An Inconvenient Forum: Altering the Doctrine of Forum Non Conveniens for Human Rights Claims Under the Alien Tort Statute

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AN INCONVENIENT FORUM: ALTERING THE DOCTRINE OF FORUM NON CONVENIENS FOR HUMAN RIGHTS CLAIMS UNDER THE ALIEN TORT STATUTE

ABSTRACT

This Article proposes a new approach to the doctrine of forum non conveniens. Traditionally, forum non conveniens has been considered a non-merits decision that does not require a prior determination of subject matter jurisdiction. This Article argues that this approach significantly disadvantages foreign plaintiffs who bring human rights claims under the Alien Tort Statute because it quickly and automatically dismisses such cases without considering either the U.S. interest in adjudicating human rights cases or the gravity of human rights violations. Both these considerations should trump the more mechanical analysis conducted under the traditional forum non conveniens model. The central thesis is that for cases involving human rights violations brought under the Alien Tort Statute, courts should decide subject matter jurisdiction before performing a forum non conveniens review. If judges determine subject matter jurisdiction before forum non conveniens, the number of human rights cases heard in U.S. federal courts would increase notably, allowing the U.S. to play a larger role in shaping international human rights norms and enforcement. It would provide greater protection of jus cogens norms (fundamental, non-derogable human rights) in states where domestic courts do not effectively protect these rights.
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I. Introduction

In the last thirty years, the Alien Tort Statute (ATS) has become a pivotal tool for victims of human rights violations to seek some level of justice against their abusers. The statute grants federal jurisdiction to cases brought by foreign plaintiffs for torts committed in violation of international law, allowing victims to pursue civil claims where criminal accountability may not be available. However, the federal common law doctrine of forum non conveniens has been equally successful in defeating human rights claims brought under the ATS. The doctrine enables courts to dismiss a case if a more convenient forum exists, and in the human rights context, this usually means the home country where the violations occurred. Though it varies between jurisdictions, courts have considered a traditional forum non conveniens analysis to be a strictly procedural, non-merits decision, and have therefore granted dismissal without considerations of subject matter.

The substance of human rights claims, however, involve high stakes circumstances where a determination of subject matter jurisdiction is central to a forum non conveniens analysis. Human rights abuses are fraught with threats to personal security and safety, and often implicate powerful government actors who have the ability to influence the judicial system in the home country. Given this gravity, human rights cases that are brought under the ATS should not be treated in the same manner as other transnational commercial litigation, especially as they relate to forum non conveniens dismissal. This paper argues that courts should conduct a subject matter inquiry before a forum non conveniens analysis in ATS suits involving human rights claims for two reasons: the U.S. interest in adjudicating human rights norms and the intrinsic fundamentality of human rights. First, when a court conducts a forum non conveniens analysis

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1 Hereinafter, the “home country.”
without first determining subject matter jurisdiction, it is unable to trigger the application of the standard advanced in *Wiwa v. Royal Dutch Petroleum Co.*: the U.S. has a strong interest in adjudicating human rights cases as a matter of foreign policy and global influence, and this interest tips the balance against a forum non conveniens motion. Second, core human rights are necessary for human existence and should therefore trump judicial convenience or, at the very least, should be an important consideration when deciding whether an alternative forum is fair and safe for victims of human rights violations.

This paper begins with a summary of the doctrine of forum non conveniens in Part II, discussing the three main features of available alternative forum, private factors, and public interest factors. Part III traces the development of ATS jurisprudence, while Part IV focuses on the Second Circuit’s ruling in *Wiwa* and examines its impact on forum non conveniens in subsequent cases. Finally, Part V discusses how a reform of the doctrine should include determining subject matter jurisdiction before a forum non conveniens inquiry. Such a reform would promote U.S. interest as well as fairness to the victims of human rights abuses.

**II. Summary of Forum Non Conveniens**

As a federal common law doctrine, forum non conveniens was first established in *Gulf Oil Corp. v. Gilbert* for cases involving U.S. litigants and was later clarified in *Piper Aircraft Co. v. Reyno* for international suits brought by foreign plaintiffs. A forum non conveniens

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analysis has three primary considerations: an alternative forum, private factors, and the public interest factors.

