear the claim (subject matter jurisdiction), and (2) power over the defendant (personal jurisdiction). See Eric S. Johnson, Note, Unsheathing Alexander's Sword: Lapides v. Board of Regents of the University System of Georgia, 51 AM. U. L. REV. 1051, 1061 (2002) (citing Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)). For a discussion of jurisdiction, see Richard H. Field et al., Material for a Basic Course in Civil Procedure 396-649 (8th ed. 2003). Venue is proper in a federal district court (1) where any defendant resides if all defendants reside in the same state, (2) where the conduct giving rise to the claim took place, or (3) where the defendant is subject to personal jurisdiction if there is no district where venue is otherwise proper. 28 U.S.C. § 1391 (2000).


40. See e.g. id.

41. See Piper Aircraft, 454 U.S. at 254-55. Generally, the defendant need only be subject to personal jurisdiction in the alternative forum for the forum to be adequate. See id. at 253 n.22. Often, if there are jurisdictional problems with the alternative forum, the court may make a conditioned dismissal. For example, if there may be problems with personal jurisdiction in the alternative forum, the court can condition its dismissal on the defendant agreeing to waive any objections to personal jurisdiction. For a detailed discussion of conditioned dismissals, see John Bies, Note, Conditioning Forum Non Conveniens, 67 U. CHI. L. REv. 489 (2000).

42. Piper Aircraft, 454 U.S. at 247.
factory that it is no remedy at all, the unfavorable change in law may be given substantial weight.43 Ultimately, the defendant has the burden of proving the adequacy of the alternative forum.44 This burden, however, tends not to be heavy because courts are often reluctant to deem a foreign forum inadequate.45

If an adequate alternative forum exists, the court must next perform a balancing test that weighs the private interests of the parties and the public interests of the competing forum.46 The private interests of the parties include: (1) the accessibility of evidence, (2) the availability of compulsory process for attendance of unwilling witnesses, (3) the cost of obtaining the attendance of willing witnesses, (4) the ease of viewing evidence if appropriate to the action, (5) whether the judgment will be enforceable in the alternative forum, and (6) any other considerations affecting the ease, cost, and fairness of the trial.47 The public interest factors include: (1) docket congestion, (2) whether the burden of jury duty should be imposed on the community, (3) whether the court will face difficult problems dealing with conflict of law or foreign law, and (4) the local interest in having the controversy decided at home.48 When considering the public interest factors, U.S. federal courts occasionally will weigh the national interest in adjudicating a particular case, as opposed to merely the interests of the particular state or district where the court sits.49 To warrant dismissal on the grounds of forum non conveniens, the balance of the private and public interest factors must weigh strongly in favor of the alternative forum.

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43. Id. at 254. In application, "no remedy at all" often literally means no remedy at all. Consider, for example, the infamous case of Gonzalez v. Chrysler Corp., 301 F.3d 377 (5th Cir. 2002). In Gonzalez, a products liability action in a Texas district court, the plaintiffs were the Mexican parents of a three-year-old child who was killed in Mexico by the air bag in their car. Id. at 379. The plaintiffs argued that Mexico was an inadequate alternative forum because Mexican law caps the maximum award for the loss of a child's life at $2,500 and, therefore, the cost of litigating in Mexico would greatly exceed any potential recovery. Id. at 380-81. The district court nevertheless ruled that Mexico was an adequate alternative forum and dismissed the suit on the grounds of forum non conveniens. Id. at 383.

44. See e.g., Wiwa, 226 F.3d at 100.

45. For example, procedural deficiencies in the alternative forum usually do not render it inadequate. See, e.g., PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998) ("[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards . . . so such a finding is rare."). Even allegations of corruption and bias in the alternative forum are unlikely to render the forum inadequate. See Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) ("The alternative forum is too corrupt to be adequate argument does not enjoy a particularly impressive track record.").


47. Id. at 508.

48. Id. at 508-09.

49. See, e.g., Carlenstolpe v. Merck & Co., Inc., 819 F.2d 33, 35 (2d Cir. 1987) ("[T]he lower court rightly noted the public interest in having a United States court decide issues concerning possibly tortious conduct occurring in this country."); Dahl v. United Techs. Corp., 632 F.2d 1027, 1033 (3d Cir. 1980) ("[T]he general national interest in aircraft regulation is not sufficient by itself to warrant retention of jurisdiction over an action when the other factors favor dismissal.").
because "the plaintiff's choice of forum should rarely be disturbed."50

In addition to detailing this two-part forum non conveniens test, the Supreme Court has drawn an important distinction between resident plaintiffs and foreign plaintiffs.51 In Piper Aircraft v. Reyno, the Court noted that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum."52 By contrast, a foreign plaintiff's choice of forum deserves less deference because it is "much less reasonable" to assume that a foreign plaintiff chose the forum for reasons of convenience, convenience being "the central purpose" of the forum non conveniens doctrine.53 The Court speculated that foreign plaintiffs tend to sue in American courts not out of convenience but out of a desire to take advantage of favorable American law.54 Unfortunately, the Supreme Court did not provide lower courts with guidance on how to determine the appropriate level of deference to give to a foreign plaintiff's choice of forum. Some lower federal courts, however, have adopted a "sliding scale" approach to aid in making this determination.55

52. Id.
53. Id. at 255-56. However, in according less deference, a court still must accord some deference to a foreign plaintiff's choice of forum. See, e.g., Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) ("[L]ess deference is not the same thing as no deference.").
54. See Piper Aircraft, 454 U.S. at 251-52. The Court feared that, without a strict application of the forum non conveniens doctrine, foreign plaintiffs will find America to be an even more attractive forum than they already do, leading to a flood of lawsuits in America's already congested courts. See id. at 252.
55. The Second Circuit, for example, uses the "sliding scale" approach to apply Piper Aircraft's lesser deference rule. See Irigarri v. United Techs. Corp., 274 F.3d 65, 70-72 (2d Cir. 2001) (en banc). As the Second Circuit explained, [t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiffs forum choice. . . . The more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons[,] . . . the less deference the plaintiff's choice commands. Id. at 71-72. Therefore, in the Second Circuit, a foreign plaintiff's choice of forum is not automatically given less deference than a resident plaintiff's choice of forum; instead, the courts apply a balancing test, weighing convenience against the likelihood of forum shopping. In practice, however, the sliding scale approach typically results in courts giving a foreign plaintiff's choice of forum less deference. See e.g., Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 73-74 (2d Cir. 2003) (applying the "sliding scale" approach and affirming dismissal of the foreign plaintiffs' claims on the grounds of forum non conveniens); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 102 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001) ("[O]ur caselaw . . . has clearly and unambiguously established that courts should offer greater deference to the selection of a U.S. forum by U.S. resident plaintiffs when evaluating a motion to dismiss for forum non conveniens."). Other federal courts have adopted the Second Circuit's approach. See e.g., In re Ford Motor Co., 344 F.3d 648, 653 (7th Cir. 2003); Miller v. Boston Scientific Corp., 380 F. Supp. 2d 443, 449-50 (D. N.J. 2005); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1141 (C.D. Cal. 2005). The Third Circuit also takes a similar approach. See Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 634 (3rd Cir. 1989) ("The district court must assess whether the . . . evidence of convenience . . . overcome[s] any reason to refrain from extending full deference to the foreign plaintiff's choice.").
III. Forum Non Conveniens and the ATCA – Recent Developments in
the Second Circuit

Due to the significant foreign element inherently present in ATCA cases, the doctrine of forum non conveniens can present a difficult hurdle for ATCA plaintiffs to overcome.\(^{56}\) To begin with, the ATCA requires a foreign plaintiff,\(^{57}\) but under the federal forum non conveniens doctrine, courts give less deference to a foreign plaintiff’s choice of forum.\(^{58}\) Also, the private interest factors often weigh against federal courts retaining jurisdiction over ATCA cases because: (1) most of the relevant evidence and witnesses are usually located abroad, (2) U.S. courts often do not have the authority to compel the attendance of foreign witnesses or the production of evidence, and (3) even those witnesses who do attend may require translators and air travel.\(^{59}\) Similarly, the public interest factors often weigh against federal courts retaining jurisdiction because: (1) federal courts labor under heavy caseloads and dismissal will always alleviate docket congestion,\(^{60}\) (2) generally speaking, the U.S. forum does not have a local interest in deciding cases involving foreign conduct by foreign individuals, (3) courts face a heavy administrative burden when handling complex human rights cases that can involve thousands of plaintiffs, and (4) ATCA claims often involve difficult issues of international and foreign law.\(^{61}\) Finally, the flexible and discretionary nature of the forum non conveniens doctrine may work against foreign human rights plaintiffs because judges are free to manipulate their analysis and dismiss cases that they simply do not wish to hear for unvoiced, illegitimate reasons such as xenophobia.\(^{62}\)

Unsurprisingly, given how the forum non conveniens factors weigh in favor of dismissal, defendants in ATCA human rights cases have argued for forum non conveniens dismissals since the first such case, *Filartiga v. Pena*

\(^{56}\) See Boyd, supra note 8, at 46. *But see* Short, supra note 16, at 1046–53 (arguing that courts are not necessarily more likely to dismiss ATCA cases on the grounds of forum non conveniens than other categories of cases).