A forum non conveniens inquiry begins with the question of the existence of an alternative forum because the doctrine necessarily presupposes a choice of at least two forums. An alternative forum exists when a particular forum is both available and adequate. In *Piper*, the Court established that the availability requirement would be satisfied when the defendant is “amenable to process in the other jurisdiction.” As to adequacy, the Court acknowledged circumstances in which a remedy does not exist or is “clearly unsatisfactory;” in these instances, dismissal on forum non conveniens grounds would be inappropriate. Courts have generally placed the burden of proving adequacy on the defendant, requiring the litigant to demonstrate that the parties will not “be deprived of any remedy or treated unfairly.”

If the court finds the alternative forum inadequate, it denies the motion for dismissal; but if the court determines that the forum is adequate, it proceeds to the central part of its analysis: the balancing of the private and public interest factors. The modern doctrine of forum non conveniens was first established in 1947 in *Gilbert*, a case involving a plaintiff who brought suit in New York federal court despite the location of evidence, witnesses, and residence in

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5 *Piper*, 454 U.S. at 254, n. 22.
8 *Piper*, 454 U.S. at 254, n. 22.
9 *Id.* at 254.
11 *Piper*, 454 U.S. at 255.
Virginia.\textsuperscript{12} In dismissing the case on forum non conveniens grounds because Virginia was a more convenient forum, the Court instituted a balancing scheme that takes into consideration private and public interest factors.

The private factors include access to evidence; the availability of witnesses; the possibility of the court to view the premises; the enforceability of judgment; and whether the plaintiff is attempting to harass the defendant by making the trial cumbersome and expensive.\textsuperscript{13} The public interest factors are court congestion; the burden on a jury to decide matters that do not concern them and, conversely, the local interest of deciding local controversies at home; court familiarity with the law; and avoidance of conflict-of-law problems.\textsuperscript{14} The Court held that unless the balance of factors was strongly in favor of the defendant, the plaintiff’s choice of forum should not be disturbed.\textsuperscript{15}

While the balancing test was designed in the context of U.S. courts – involving U.S. parties – \textsuperscript{16} \textit{Piper} elaborated on \textit{Gilbert} by clarifying the doctrine of forum non conveniens in cases brought by foreign plaintiffs. In \textit{Piper}, the plaintiff filed suit on behalf of the estates of five deceased Scottish citizens who were killed in an airplane crash in Scotland; the defendants were the U.S. manufacturers of the downed aircraft.\textsuperscript{17} Applying the \textit{Gilbert} factors, the Court

\textsuperscript{12} \textit{Gilbert}, 330 U.S. at 502-503.

\textsuperscript{13} \textit{Id.} at 508.

\textsuperscript{14} \textit{Id.} at 508-09.

\textsuperscript{15} \textit{Id.} at 508.

\textsuperscript{16} A year after \textit{Gilbert}, Congress enacted 28 U.S.C. § 1404(a), which altered the remedy from dismissal to transfer to a more convenient forum.

\textsuperscript{17} \textit{Piper}, 454 U.S. at 238-39.
dismissed on forum non conveniens grounds, reasoning that a larger proportion of the evidence was located in Scotland and the Scottish had a strong interest in this litigation.\textsuperscript{18} In articulating its ruling, the Court modified the \textit{Gilbert} standard in two ways. First, the deference that is normally given to the plaintiff’s choice of forum is “much less reasonable” when the plaintiff is foreign: in short, the \textit{Piper} court held that “a foreign plaintiff’s choice deserves less deference.”\textsuperscript{19} Second, as mentioned previously, the Court established the standard for determining the availability and adequacy of an alternative forum.

The Court’s modification of the doctrine in \textit{Piper} presents a greater hurdle for foreign plaintiffs bringing suit in U.S. courts. Forum non conveniens tends to favor defendants because the normal deference that is given to the plaintiff’s choice of forum is significantly mitigated while the threshold for the availability of an alternative forum is lowered, requiring only that a remedy exists and defendant amenability. Thus, for the foreign plaintiff in ATS cases seeking redress for human rights abuses, a motion for forum non conveniens dismissal places her at an immediate disadvantage.

\section*{III. The Alien Tort Statute}

Part of the Judiciary Act of 1789, the ATS grants original jurisdiction to U.S. federal courts over suits brought by foreign plaintiffs for torts committed in violation of international law.\textsuperscript{20} While the statute opened the doors to international litigation in domestic courts, the U.S. federal courts have been reluctant to hear such cases due to forum non conveniens considerations.

\begin{flushright}
\textsuperscript{18} \textit{Id.} at 258, 259-60.
\textsuperscript{19} \textit{Id.} at 256.
\textsuperscript{20} 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).
\end{flushright}
was not amenable to adjudicating international law until 1900 in *The Paquete Habana*, a Supreme Court case that held that “international law is part of our law.”21 Despite this landmark ruling, international law has rarely been litigated in U.S. federal courts since *Paquete Habana*,22 and the ATS has remained largely dormant until *Filartiga v. Peña-Irala* in 1980.23

A. *Filartiga*: Groundbreaking Litigation

As the seminal case that set ATS litigation in motion, *Filartiga* held that the statute provides both a private right of action and a federal forum where foreign plaintiffs may seek redress for violations of international law. *Filartiga* involved an action brought by Dr. Joel Filartiga and his daughter against Americo Norberto Peña-Irala, a former inspector general of the Paraguayan police in Asunción; both parties were residing in the U.S.24 The Filartigas claimed that Peña-Irala had tortured and killed their son/brother in violation of international law, but their case was dismissed by the district court for lack of subject matter jurisdiction.25 On appeal, however, the Second Circuit reversed, holding that the prohibition of torture constitutes a norm

21 175 U.S. 677 (1900).
23 630 F.2d 876 (2d Cir. 1980).
24 *Id.* at 878-79.
25 *Id.* at 879.
under the “law of nations,” and an action brought under the ATS by a foreign plaintiff for an abuse in violation of international law triggers federal jurisdiction.26

Filartiga’s ruling was groundbreaking in its jurisdictional grant under the ATS and ushered in a new wave of litigation in U.S. courts. With the exception of a divided opinion in Tel-Oren v. Libyan Arab Republic,27 which has retained little precedential value,28 federal courts have upheld Filartiga,29 and subsequent cases have elaborated on the Second Circuit’s reading of the statute by expanding the category of defendants, as well as delimiting the torts that are actionable under the ATS.

B. Kadic: Including Non-State Actors

Elaborating on Filartiga, Kadic v. Karadzic30 significantly broadened the scope of the ATS by ruling that private parties can be subject to liability under the statute. Before the Kadic decision, the position within the legal community of scholars, practitioners, and the courts was that only state actors could be held responsible under the ATS. In the wake of Filartiga, this position was reasonable given that Peña-Irala had acted in his official capacity as the inspector general of the Paraguayan police, and the court was clear in stating that “deliberate torture

26 Id. at 878. (“Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.”).

27 726 F.2d 744 (D.C. Cir. 1984).


30 70 F.3d 232 (2d Cir. 1995).
perpetrated *under color of official authority* violates universally accepted norms of the international law of human rights.”  

In *Kadic*, however, the Second Circuit’s pivotal decision extended the category of defendants in ATS litigation to non-state actors. Citing piracy as an example of private acts that violate the law of nations, the court stated, “We do not agree that the law of nations . . . confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”  

This expansion meant that the landscape of ATS litigation would change significantly, increasing the number of claims filed against private actors – including corporations.  

But *Kadic* did not give federal courts *carte blanche* to find liability against all private individuals for committing torts in violation of international law. The court was careful to qualify private liability under the ATS, establishing two ways that a private individual can be responsible under the statute. First, the actor can be liable if s/he commits a violation under “color of law.”  

An individual acts under color of law when s/he “acts together with state officials or with significant state aid.” According to Ralph G. Steinhardt, this is a category of contextual wrongs where private conduct is “sufficiently infused with state action as to engage international standards.” Second, the actor can be liable if s/he acts alone in committing a class

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31 Filartiga, 630 F.2d at 878 (emphasis added).