\(^{58}\) See supra notes 51–55 and accompanying text.

\(^{59}\) See Fellmeth, supra note 11, at 243. If human rights plaintiffs sue wealthy defendants, particularly multinational corporations, however, they may be in a better position with regard to the private interest factors. A wealthy defendant’s vast resources, combined with the advanced communications technology and easy transportation that such resources can provide, suggests that litigating in the U.S. forum will only slightly inconvenience such a defendant. Meanwhile, victims of human rights violations often have minimal resources, making it extremely inconvenient for the plaintiffs to reinstitute litigation in a different forum. See *Wiwa*, 226 F.3d at 102; Boyd, supra note 8, at 70 (noting that litigants today have access to overnight delivery, faxes, e-mail, and air travel).

\(^{60}\) See Fellmeth, supra note 11, at 243. *But see* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 99 (2004) (stating that caseload concerns are overstated because international human rights cases are a tiny percentage of the caseloads of U.S. courts).


\(^{62}\) See Boyd, supra note 8, at 69.
Irala in 1980. In the two decades following Filartiga, federal courts failed to address the unique tension created by the application of forum non conveniens to ATCA claims. In September 2000, however, the Second Circuit handed down Wiwa v. Royal Dutch Petroleum Co., a decision that alters the forum non conveniens analysis and arguably lowers the hurdle that the doctrine presents to certain ATCA plaintiffs.

A. Wiwa v. Royal Dutch Petroleum Co.

The Wiwa case involved Nigerian plaintiffs suing a Dutch corporation, Royal Dutch, and an English corporation, Shell Transport, in the Southern District of New York under the ATCA, among other theories of liability. The Wiwa plaintiffs alleged that the Nigerian government, at the instigation of the defendants' subsidiary, had either imprisoned, tortured, or killed them or their next of kin. The district court originally dismissed the case on the grounds of forum non conveniens, but the Second Circuit reversed on appeal.

The Second Circuit's decision, authored by Judge Leval, strongly disagreed with the lower court's forum non conveniens analysis. Although it accepted that England would qualify as an adequate alternative forum, the Second Circuit reversed the district court for its failure to consider three matters that favored U.S. jurisdiction. First, the district court failed to give proper weight to a U.S. resident plaintiff's choice of forum. Second, the district court gave too much weight to certain public and private interest factors indicating that England might be the preferable forum. Finally, and most importantly for ATCA purposes, the district court failed to consider "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human

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63. 630 F.2d at 876, 880 n.6 (2d Cir. 1980).
64. 226 F.3d 88. For further discussion of Wiwa and its impact on the forum non conveniens analysis, see Fellmeth, supra note 11; Matthew R. Skolnik, Comment, The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self after Wiwa, 16 EMORY INT'L L. REV. 187 (2002).
65. Wiwa, 226 F.3d at 92.
66. Id.
67. Id.
68. Id. at 99-100.
69. Id. at 101 ("[W]e assume arguendo that there are no rules of British law that would prevent a British court from reaching the merits.").
70. Id. ("While any plaintiff's selection of a forum is entitled to deference, that deference increases as the plaintiff's ties to the forum increase."). Although not U.S. citizens, two of the four plaintiffs in Wiwa were U.S. residents at the time they initiated the lawsuit, id. at 94.
71. Id. Disagreeing with the district court, the Second Circuit reasoned that it would be just as inconvenient for Nigerian witnesses to testify in England as it would be for them to testify in New York. Id. at 107. Also, the cost of shipping evidence from England to New York would not be excessively burdensome, especially in light of the defendant's vast resources. Id. Meanwhile, it would be very inconvenient for the plaintiffs to litigate the lawsuit in England, considering the plaintiffs' limited resources. Id. Finally, the Second Circuit concluded that, even though England has an interest in adjudicating disputes involving British corporations, the United States has an interest in adjudicating disputes involving its own residents. Id.
In concluding that the United States has a strong interest in adjudicating certain ATCA claims, the Second Circuit turned to the legislative intent and statutory language of the TVPA.\footnote{Id. at 105-06.} According to the court, the language Congress adopted when drafting the TVPA indicates congressional recognition that "the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."\footnote{Id. at 105.} Similarly, Congress also recognized that, because U.S. domestic law has incorporated the law of nations, a violation of international law is "our business."\footnote{Id. at 106.} In the court's view, Congress, therefore, had enacted the TVPA in part to express "a policy of favoring receptivity by our courts" to suits alleging a violation of the law of nations.\footnote{Id. at 106.} Addressing the effect that this U.S. policy interest should have on the forum non conveniens analysis, the Second Circuit explained:

\begin{quote}
[T]he TVPA has [not] nullified, or even significantly diminished, the doctrine of forum non conveniens. The statute has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.
\end{quote}

The TVPA . . . expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the \textit{[Gulf Oil Co. v.} Gilbert\textit{]} factors "tilt[]] strongly in favor of trial in the foreign forum."\footnote{See Skolnik, supra note 64, at 219.}

This language clearly instructs federal courts to give the U.S. interest in providing a forum for international human rights claims an important role when balancing the forum non conveniens factors, at least with respect to ATCA cases involving claims of torture.

With regard to TVPA claims and certain ATCA claims \textit{Wiwa} therefore emphasizes the U.S. interest in adjudicating human rights violations and appears to raise the bar for granting forum non conveniens dismissals.\footnote{Id. at 105.} The decision, however, leaves open the important question of what types of ATCA claims engender a strong U.S. interest in providing a forum. The \textit{Wiwa} court's emphasis on the TVPA suggests that, if read narrowly, \textit{Wiwa}'s reasoning may apply only to ATCA claims involving the two TVPA causes of action, torture or extrajudicial killing. In the years following \textit{Wiwa}, the lower courts in the Second Circuit grappled with this ambiguity.
B. Limiting Wiwa

In the years immediately following Wiwa, the Southern District of New York read the Second Circuit’s opinion narrowly and limited Wiwa’s reasoning to ATCA claims involving torture and extrajudicial killings.

1. Aguinda v. Texaco

The case of Aguinda v. Texaco in 2001 involved Ecuadorian and Peruvian plaintiffs suing Texaco, a U.S.-based oil corporation, in the Southern District of New York. The plaintiffs alleged that an Ecuadorian consortium, in whom Texaco held an indirect interest, had engaged in oil operation activities that polluted the rain forests and rivers of Ecuador and Peru. Arguing that Texaco designed, controlled, and directed the activities of the consortium through its U.S. operations, the plaintiffs sought relief under state tort law and the ATCA for injuries resulting from environmental damage. Unfortunately for the plaintiffs, the district court dismissed the case on the grounds of forum non conveniens.

In granting Texaco’s motion for dismissal on forum non conveniens grounds, the district court concluded that Wiwa “divined a special United States receptivity to TVPA suits not necessarily present in the case of other ATCA suits.” According to the district court, Wiwa’s emphasis on the TVPA’s statutory language suggests that the doctrine of forum non conveniens “applies in undiminished fashion to ATCA suits that do not fall within the purview of the TVPA.” In August 2002, the Second Circuit affirmed the Aguinda decision but did not address the lower court’s narrow interpretation of its Wiwa decision.

2. Flores v. Southern Peru Copper Corp.

In July 2002, the Southern District of New York decided Flores v. Southern Peru Copper Corp. Flores involved Peruvian plaintiffs suing an American company for environmental torts under the ATCA. The plaintiffs alleged that the defendant’s mining operations resulted in pollution.