32 Kadic, 70 F.3d at 239.

33 Id. at 245.

34 Id.

of violations that are considered so serious that they violate *jus cogens* (non-derogable) norms. Citing § 404 of the Restatement (Third) of the Foreign Relations Law of the United States (“Restatement (Third)”), the *Kadic* court outlined this set of offenses that are of “universal concern;” it includes, *inter alia*, slavery, genocide, and war crimes. Steinhardt classifies these violations as *per se* wrongs located in treaties or custom as not requiring state action in order to be considered a breach of international law. Torture is not explicitly enumerated in § 404, and is therefore “proscribed by international law only when committed by state officials or under color of law.” In other words, torture is grounds for ATS liability only when committed in the course of genocide or war crimes.

C. *Sosa*: The ATS goes to the Supreme Court

Following *Filartiga* and *Kadic, Sosa v. Alvarez-Machain* was instrumental in further developing ATS jurisprudence. In *Sosa*, the ATS was tested for the first time in the country’s highest court, and – to the relief of human rights advocates – passed muster. The case involved Humberto Alvarez-Machain who filed an ATS suit against Jose Francisco Sosa, among others, for abducting Alvarez-Machain from Mexico to the U.S. so that he can stand trial for assisting the torture and murder of a Drug Enforcement Agency officer. Alvarez-Machain claimed that

36 *Kadic*, 70 F.3d at 240.

37 *Id.*

38 *Id.* at 243.


40 *Id.* at 697-98.
his abduction and detention violated international human rights norms. While the Supreme Court affirmed the authority of the ATS in granting federal jurisdiction for violations of international law, it found that Alvarez-Machain’s one-day detention did not rise to the level of “prolonged arbitrary detention” prohibited by international law. The Court also recognized that Alvarez-Machain would have to prove that Sosa, et. al. acted under the color of law since “prolonged arbitrary detention” belonged to the category of contextual wrongs that require state action, vis-à-vis Kadic.

For advocates of human rights, the Sosa decision was a mixed outcome: although the Court preserved the ATS as a way of adjudicating human rights claims, it also set a high bar for determining actionable content under the statute. In order for a tort to be actionable as a violation of the law of nations, it must be “specific, universal, and obligatory” and based on “the norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized.” The Court did not enumerate the specificities of these “18th-century paradigms,” nor did it offer a general rubric for claims that can be adjudicated under the ATS. Therefore, what this standard means exactly is unclear, but the Court did affirm the interpretations of lower courts, and federal courts in general have been comfortable with using the Restatement (Third) as an authoritative starting point for delimiting the range of tortious conduct under the ATS. Nonetheless, the Court

41 Id.

42 Id. at 736-37.

43 Id.

44 Id. at 748 (“Actionable violations of international law must be a norm that is ‘specific, universal, and obligatory’”) (quoting In Re Estate of Marcos Human Rights Litigation 25 F.3d 1467, 1475 (CA9 1994)); id at 725.
cautioned that these determinations should be “only a very limited set of claims” or a “modest number of international law violations.”

D. *Wiwa*: Shaping the Future of ATS Litigation?

While *Sosa* impacted the content of ATS litigation, *Wiwa* had more procedural reverberations, namely the standard for assessing forum non conveniens motions in certain ATS cases. In *Wiwa*, Nigerian plaintiffs brought suit under the ATS, alleging that a Dutch corporation (Royal Dutch) and a British corporation (Shell Transport) worked in concert with the Nigerian government to either imprison, torture, or kill them and/or their relatives. The Southern District of New York dismissed the case for forum non conveniens, but the Second Circuit reversed on appeal. Although the Second Circuit acknowledged that England could serve as an adequate alternative forum, it held that the district court failed to consider three matters. First, the district court did not give proper weight to the U.S. residency of two of the plaintiffs. Second, the district court gave too much weight to particular private and public interest factors that favored England as the preferable forum. And third, and most importantly, the district court did not 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.”

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45 *Id.* at 720, 724.

46 *Wiwa*, 226 F.3d at 92.

47 *Id.*

48 *Id.* at 94.

49 *Id.*

50 *Id.* at 101.
weighing the public interest factors, the U.S. has a substantial interest in litigating human rights claims and the district court should have factored this into its decision. The *Wiwa* court subsequently denied the forum non conveniens motion.

This last reasoning of the Second Circuit is the most salient analysis to emerge from *Wiwa* primarily because it carved out a niche for human rights within ATS jurisprudence and underscored a strong U.S. interest in adjudicating human rights claims. Following the decision, legal scholars heralded *Wiwa* as a new standard that could potentially shield ATS cases involving human rights violations from forum non conveniens dismissal. *Wiwa* was considered an approach that “fundamentally changes . . . the way forum non conveniens should be invoked in [ATS] cases in the future” and possibly marked “a turning point away from judicial indifference and hostility to international human rights law.” In short, *Wiwa* would make it easier for foreign plaintiffs to bring suit for human rights violations despite the availability of an alternative forum and defendants would have a significantly higher burden in invoking dismissal on forum non conveniens grounds.

**IV. Assessing Wiwa**

In light of the acclaim from segments of the legal community, it is necessary to assess the Second Circuit’s discussion of the U.S. interest, as well as to examine the impact of *Wiwa* on

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51 Subsequent references to the *Wiwa* “approach” or “standard” will allude to this U.S. interest prong of the court’s decision.


subsequent judicial decisions involving the ATS and forum non conveniens. This section will argue that the *Wiwa* court’s emphasis on the U.S. interest in adjudicating human rights violations is sound legal reasoning because it is rooted in legislative authority and can positively impact public policy outcomes. Further, this section will discuss the impact *Wiwa* has had on subsequent cases in the Southern District of New York and the Second Circuit, as well as the obstacles to weighing the U.S. interest more heavily in balancing the forum non conveniens factors.

A. *Wiwa* and U.S. Interest in Human Rights

1. Legislative Intent

In explaining its conclusion that the U.S. has a strong interest in litigating human rights ATS claims, the Second Circuit looked to the congressional intent and statutory language of the Torture Victim Protection Act of 1991 (TVPA).\(^{54}\) The TVPA established a private right of action for foreign and U.S. victims of torture and extrajudicial killing occurring on foreign soil.\(^ {55}\) It differs from the ATS in four respects. One, the TVPA expanded the scope of possible plaintiffs from alien and U.S. resident plaintiffs to include U.S. citizen plaintiffs as well. Two, it explicitly contains a state actor requirement. Three, only torture and extrajudicial killings are considered actionable conduct under the TVPA. And four, it requires exhaustion of local

\(^{54}\) *Wiwa*, 226 F.3d at 105-06.

\(^{55}\) The TVPA stipulates that an “individual who, under actual or apparent authority, or under color of law, of any foreign nation, (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative or to any person who may be a claimant in an action for wrongful death.” The Torture Victim Protection Act, Pub. L. No. 102-1256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).
remedies “in the [state] in which the conduct giving rise to the claim occurred.”

Despite the technical differences between the ATS and the TVPA, their similarities are what remain relevant, namely the U.S. interest in adjudicating international law, particularly where it concerns human rights.

The legislative history of the TVPA is important for ATS purposes. It is a widely accepted assertion that the TVPA effectively codified the Filartiga decision. The Wiwa court itself stated that, “In passing the [TVPA] . . . Congress expressly ratified our holding in Filartiga.” Indeed, Congress enacted the TVPA in order to complement the ATS. The codifying of the TVPA in the same section of the U.S. Code as the ATS (§ 1350) evinces this intention, as such codification effectively fills in the lacuna of legislative history for the ATS.

The Second Circuit found that the statutory language of the TVPA reflected congressional recognition that “the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations.” Moreover, because U.S. domestic law has incorporated international law, violations of the law of nations are necessarily “our business.” By underscoring U.S. interest under the TVPA, the court essentially underscored the importance

56 Id.

57 See, e.g. Walker, supra note 22, at 551; Ryan Goodman & Derek P. Jinks, Filartiga’s Firm Footing: International Human Rights and Federal Common Law, 66 FORDHAM L.REV. 466, 525 (Nov. 1997) (“The legislative record is also filled with statements . . . that the TVPA would – and should – act as endorsement of the Filartiga litigation).