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79. 142 F. Supp. 2d 534 (S.D.N.Y. 2001), aff’d as modified, 303 F.3d 470 (2d Cir. 2002).
80. Id. at 537-38.
81. Id.
82. Id. at 554.
83. Id.
84. Id.
85. The Second Circuit only addressed the issue of forum non conveniens in a single footnote. Aguinda, 303 F.3d at 480 n.13. After refusing to decide whether the ATCA encompasses environmental torts, the court also refused to speculate whether the United States would have a strong national interest in providing a forum to litigate such claims if they were actionable under the ATCA. Id. The Second Circuit, however, did add that, even if the ATCA covers environmental torts and the United States has a strong policy interest in adjudicating such claims, the private and public interest factors in the case require that the court affirm the lower court’s dismissal on the grounds of forum non conveniens. Id.
87. Id. at 512-13.
causing them personal injury in violation of international law.\textsuperscript{88} The district court ultimately concluded that it lacked subject matter jurisdiction under the ATCA because environmental torts do not violate universally recognized norms of international law.\textsuperscript{89} The court still addressed the issue of forum non conveniens, however, so that, on appeal, the higher court could also address the issue if it concluded that environmental harms are actionable under the ATCA.\textsuperscript{90}

The district court first rejected the plaintiffs' argument that the doctrine of forum non conveniens categorically does not apply to any action brought pursuant to the ATCA.\textsuperscript{91} The court then sought to determine "the effect" that the presence of an ATCA claim should have on its traditional forum non conveniens analysis.\textsuperscript{92} Following Aguinda's lead, the district court refused to find that a broad policy favoring the exercise of jurisdiction over all claims brought under ATCA existed; instead, the court applied a traditional forum non conveniens analysis because, unlike Wiwa which involved a claim of torture, the present case did "not implicate the TVPA or its discerned policy."\textsuperscript{93}

Nevertheless, the Flores court speculated that the presence of an ATCA claim might impact the forum non conveniens analysis even in cases that do not involve torture or extrajudicial killing.\textsuperscript{94} After acknowledging that federal courts generally give a foreign plaintiff's choice of forum less deference than a U.S. resident's choice of forum,\textsuperscript{95} the court looked to the Second Circuit precedent that when a treaty accords foreigners access to U.S. courts, courts must apply an identical forum non conveniens standard to such foreigners as it would to American citizens.\textsuperscript{96} Analogizing the ATCA to a treaty granting foreign citizens access to American courts, the Flores court speculated—but did not hold—that an ATCA plaintiff's choice of forum should not be subject to less deference.\textsuperscript{97} Nonetheless, the court held that, even if it had subject matter jurisdiction over the case, it would dismiss the case on the grounds of forum non conveniens because, despite any deference given to plaintiffs' choice of forum, the private and public

\textsuperscript{88} Id.
\textsuperscript{89} Id. at 525.
\textsuperscript{90} Id. at 526.
\textsuperscript{91} Id. at 529 ("Wiwa cannot possibly be read to hold that forum non conveniens does not apply at all to ACTA-TVPA cases."). The Central District of California and the Northern District of Texas have also rejected the argument that the ATCA precludes a court from applying the doctrine of forum non conveniens. See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1142 (C.D. Cal. 2005); Robert v. Bell Helicopter Textron, Inc., No. Civ.A.3:01-CV-1576-L, 2002 WL 1268030, at *2 (N.D. Tex. May 31, 2002). For an argument as to why forum non conveniens should not apply to any ATCA claims, see Boyd, supra note 8. For a detailed response to Boyd's arguments, see Short, supra note 16.
\textsuperscript{92} Flores, 253 F. Supp. 2d at 543.
\textsuperscript{93} Id. at 544 n.32.
\textsuperscript{94} Id. at 543-44.
\textsuperscript{95} See id. at 527-28.
\textsuperscript{96} Id. at 543 (citing Blanco v. Banco Industrial de Venezuela, 997 F.2d 974, 981 (2d Cir. 1993)).
\textsuperscript{97} Id. at 543-44.
interest factors overwhelmingly favored dismissal.\textsuperscript{98}

3. *Abdullahi v. Pfizer*

In September 2002, the Southern District of New York issued *Abdullahi v. Pfizer*,\textsuperscript{99} an unreported decision. In *Abdullahi*, Nigerian plaintiffs sued a U.S. drug company, Pfizer, under the ATCA, alleging that they suffered grave injuries when Pfizer, with assistance from the Nigerian government, subjected them to experimental antibiotics without their informed consent.\textsuperscript{100} Unlike in *Aguinda* and *Flores*, the Southern District of New York found that it did have subject matter jurisdiction under the ATCA because illicit medical experimentation violates the law of nations.\textsuperscript{101} The court nevertheless proceeded to make a conditioned dismissal on the grounds of forum non conveniens without ever mentioning Wiwa's recognition of the U.S. policy interest in adjudicating violations of the law of nations.\textsuperscript{102}

C. *Presbyterian Church of Sudan v. Talisman Energy*

*Presbyterian Church of Sudan v. Talisman Energy* in 2003 concerned Sudanese plaintiffs suing Talisman Energy, a Canadian energy company, under the ATCA.\textsuperscript{103} The plaintiffs alleged that the defendants, in order to facilitate oil exploration and extraction, collaborated with the Sudanese government in a policy of ethnic cleansing.\textsuperscript{104} After concluding that it had subject matter jurisdiction under the ATCA,\textsuperscript{105} the court turned to the doctrine of forum non conveniens. The court began its analysis by pointing out that, in *Wiwa*, the Second Circuit cautioned that courts should rarely dismiss ATCA claims on the grounds of forum non conveniens.\textsuperscript{106}

The court then turned to the threshold inquiry in the forum non conveniens analysis, the availability of an adequate alternative forum. The court concluded that, for a variety of reasons, Sudan would not serve as an adequate forum.\textsuperscript{107} First, the plaintiffs were not Muslims, and non-Muslims receive less legal protection under Sudan's system of Islamic law.\textsuperscript{108} Also, considering that the plaintiffs were accusing the Sudanese government of undertaking a policy of ethnic cleansing, the court found it unlikely that the same government would grant the plaintiffs a fair trial.\textsuperscript{109} Finally, the court suspected that the plaintiffs might expose themselves to

\textsuperscript{98} Id.
\textsuperscript{100} Id. at *1–2.
\textsuperscript{101} Id. at *3–6.
\textsuperscript{102} See id. at *6–12.
\textsuperscript{103} 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 306, 318, 329.
\textsuperscript{106} Id. at 335.
\textsuperscript{107} See id. at 335–36.
\textsuperscript{108} Id. at 336.
\textsuperscript{109} Id.
personal danger if they tried to bring suit in Sudan.\textsuperscript{110}

The court next addressed the question of whether Canada would be an adequate alternative forum and suggested that Canada might be inadequate for two reasons. First, Canadian courts might apply Sudanese law, which provides less protection to non-Muslims like the plaintiffs.\textsuperscript{111} Second, even if they did not apply domestic law, Canadian courts lack ATCA-style jurisdiction over violations of international law.\textsuperscript{112} Therefore, Canadian courts would have to treat the plaintiffs' allegations as ordinary tort claims in violation of Canadian common law.\textsuperscript{113} The Southern District of New York believed that such treatment does "not reflect the gravity of the alleged offenses, and in particular, the universally condemned nature of these acts."\textsuperscript{114} Nevertheless, because the plaintiffs never argued the inadequacy of the Canadian forum, the court assumed, without deciding, that Canada would be an adequate alternative forum.\textsuperscript{115}

Having found the availability of an adequate alternative forum, the court then weighed the interests at stake including the "strong United States interest in vindicating international human rights violations."\textsuperscript{116} The court placed great significance on the fact that the plaintiffs were seeking redress for violations of \textit{jus cogens} norms of international law, namely genocide, war crimes, torture, and enslavement.\textsuperscript{117} \textit{Jus cogens} norms consist of a small subset of international law comprising offenses so depraved that they violate basic rules of civilized conduct and, as such, are of universal concern and binding on all nations.\textsuperscript{118} According to the court, when confronted with violations of \textit{jus cogens} norms, "the United States has a substantial interest in affording alleged victims of atrocities a method to vindicate their rights."\textsuperscript{119} Therefore, after also considering the private interest factors at stake, the court denied the defendants' motion to dismiss on the grounds of forum non conveniens.\textsuperscript{120}