58 Wiwa, 226 F.3d at 104.


60 See Wiwa, 226 F.3d at 105, n. 10 (“The [ATS] has no formal legislative history.”).

61 Id. at 105.

62 Id. at 106.
of U.S. interest under the ATS. Taking these rationales together, the Second Circuit not only reinforced federal jurisdiction of human rights ATS claims, it provided a strong U.S. interest in litigating these claims as a central reason for denying the forum non conveniens motion.

The Second Circuit’s approach to weighing the public interest factors of the forum non conveniens analysis is prudent because it is rooted in congressional authority and not judicial activism. In parsing the legislative goals of the TVPA, as well as the statute’s history relative to the ATS, the Wiwa court extracted the U.S. interest as pivotal to both the TVPA and the ATS. Thus when confronted with a forum non conveniens challenge, this interest must be asserted as a significant consideration when balancing the forum non conveniens factors, at least with regard to ATS cases involving claims of torture and extrajudicial killing. As the Second Circuit noted, the TVPA has neither nullified nor diminished the doctrine of forum non conveniens; instead, it “communicate[s] a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.” According to Wiwa, Congress considers certain foreign controversies to be very much the business of U.S. courts.

2. Public Policy

In articulating its ruling, the Second Circuit was correct to acknowledge the interests that the U.S. has in litigating human rights claims under the ATS because adjudicating such cases can have salutary policy consequences for the U.S. First, arbitrating human rights violations promotes the U.S.’ “outward” reputation on the world stage as a protector of human rights. The U.S. State Department has been clear in espousing this position: “The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years

63 Id.
ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights . . . The United States understands that the existence of human rights helps secure the peace . . .”\[^{64}\] Such a reputation is “an important national interest” because it aids foreign policy, maintains security for Americans, and conforms to the image of the U.S. as historically rooted in a tradition of human rights preservation.\[^{65}\]

Secondly, adjudicating human rights ATS cases means that the U.S. can play a large role in shaping international norms and their application. In addition to treaties, international human rights law is derived from customary international law, which is created by the customary practice of a community of ever-evolving nations.\[^{66}\] But as a result of this continual evolution of nation-states, the scope and application of customary international law are not clearly delineated, though it is shaped, in part, by judicial opinions. Therefore, in adjudicating human rights cases, “the United States has a strong interest in influencing the evolutionary process by which international norms emerge and are applied.”\[^{67}\] By taking on human rights claims brought under the ATS, U.S. federal courts can have a substantial impact on the interpretation and application of international norms.

Finally, the U.S. has a substantial interest in influencing international human rights norms because such norms have the potential of being incorporated into domestic federal common law.

\[^{64}\] Human Rights, Bureau of Democracy, Human Rights, and Labor, Under Secretary for Democracy and Global Affairs, U.S. Dep’t of State Website, [http://www.state.gov/g/drl/hr/index.htm](http://www.state.gov/g/drl/hr/index.htm).

\[^{65}\] Id.

\[^{66}\] International Court of Justice Statute, art. 38(1).

Domestic courts, including the Supreme Court of the U.S., have historically cited customary international law in articulating their holdings.\textsuperscript{68} The excessive use of forum non conveniens to reject human rights claims means that federal courts will miss opportunities to pronounce on issues that are both relevant and integral to domestic federal law.\textsuperscript{69}

B. Wiwa’s Impact

Although it was perceived as a potential watershed case, Wiwa has not drastically transformed the landscape of human rights litigation under the ATS, despite its grounding in sound considerations of legislative authority and public policy. To the dismay of human rights advocates, Wiwa has not become the bulwark against forum non conveniens in ATS litigation. In examining Wiwa’s impact, this sub-section now turns to subsequent cases that took place in the Southern District of New York, as well as the Second Circuit, where Wiwa has the most binding authority.