In its discussion of the U.S interest in vindicating international human rights violations, the Southern District of New York distinguished \textit{Presbyterian Church} from its earlier \textit{Aguinda, Flores, and Abdullahi} decisions based on the "grave nature" of the plaintiffs' allegations.\textsuperscript{121} Unlike the plaintiffs

\begin{thebibliography}{99}
\bibitem{110} Id.
\bibitem{111} Id. at 337.
\bibitem{112} See id.
\bibitem{113} See id.
\bibitem{114} Id.
\bibitem{115} Id. at 336-37.
\bibitem{116} Id. at 338-41.
\bibitem{117} Id. at 339.
\bibitem{118} See id. at 306.
\bibitem{119} Id. at 340. The court explained that the United States still has an interest in adjudicating ATCA claims of non-\textit{jus cogens} violations of international law, but the U.S. interest is much greater when dealing with violations of \textit{jus cogens} norms. \textit{Id.} at 339.
\bibitem{120} Id. at 340-41. In weighing the private interest factors, the court found that the great inconvenience the plaintiffs would face if they had to litigate in Canada substantially outweighed any inconvenience to the defendant in litigating the case in New York. \textit{Id.} at 341. In reaching its conclusion, the court compared the vast wealth and resources of the defendant to the relative poverty of the plaintiffs. \textit{Id.}
\bibitem{121} Id. at 340.
\end{thebibliography}
in *Presbyterian Church*, the plaintiffs in the three earlier ATCA cases did not allege violations of *jus cogens* norms.\(^{122}\) Instead, the plaintiffs in *Aguinda* and *Flores* were victims of environmental torts, which are not violations of the law of nations. Although the illicit medical experimentation that the *Abdullahi* plaintiffs suffered was a violation of the law of nations, it did not rise to the level of a *jus cogens* violation of "universal concern."\(^{123}\) Therefore, according to *Presbyterian Church*, the Southern District was correct in refusing to apply Wiwa's reasoning to *Aguinda*, *Flores*, and *Abdullahi*, because none of these cases involved *jus cogens* violations, not because Wiwa's reasoning only applies to ATCA claims of torture and extrajudicial killing. In holding that courts must weigh the United States' interest in adjudicating any ATCA claim involving a *jus cogens* violation, the Southern District of New York read Wiwa more expansively than it previously had.

**D. Turedi v. Coca Cola Co.**

In November 2006, the Southern District of New York again discussed the application of forum non conveniens to an ATCA claim in *Turedi v. Coca Cola Co.*\(^ {124}\) *Turedi* involved Turkish plaintiffs suing the American soft-drink manufacturer Coca Cola, its subsidiary, and its Turkish bottler.\(^ {125}\) Asserting claims under, among other theories of liability, the ATCA and the TVPA, the plaintiffs alleged that, acting on behalf of Coca Cola and its subsidiary, managers at the Turkish bottling plant hired a branch of the Turkish police to beat former plant employees who were engaged in a peaceful labor demonstration.\(^ {126}\)

The court initially addressed the issue of whether a federal court may dismiss a suit on grounds of forum non conveniens without first establishing subject matter or personal jurisdiction.\(^ {127}\) Acknowledging a circuit court split on the issue, the court followed Second Circuit precedent. Second Circuit precedent holds that a forum non conveniens dismissal is a non-merits decision and, therefore, does not require a prior verification of jurisdiction.\(^ {128}\) The *Turedi* court proceeded to express its own views on the issue, explaining that when complex questions of jurisdiction are present,

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122. *Id.*
123. *Id.*
125. *Id.* at 509-11.
126. *Id.*
127. *Id.* at 511-21.
128. *Id.* at 512 (citing Dattner v. Conagra Foods, Inc., 458 F.3d 98, 102 (2d Cir. 2006)). The D.C. Circuit agrees with the Second Circuit that a finding of forum non conveniens is a non-merits decision and that courts may dismiss on such grounds before determining jurisdiction. *Id.* at 511-12 (citing *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998)). The Third Circuit agrees that dismissal on grounds of forum non conveniens is a non-merits decision but, nevertheless, holds that a court must verify that it has valid jurisdiction before it can dismiss on such grounds. *Id.* at 512 (citing *Malaysia Intl' Shipping Corp. v. Sinochem Intl' Co., Ltd.*, 436 F.3d 349, 359 (3d Cir. 2006)). According to the Fifth Circuit, however, a dismissal on the grounds of forum non conveniens necessarily involves a consideration of the merits and, therefore, courts cannot make such a dismissal without first confirming jurisdiction. *Id.* at 511 (citing *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 654 (5th Cir. 2005)).
it "serves the interests of justice, convenience of the parties and judicial economy" for courts to dismiss a case on forum non conveniens grounds without engaging in a lengthy and expensive inquiry into the existence of subject matter or personal jurisdiction.\textsuperscript{129} The district court used ATCA and TVPA claims to illustrate its position by pointing out that such claims inherently involve difficult questions of subject matter jurisdiction and implicate complex doctrines such as international comity and extraterritoriality.\textsuperscript{130} Meanwhile, because ATCA and TVPA claims often involve foreign plaintiffs and events that have occurred abroad, the forum non conveniens analysis usually leans heavily towards dismissal.\textsuperscript{131} Courts can prevent the needless waste of time and resources, therefore, simply by conducting the forum non conveniens inquiry before addressing the more complicated jurisdictional issues.\textsuperscript{132}

Bypassing any disputes over its jurisdiction, the Turedi court then applied the doctrine of forum non conveniens to the specific facts of the case. It first addressed the question of how much deference it should give to the plaintiffs' choice of forum and, considering that none of the plaintiffs were U.S. residents and that the underlying labor dispute had only a tenuous connection to the United States, the court concluded that the plaintiffs' choice of forum should receive little deference.\textsuperscript{133} The court explained that, in reaching this conclusion, it gave scant consideration to the presence of ATCA and TVPA claims.\textsuperscript{134} Instead, the court cited its 2001 Aguinda opinion for the proposition that the United States has no special public interest in providing an ATCA plaintiff with a U.S. forum when the plaintiff can pursue the claim where the violation actually occurred.\textsuperscript{135} Although the court did acknowledge that, according to the Second Circuit's Wiwa opinion, Congress has expressed through the ATCA and the TVPA a policy favoring receptivity by U.S. courts to cases involving alleged violations of the law of nations, the court chose to emphasize the language in Wiwa explaining that the ATCA and the TVPA have not diminished the doctrine of forum non conveniens in any significant way.\textsuperscript{136} Then, the court, trying to limit Wiwa to its facts, argued that the plaintiffs' reliance on Wiwa was misguided because, unlike the present case, several of the Wiwa plaintiffs were lawful U.S. residents at the time of the lawsuit and the alternative forum under consideration in Wiwa was not the country where the events occurred.\textsuperscript{137}

\textsuperscript{129} Id. at 517.
\textsuperscript{130} Id. at 518-20.
\textsuperscript{131} Id. at 519-20.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 522-23.
\textsuperscript{134} Id.
\textsuperscript{135} Id. (citing Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001), aff'd as modified, 303 F.3d 470 (2d Cir. 2002)).
\textsuperscript{136} Id. (quoting Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105-06 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001)).
\textsuperscript{137} Id.
The district court next addressed the adequate alternative forum requirement in the forum non conveniens analysis and, rejecting the plaintiffs' contention that Turkey's legal system is too corrupt, found that a Turkish forum would satisfy the requirement. In their brief to the court, the plaintiffs cited Presbyterian Church and argued that Turkey would not be an adequate forum in part because Turkish courts might not recognize a cause of action for violations of international human rights law. The court, however, rejected this argument and held that the "contention that Turkish law may not contain provisions allowing causes of actions or remedies precisely equivalent to those Plaintiffs assert in the instant action [does not] constitute a bar to a finding that an adequate forum exists."

Having found the availability of an adequate alternative forum, the Turedi court proceeded to balance the private and public interest factors. According to the court, these factors weighed strongly in favor of litigating the dispute in Turkey. The plaintiffs' argument that the United States has a strong national interest in adjudicating violations of international law under the ATCA or the TVPA did not persuade the court. Rather, the court stated that the controlling question is not whether the United States has some interest in adjudicating the case but whether the U.S. interest outweighs the alternative forum's interest. Considering that the events took place in Turkey and that the suit involved Turkish plaintiffs, a Turkish employer, the Turkish police, and an American corporation doing substantial business in Turkey, the court concluded that Turkey's national interest in adjudicating the claims far outweighed that of the United States. In the end, the court dismissed the case on the grounds of forum non conveniens.

138. Id. at 523-26.
139. See Plaintiffs Joint Memorandum of Points and Authorities in Opposition to All Defendants' Motions to Dismiss, Turedi v. Coca Cola Co., 460 F. Supp. 2d 507 (S.D.N.Y. 2006) (No. 05 Civ. 9635).
140. Turedi, 460 F. Supp. 2d at 525.
141. Id. at 526-29. With regard to the private interest factors, the court pointed out that the events occurred in Turkey and that the witnesses and documentary evidence were all located in Turkey. Id. at 526-27. As for the public interest factors, the court stressed Turkey's interest in having a local matter decided in the local forum and that adjudicating many of the plaintiffs' claims would require the application of Turkish law. Id. at 527-28.
142. Id. at 528.
143. Id.
144. Id.
145. Id. at 529. The dismissal was conditioned on the defendants agreeing to: (1) accept service of process and personal jurisdiction in Turkey, (2) not assert any statutes of limitations defenses that would be unavailable if the litigation were to proceed in the Southern District of New York, and (3) satisfy any final judgment rendered by a Turkish court. Id.
IV. "The Wiwa Approach:" Applying the Forum Non Conveniens Doctrine to ATCA Claims

The traditional forum non conveniens doctrine is in tension with the Alien Tort Claims Act as a human rights statute because there is an obvious contradiction between a statute that opens U.S. courts to suits by alien plaintiffs who have suffered human rights violations abroad and a doctrine that often operates to shut the door to U.S. courts when the plaintiffs are aliens and the violations have occurred overseas. To alleviate this tension, courts must not treat cases involving international human rights violations as they would treat mere products liability cases or commercial actions. Instead, courts must treat the presence of an international human rights violation as an important factor in the forum non conveniens analysis. The Second Circuit's Wiwa decision does so by instructing federal courts to consider "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights."146

The Wiwa court is certainly correct to emphasize the United States' interest in providing a forum for international human rights claims, an interest that Congress acknowledged in supplementing the ATCA with the TVPA.147 On the most general level, adjudicating human rights abuses helps the United States maintain an international reputation as a protector of human rights, a reputation that is important both for the United States' self-image and for U.S. foreign policy.148 The United States also should be vested in adjudicating international human rights claims because—like all nations—the United States has a "strong interest in influencing the evolutionary process by which international norms emerge and are applied."149 Because international law norms are derived, in part, from judicial opinions,150 U.S. courts help shape the contours of international law when they adjudicate human rights claims. U.S. courts also have a strong interest in shaping international norms because, when a norm becomes a part of international law, it, in turn, becomes incorporated into U.S. federal common law.151 Therefore, adjudicating violations of international law is very much "our business"152 and U.S. courts must be careful not to compromise the U.S. interest in shaping international law and by extension,
U.S. domestic law, through the overuse of forum non conveniens dismissals.

Wiwa acknowledges the strength of the United States' interest in providing a forum for violations of international human rights law by formulating an approach to the traditional forum non conveniens doctrine in which the presence of an international human rights claim plays an important role. Unfortunately, the Wiwa approach remains somewhat vague. According to Wiwa, Congress expressed a policy favoring receptivity by U.S. courts to claims alleging a violation of the law of nations. Courts, therefore, must consider the United States' interest in adjudicating such claims when conducting the forum non conveniens analysis. The Wiwa opinion, however, does not clarify how this interest should affect a court's analysis and precisely what elements of the forum non conveniens analysis are affected.

This section of the Note attempts to interpret "the Wiwa approach" and its impact on the doctrine of forum non conveniens by exploring both the Second Circuit's Wiwa decision and subsequent decisions by the Southern District of New York. It begins by surveying each element of the forum non conveniens doctrine and discussing how the presence of an ATCA claim should affect a court's analysis. It then addresses how the Southern District of New York's Presbyterian Church properly clarified the reach of the Wiwa approach. Next, it critiques the Southern District's recent Turedi decision and its attempt to limit Wiwa to its facts. Finally, this section ends with a word of caution regarding the ability of Second Circuit courts to dismiss ATCA claims on the grounds of forum non conveniens without first establishing jurisdiction.

A. The Wiwa Approach & the Elements of the Forum Non Conveniens Analysis

1. Adequate Alternative Forum

A court's first step in the forum non conveniens analysis is to determine whether the defendant has proposed an alternative forum that is adequate. The Wiwa approach does not affect this element. The adequate alternative forum inquiry remains a threshold question. If the alternative forum is not adequate, the court may not dismiss the case on the grounds of forum non conveniens and need not balance the private and public interest factors.

In ATCA cases, the most obvious alternative forum is frequently the country where the alleged human rights abuses occurred. Countries with a history of human rights abuses, however, are often unlikely or unable to provide an adequate forum for the adjudication of human rights claims.
Indeed, because jurisdiction under the ATCA for many claims requires state action, the alternative forum's government usually will have been directly or indirectly involved in the alleged human rights violations. Given such involvement, it is doubtful that courts of the offending country will give the plaintiff a fair hearing; instead, it may be dangerous for the plaintiff to even return to the country to conduct the lawsuit. U.S. courts, therefore, should be exceptionally reluctant to deem the site of the alleged human rights violations an adequate forum to adjudicate the plaintiff's ATCA claims.

If the site of the human rights abuse will not serve as an adequate forum, an ATCA defendant may instead argue that a third country will function as an adequate alternative forum. For example, in Wiwa, the alleged human rights abuses occurred in Nigeria yet the defendants argued that a third-country forum, England, was preferable to the United States. In proposing a third-country forum, ATCA defendants likely will have a much easier time demonstrating the adequacy of the forum because the third country is unlikely to have been directly or indirectly involved in the human rights violations.

However, the Southern District of New York's Presbyterian Church decision suggests that the ATCA's unique jurisdictional grant may aid human rights plaintiffs in arguing that even a third-country forum is inadequate. According to Presbyterian Church, an alternative forum may be inadequate simply because it has not incorporated international human rights law into its domestic law. For example, in Presbyterian Church, the court suggested that the Canadian forum might be inadequate because, in Canada, the plaintiffs could sue only under domestic tort law and not under the theory that the defendants violated international law. The Presbyterian Church court is not alone in accepting the argument that a lack of ATCA-style jurisdiction can render an alternative forum inadequate; the Central District of California deemed Australia an inadequate forum in an ATCA case in part because Australian courts lack ATCA-style jurisdic-

protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent.

157. See Swan, supra note 2, at 95-102 (surveying the international norms which courts have found actionable under the ATCA, the majority of which require state action).

158. See Wiwa, 226 F.3d at 106 ("Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place."); Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 336 (S.D.N.Y. 2003) ("It would be perverse, to say the least, to require plaintiffs to bring suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them.").

159. See Wiwa, 226 F.3d at 100. Similarly, in Presbyterian Church, the alleged human rights abuses occurred in Sudan but the defendant's argued that, even if Sudan was not an adequate alternative forum, Canada would serve as an adequate forum. See Presbyterian Church, 244 F. Supp. 2d at 336-37.

160. See Presbyterian Church, 244 F. Supp. 2d at 337-38.

161. Id.
tion over human rights violations.\textsuperscript{162}

Federal courts, however, should be reluctant to regard the lack of ATCA-style jurisdiction as contributing to the inadequacy of an alternative forum. Otherwise, U.S. courts will have to deem most alternative fora inadequate because no legal system outside the United States has an ATCA-style statute and most foreign fora do not even recognize violations of international law as torts that furnish a domestic cause of action.\textsuperscript{163} Also, courts are mistaken if they expect different countries with different legal systems and legal cultures to redress international human rights violations in the same manner as the United States.\textsuperscript{164} Instead, "[e]ach system translates its international law obligations into proceedings that are appropriate to its domestic civil and criminal system."\textsuperscript{165} For example, unlike in the United States where only the government may initiate criminal prosecutions, many civil law systems allow private parties to initiate criminal prosecutions.\textsuperscript{166} Therefore, a victim of a human rights abuse might be able to bring a criminal charge against the defendant even if there is no ATCA-style statute through which to make a civil charge. U.S. courts must be careful not to deem a judicial system incapable of properly addressing human rights violations merely because it redresses human rights violations differently than U.S. courts.

Therefore, \textit{Presbyterian Church} was mistaken in suggesting that Canada might be an inadequate forum merely because international human rights plaintiffs would be limited to Canadian domestic tort remedies, which the court argued are inadequate to address gross violations of human rights.\textsuperscript{167} Admittedly, it may appear to U.S. courts, familiar only with the United States' legal culture, that domestic tort law does not fully reflect the gravity of a human rights offense. Given the particulars of a foreign country's legal system, civil suits based on the country's tort law, however, still might be a sufficient and appropriate means of addressing international human rights violations.\textsuperscript{168} Certainly, on the most basic
level, domestic tort remedies still provide financial redress to victims. Therefore, U.S. courts should avoid making sweeping, uninformed judgments over the manner that a country chooses to address human rights violations. Otherwise, U.S. courts run the risk of needlessly insulting countries that have a genuine and admirable commitment to human rights, such as Canada, by deeming their judicial systems inadequate to address international human rights claims. Thus, the Southern District of New York was right, with its 2006 Turedi decision, to abandon its earlier reasoning from Presbyterian Church and reject the plaintiffs' argument that Turkey is an inadequate forum for ATCA cases because Turkish courts might not recognize a cause of action for violations of international human rights law. In applying the forum non conveniens doctrine, federal courts generally do not require that the alternative forum provide an identical cause of action and they should not deviate from this position in ATCA cases.

2. Private and Public Interest Factors

The Wiwa approach has a substantial impact on the balancing of the private and public interest factors. Simply stated, the Wiwa approach instructs federal courts to give considerable weight to the U.S. public interest "in furnishing a forum to litigate claims of violations of the international standards of the law of human rights." The Wiwa approach does not, however, drastically alter the forum non conveniens analysis and the U.S. public interest remains only one of the many private and public interest factors that the court must weigh. Nevertheless, the U.S. public interest is a significant factor and serves as a much needed counter-weight to the lesser-deference rule and the other private and public interest factors, which generally weigh against courts retaining ATCA cases. If U.S. federal courts properly apply it, the Wiwa approach ensures that ATCA claims are not "facilely dismissed on the assumption that the ostensibly foreign controversy is not our business."
The Wiwa approach still requires courts, when balancing the public interest factors, to consider the interests of the alternative forum in adjudicating the case.\textsuperscript{176} This is the correct approach because the United States' interest in providing a forum for international human rights violations is not unique; on the contrary, all countries share an interest in validating universal human rights. Furthermore, in some situations, the alternative forum's interest may be even stronger than that of the United States. Such situations are likely only to arise, however, when the alternative forum is the nation in which the alleged human rights violations occurred, because in such cases, the alternative forum may have a very compelling interest in remedying the suffering of its nation's people.\textsuperscript{177} Consequently, it may be appropriate for a U.S. court to dismiss an ATCA case on the grounds of forum non conveniens if the alternative forum's interest in litigating the human rights claim is substantially greater than that of the United States.\textsuperscript{178}

Nevertheless, dismissal of ATCA cases on the grounds of forum non conveniens should be very rare. The traditional forum non conveniens doctrine permits dismissal only when the balance of private and public interest factors strongly favors the alternative forum\textsuperscript{179} and Wiwa's emphasis on the U.S. public interest in adjudicating human rights violations should make such situations unlikely. Also, from a purely practical standpoint, dismissal on the grounds of forum non conveniens usually spells the end of the lawsuit\textsuperscript{180} and U.S. courts run the risk of condoning human rights abuses if they allow a plaintiff's claims to go completely unaddressed. To ensure that human rights victims will obtain redress, U.S. courts must be careful to dismiss ATCA claims on the grounds of forum non conveniens only in the most appropriate cases. For example, dismissal may be appropriate when: (1) a truly adequate alternative forum is available, i.e., the human rights plaintiffs can easily and safely seek redress in a

\textsuperscript{176} See id. at 107–08 (considering England's interest in adjudicating the case).

\textsuperscript{177} See Short, supra note 16, at 1088–89. For example, if the plaintiffs charge a country's former government officials with human rights abuses, the country might have a strong public interest in correcting past governmental wrongs through litigation. Id.

\textsuperscript{178} Arguably, the occasional dismissal of a human rights claim helps to expand the ATCA's jurisdictional reach because the Supreme Court's Sosa's standard requires that a modern international norm reach a high level of acceptance before it can provide a cause of action under the ATCA. See Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). Achieving the required level of acceptance will necessitate the input of many foreign courts. Therefore, the rare forum non conveniens dismissal might help expand the ATCA's jurisdiction by allowing foreign courts to adjudicate human rights claims and join in an emerging consensus.


\textsuperscript{180} Dismissal on the grounds of forum non conveniens is usually fatal to the plaintiff's lawsuit because foreign plaintiffs, after dismissal, almost invariably abandon their cases or settle for a small amount. See Field et al., supra note 37, at 622; Jacqueline Duval-Major, Note, One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff, 77 Cornell L. Rev. 650, 671–72 (1992) (exploring the legal and practical barriers that prevent foreign plaintiffs from recovering in their home countries).
forum that will undoubtedly provide a fair trial, (2) the private interest factors strongly indicate that the defendants will suffer real inconvenience, e.g., the defendants are all foreigners and all the key evidence and witnesses are located abroad, and (3) the alternative forum's public interest in hearing the case substantially outweighs the United States' strong interest in adjudicating international human rights claims.

3. **Lesser Deference to Foreign Plaintiff**

Under the traditional forum non conveniens analysis, courts give less deference to a foreign plaintiff's choice of forum than to a U.S. resident's choice of forum and the Wiwa approach does not alter this element of the analysis. The Wiwa approach centers on the United States' significant policy interest in adjudicating international human rights claims. Meanwhile, the lesser-deference rule is premised solely on issues of convenience, not on the forum's interests in adjudicating the case. As the Wiwa opinion explains, U.S. courts give greater deference to a U.S. residents' choice of forum, not because the United States has a "bias" towards adjudicating the claims of U.S. residents, but because a U.S. resident's ties to the forum make it "more likely . . . that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction." Although courts may properly consider a forum's interest in adjudicating the claims of its residents when weighing the public interest factors, the interests of the forum in adjudicating the case do not fit in with the stated rationale of the lesser-deference rule. Therefore, it is improper for courts to con-

182. See id. at 251-56. The Supreme Court accounts for the lesser-deference rule by contending that it is "much less reasonable" to assume that a foreign plaintiff chose a U.S. forum for reasons of convenience rather than a desire to take advantage of favorable American law. Id.
184. See, e.g., id. at 107 (weighing the U.S. "interest in adjudicating matters affecting its residents" when balancing the private and public interest factors).
185. One can certainly argue, however, that the convenience rationale for the lesser-deference rule is a fiction, a mere excuse for making the dismissal of foreigners' claims easier. See Stephen B. Burbank, Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?, 26 Hous. J. Int'l L. 385, 396 (2004) (arguing that the lesser-deference rule "was built, or at least is sustained, on fictions, if not hypocrisy"). Indeed, the Supreme Court of Washington, in formulating the application of the forum non conveniens doctrine to claims brought in Washington state courts, rejected Piper Aircraft's lesser-deference rule. See Myers v. Boeing Co., 794 P.2d 1272, 1280-81 (Wash. 1990). In doing so, the court argued that *Piper Aircraft's* reasoning "does not withstand scrutiny":

The *Piper Aircraft* Court purports to be giving lesser deference to the foreign plaintiff's choice of forum when, in reality, it is giving lesser deference to the foreign plaintiffs, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a foreign plaintiff's choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?

*Id.* at 1281. Twisting the knife, the Supreme Court of Washington suggested that *Piper Aircraft's* reasoning "raises concerns about xenophobia." *Id.* Finally, the court
sider the interests of the United States in adjudicating the case—whether it be because the plaintiff is a U.S. resident or because the claim alleges an international human rights violation—when determining how much deference to give to the foreign plaintiff’s choice of forum.

Although the Wiwa approach preserves the lesser-deference rule, courts should nevertheless consider abandoning the rule with respect to ATCA plaintiffs because it is incongruous for a court to apply the lesser-deference rule to foreign plaintiffs who bring suit under a statute expressly granting them access to a U.S. forum. In its 2002 decision in *Flores v. Southern Peru Copper Corp.*, the Southern District of New York recognized this incongruity and looked to Second Circuit precedent, which holds that “when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens, identical forum non conveniens standards must be applied to such nationals as to American citizens.”186 Analogizing the ATCA to a treaty granting foreign citizens access to U.S. courts, the court speculated—but did not hold—that an ATCA plaintiff’s choice of forum should never be subject to lesser deference.187 Although the Second Circuit has not addressed this reasoning and the Southern District has not applied it to any subsequent ATCA cases, U.S. federal courts should adopt it as a means of alleviating the tension between the ATCA and the doctrine of forum non conveniens.

B. *Presbyterian Church* & Clarification of the Wiwa Approach’s Reach

During the years immediately following Wiwa but preceding *Presbyterian Church*, the Southern District of New York read Wiwa narrowly and held that, due to Wiwa’s emphasis on the TVPA, the court did not have to weigh the U.S. public interest in adjudicating international human rights claims when applying the doctrine of forum non conveniens to ATCA cases that do not involve torture or extrajudicial killing.188 With *Presbyterian Church* in 2003, however, the Southern District interpreted Wiwa more broadly and correctly held that the Wiwa approach extends to all ATCA claims involving violations of jus cogens norms of international law.189

*Jus cogens* norms comprise a very select subset of international law dealing with offenses so depraved that they violate the most basic rules of civilized conduct and are therefore of universal concern and automatically binding on all nations.190 There is no established list of *jus cogens* norms,
but it is generally agreed that *jus cogens* norms include genocide, war crimes, piracy, slavery, prolonged arbitrary detention, torture, and extrajudicial killing.\(^{191}\) Because of the egregious nature and universal acceptance of all *jus cogens* norms, the United States has a compelling interest in providing a forum to adjudicate violations of any and all *jus cogens* norms, not just torture and extrajudicial killing. Limiting the *Wiwa* approach to claims of torture and extrajudicial killing implies that the victims of genocide or slavery are somehow less deserving of redress. Therefore, *Presbyterian Church* is correct to hold that U.S. federal courts must give the U.S. interest in adjudicating international human rights claims significant weight when dealing with a violation of any *jus cogens* norm.

*Presbyterian Church* is also correct in not extending the *Wiwa* approach to violations of any and all international norms because the U.S. interest in adjudicating such violations is greatly diminished when not dealing with universally accepted *jus cogens* norms.\(^{192}\) Moreover, drawing the line at *jus cogens* norms is unlikely to preclude federal courts from applying the *Wiwa* approach to any cognizable ATCA claims. According to the Supreme Court’s *Sosa* decision, the ATCA provides a cause of action only for violations of those international norms that are as widely accepted and specifically defined as the claims recognized in 1789.\(^{193}\) Modern human rights claims not grounded in *jus cogens* norms, such as claims alleging environmental harms or free speech violations, are unlikely to meet the required level of acceptance and specificity. Consequently, limiting the *Wiwa* approach to *jus cogens* violations is appropriate since ATCA claims alleging violations of *jus cogens* norms are probably the only claims that will satisfy *Sosa*’s strict requirements.

## C. *Turedi*’s Misguided Attempt to Limit *Wiwa* to Its Facts

In its most recent decision applying the doctrine of forum non conveniens to an ATCA claim, *Turedi v. Coca Cola Co.* in 2006, the Southern District of New York accused the plaintiffs of misapplying *Wiwa*.\(^{194}\) It was, however, the *Turedi* court itself that committed that offense when, in a confusing section of the opinion, the court attempted to limit the *Wiwa* approach to only those ATCA cases falling within *Wiwa*’s precise fact pattern.\(^{195}\) In their brief to the court, the plaintiffs, citing *Wiwa*, argued that “the TVPA’s strong policy in favor of plaintiffs’ claims being heard in a U.S.


\(^{192}\) See *Presbyterian Church*, 244 F. Supp. 2d at 339.


\(^{195}\) See id. Adding to the confusion is the fact that *Turedi* discusses *Wiwa* and the U.S. policy favoring receptivity by our courts to ATCA and TVPA claims in the portion of its analysis dealing with the amount of deference it should give the plaintiffs’ choice of forum. *Id.* This is an erroneous application of *Wiwa* because, as previously explained, the *Wiwa* approach does not implicate the rationale of the lesser-deference rule. *See supra* Part IV.A.3.
forum substantially alters the [forum non conveniens] analysis" and that, to prevail, the defendants "must meet a heavier burden than if this case were an ordinary tort or commercial action.\footnote{196} The \textit{Turedi} court responded by maintaining that the plaintiffs' reliance on Wiwa was misplaced because: (1) some of the Wiwa plaintiffs were lawful United States residents, and (2) the alternate forum that the defendants proposed in Wiwa was not the site of the alleged human rights abuses.\footnote{197} In contrast, none of the \textit{Turedi} plaintiffs were U.S. residents and the \textit{Turedi} defendants proposed Turkey, the site of the alleged human rights violations, as the alternative forum.\footnote{198}

\textit{Turedi}'s attempt to limit the \textit{Wiwa} approach to only those ATCA cases brought by U.S. resident plaintiffs involves a faulty reading of the \textit{Wiwa} opinion. It is true that, in \textit{Wiwa}, the Second Circuit reversed the district court's forum non conveniens dismissal in part because the lower court failed to give sufficient deference to the resident plaintiffs' choice of forum.\footnote{199} But the status of the plaintiffs as U.S. residents was a factor contributing to reversal, not a factor that lead the court to conclude that the U.S. interest in providing a forum for the adjudication of international human rights abuses must have a significant role in the forum non conveniens analysis. Indeed, the section of the \textit{Wiwa} opinion discussing the application of the forum non conveniens doctrine to ATCA claims makes no mention of the plaintiffs' status as U.S. residents.\footnote{200} Instead, the \textit{Wiwa} court divined the U.S. policy favoring receptivity by U.S. courts to suits alleging violations of international law from Congress's enactment of the TVPA, a statute which makes no distinction between U.S. resident plaintiffs and non-U.S. resident plaintiffs.\footnote{201} Therefore, any suggestion that the plaintiffs must be U.S. residents in order to avail themselves of the \textit{Wiwa} approach misreads the \textit{Wiwa} opinion itself and, to the extent that the district court's \textit{Turedi} decision conflicts with the Second Circuit's \textit{Wiwa} decision, \textit{Wiwa} controls.

\textit{Turedi}'s attempt to limit the \textit{Wiwa} approach to only those ATCA cases brought by U.S. residents is also mistaken as a matter of policy. The U.S. interest in providing a forum for international human rights claims is wholly unrelated to the status of the plaintiffs as U.S. residents. Consider the following illustration. The government of Country X tortures a member of an opposition party. The victim flees the country and finds residence in the United States. Subsequently, the victim brings claims against the torturers in U.S. federal court under the ATCA. Meanwhile, the govern-

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\footnote{196. See Plaintiffs Joint Memorandum of Points and Authorities in Opposition to All Defendants' Motions to Dismiss, Turedi v. Coca Cola Co., 460 F. Supp. 2d 507 (S.D.N.Y. 2006) (No. 05 Civ. 9635).}
\footnote{197. \textit{Turedi}, 460 F. Supp. 2d at 523.}
\footnote{198. \textit{Id.} at 509-11.}
\footnote{200. See \textit{id.} at 103-06.}
\footnote{201. See \textit{id.}}
}
ment of Country Y engages in an extended campaign of genocide and torture against its own citizens. Years later, a group of plaintiffs, comprised entirely of residents of Country Y, brings claims of genocide and torture against former government officials of Country Y in U.S. federal court under the ATCA. It is difficult to see how the U.S. has a significant interest in providing a forum to the torture victim from Country X but has little interest in providing a forum to the genocide and torture victims from Country Y. Thus, it is bizarre for Turedi to suggest that the U.S. interest in adjudicating international human rights claims arises only when some of the victims are fortunate enough to find refuge in the United States.

As with its attempt to limit Wiwa to only ATCA claims involving U.S. residents, Turedi is also mistaken in limiting the Wiwa approach to only those ATCA cases in which the adequate alternative forum is a third country, as opposed to the site of the alleged human rights violations. The U.S. interest in providing a forum for international human rights claims does not depend on the identity of the alternative forum. Instead, the U.S. public interest is always present and courts must consider it when weighing the private and public interest factors in the forum non conveniens analysis. Admittedly, it is true that when the adequate alternative forum is the site of the alleged human rights violations, the United States' interest in adjudicating the claim might not be as great as that of the alternative forum. But the presence of the alternative forum's interest does not negate the United States' interest in providing a forum for international human rights victims; it merely introduces another factor for the court to weigh in the forum non conveniens analysis.

Despite its attempt to read Wiwa as narrowly as possible, the Turedi court did acknowledge, albeit briefly, the U.S. public interest in adjudicating international human rights claims when it weighed the public interest factors. The court, however, failed to acknowledge that, under the Wiwa approach, it should give the factor substantial weight. Nevertheless, in terms of the outcome, the Turedi case might have warranted dismissal on the grounds of forum non conveniens even if the court had properly applied Wiwa because Turkey probably qualifies as an adequate alternative forum and, even if the court had given substantial weight to the U.S. public interest in adjudicating international human rights claims, the interests of Turkey, as the site of the alleged human rights abuses, would probably have still outweighed the United States' interests.

D. A Word of Caution over the Ability of Second Circuit Courts to Dismiss ATCA Claims on Grounds of Forum Non Conveniens Without Establishing Jurisdiction

As the Turedi opinion discusses, the Second Circuit has held that dismissal on the grounds of forum non conveniens is a non-merits decision and federal courts may, therefore, dismiss cases on such grounds without

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203. See supra notes 176–78 and accompanying text.
204. See Turedi, 460 F. Supp. 2d at 528.
first establishing jurisdiction. The ability of Second Circuit courts to address a forum non conveniens motion before establishing jurisdiction should not affect how the courts apply the Wiwa approach to ATCA claims, which if the forum non conveniens analysis is to result in a non-merits decision, the court will have to assume are substantively valid. Therefore, under the Wiwa approach as clarified by Presbyterian Church, if the plaintiffs allege violations of jus cogens norms, such as torture or genocide, the federal court, in the forum non conveniens analysis, must give significant weight to the U.S. interest in adjudicating international human rights claims even if the ATCA claims might not support subject matter jurisdiction or might be without merit. Even if a court's ability to dismiss international human rights claims on grounds of forum non conveniens without first verifying subject matter jurisdiction does not alter the Wiwa approach, however, it still raises serious concerns about the general development of ATCA jurisprudence.

The ability to bypass difficult jurisdictional questions and dismiss ATCA claims on the grounds of forum non conveniens may make such dismissals overly tempting to federal courts. As the Turedi court points out, the forum non conveniens analysis is often "far simpler" for courts to resolve than the underlying jurisdictional disputes of ATCA claims. Certainly, any inquiry into ATCA subject matter jurisdiction will present difficulties for the court. For example, the extreme vagueness of the Supreme Court's Sosa standard ensures that establishing subject matter jurisdiction over any ATCA claim—except maybe those involving certain jus cogens norms—will entail the lengthy and challenging process of determining whether a particular defendant's conduct violated the law of nations. In addition, ATCA subject matter jurisdiction can implicate complex legal doctrine such as international comity and extraterritoriality. Given these challenges, federal courts may find it tempting to simply evade complex jurisdictional questions by dismissing potentially valid ATCA claims on the grounds of forum non conveniens.

Federal courts in the Second Circuit, however, must exercise restraint and not abuse their ability to dismiss ATCA claims on the grounds of forum non conveniens without first establishing jurisdiction. Post-Sosa, it remains unclear exactly which international norms support federal subject

205. See Dattner v. Conagra Foods, Inc., 458 F.3d 98, 102 (2d Cir. 2006); Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002); Turedi, 460 F. Supp. 2d at 511-12.
206. Turedi, 460 F. Supp. 2d at 520.
207. See supra notes 26-30 and accompanying text.
208. See Turedi, 460 F. Supp. 2d at 519.
209. Given this temptation, it should come as no surprise that the Turedi decision is not the first time that the Southern District of New York has dismissed an ATCA claim on the grounds of forum non conveniens without first establishing jurisdiction. In Aguinda, the court bypassed the difficult question of whether environmental harms are actionable under the ATCA and dismissed the claim on forum non conveniens grounds. See Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 552-54 (S.D.N.Y. 2001), aff'd as modified, 303 F.3d 470 (2d Cir. 2002).
matter jurisdiction under the ATCA. Federal courts therefore cannot properly enforce international law until they develop a body of ATCA jurisprudence clarifying which international norms supply them with jurisdiction. Second Circuit courts will severely hamper this development if they overuse their ability to dismiss ATCA claims on the grounds of forum non conveniens without first addressing jurisdictional questions. The Wiwa court was appropriately concerned with U.S. courts doing "little to enforce the standards of the law of nations" by "exercis[ing] their jurisdiction conferred by the [ATCA] only for as long as it takes to dismiss the case for forum non conveniens." U.S. courts will do still less to enforce the standards of international law if they do not even determine whether the ATCA confers jurisdiction over a particular claim before dismissing it on forum non conveniens grounds.

Conclusion - Beyond the Second Circuit

There are some indications that courts beyond the Second Circuit might embrace Wiwa's reasoning and alter how they apply the forum non conveniens doctrine to certain ATCA claims. Most notably, California's district courts have repeatedly flirted with Wiwa's instruction that federal courts must be receptive to international human rights claims. For example, the Central District of California, in denying a defendant's motion to dismiss on grounds of forum non conveniens, approvingly cited Wiwa and explained that "[t]he court believes [denial of dismissal] is particularly appropriate given that the case is brought under the ATCA and alleges violations of international law." Similarly, the Northern District of Illinois quoted approvingly from Wiwa and acknowledged that "[a] motion for dismissal on forum non conveniens grounds raises special concerns when the claims against the defendant are brought under the ATCA for torture and other human rights abuses." To date, however, no court outside of the Second Circuit has fully and clearly embraced the Wiwa approach. This is a mistake. All federal courts should adopt the Wiwa approach to ensure that they do not apply the forum non conveniens doctrine in a way that undermines the ATCA's function or that ignores the

210. See supra notes 26-30 and accompanying text.
213. Sarei, 221 F. Supp. 2d at 1175.
United States' strong interest in adjudicating international human rights violations.

Adoption of the Wiwa approach will not place any unnecessary burdens on federal courts or ATCA defendants. Admittedly, it will be harder for a federal court to dismiss ATCA claims on the grounds of forum non conveniens if the court embraces Wiwa's reasoning. But U.S. federal courts need not fear a torrent of ATCA claims if they adopt the Wiwa approach because international human rights cases make up only a tiny percentage of federal court caseloads and, of that tiny percentage, only a very select group of human rights violations will satisfy Sosa's strict requirements and confer subject matter jurisdiction under the ATCA. U.S. federal courts also need not fear that the Wiwa approach will force them to adjudicate claims that will interfere with foreign relations or executive branch functions because the act of state doctrine and the political question doctrine still apply. In addition, the Wiwa approach will not unfairly force defendants who have no connection to the U.S. forum to litigate ATCA claims since the requirement of personal jurisdiction ensures that all defendants have a meaningful connection with the forum.

Therefore, federal courts outside the Second Circuit should not hesitate to adopt the Wiwa approach. Specifically, they should adopt the Wiwa approach as clarified by the Southern District of New York in *Presbyterian Church*, which instructs courts, when balancing the private and public interest factors in the context of any ATCA claim alleging a *jus cogens* violation, to give significant weight to the U.S. policy interest in providing a forum to adjudicate such violations. If U.S. federal courts fail to adopt this approach, they run the risk of "falsely dismiss[ing]" international human rights claims on the mistaken "assumption that the ostensibly foreign controversy is not our business."

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216. See *supra* notes 26-29 and accompanying text.
217. See *Swan*, supra note 2, at 78-82.