1. Limiting Wiwa or Enforcing Kadic and Sosa?

Immediately following Wiwa, the Southern District of New York came down against human rights plaintiffs in three key ATS cases: Aguinda v. Texaco\textsuperscript{70} in 2001, and Flores v. S. Peru Copper Corp.\textsuperscript{71} and Abdullahi v. Pfizer\textsuperscript{72} in 2002. In all three cases, the court favored

\textsuperscript{68} See, e.g. Roper v. Simmons 125 S. Ct. 1183, 1198-1200 (2005) (“it is proper that we acknowledge the overwhelming weight of international opinion.”).

\textsuperscript{69} The question of whether individual state courts are bound by international norms is perhaps the next terrain of contestation about domestic incorporation of international law.

\textsuperscript{70} 142 F. Supp. 2d 534 (S.D.N.Y. 2001), aff’d as modified, 303 F.3d 470 (2d Cir. 2002).

\textsuperscript{71} 253 F. Supp. 2d 510 (S.D.N.Y. 2002), aff’d as modified, 406 F.3d 65 (2d Cir. 2003).
forum non conveniens dismissal. Scholars have criticized these decisions as limiting the scope of *Wiwa*, but a stronger interpretation of these cases is that the district court was merely following the rubric of actionable conduct under *Kadic* and *Sosa*. More importantly, these cases – like *Wiwa* – reveal that the subject matter of ATS litigation is central to the forum non conveniens analysis.

In *Aguinda*, Ecuadorian and Peruvian plaintiffs sued Texaco, a U.S.-based oil corporation, under the ATS alleging that the company’s consortium in Ecuador polluted rain forests and rivers within the country, as well as in Peru. The plaintiffs sought relief for injuries stemming from environmental damage. In granting forum non conveniens dismissal, the district court held that environmental torts do not constitute actionable conduct under the ATS and that *Wiwa*’s emphasis on the TVPA suggests that forum non conveniens applies to all ATS cases that do not fall within the purview of the TVPA. The Second Circuit upheld the district court’s decision, but refused to address whether the ATS encompasses environmental injury.

In *Flores*, Peruvian plaintiffs brought suit against an American company, the Southern Peru Copper Corporation, for its mining activities that resulted in pollution and personal injury. The district court ultimately held that it lacked subject matter jurisdiction because environmental

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74 *Aguinda*, 142 F. Supp. 2d at 537-38.

75 *Id.* at 552, 554.

injury did not constitute a breach of international law under the ATS. The court rejected the plaintiffs’ argument that the *Wiwa* standard was relevant, stating that unlike *Wiwa* which involved torture claims, this case did not “implicate the TVPA or its discerned policy,” and thus, a traditional forum non conveniens analysis applied.

Finally, *Abdullahi* involved Nigerian plaintiffs who brought an action against Pfizer, a U.S. drug company, for subjecting the plaintiffs to experimental medication without their informed consent. In an unreported decision, the court held that unauthorized medical experimentation violated international law under the ATS, but conditionally dismissed on forum non conveniens grounds without addressing *Wiwa*’s acknowledgment of the U.S. interest in litigating human rights claims under the ATS.

While it is fair to say that these three cases offer a sampling of both the Southern District of New York’s and the Second Circuit’s hesitation to pronounce more fully on *Wiwa*’s mandate to substantially consider the U.S. interest in human rights ATS cases, this hesitation does not demonstrate an unwillingness to apply *Wiwa*, or even an attempt to narrow it. Instead, these cases evince a subject matter adherence to *Kadic* and *Sosa*. Recalling *Kadic*, the Second Circuit held that a private individual could be liable under the ATS for committing human rights violations in two circumstances: (1) if the breach of the law of nations was carried out with state action (contextual wrongs), and (2) if acting alone, the abuses must be of such “universal concern” as to violate *jus cogens* norms (*per se* wrongs such as slavery, genocide, and war crimes). And in *Sosa*, the Supreme Court found that actionable conduct under the ATS included

77 *Id.* at 525.
78 *Id.* at 544, n. 32.
79 *Abdullahi*, at *1-2.
violations that were “specific, universal, and obligatory” and consistent with “the norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized.”

Applying these standards to Aguinda and Flores, the Southern District of New York could not deploy the Wiwa approach to its forum non conveniens analysis because the environmental injury claims did not rise to the subject matter level of actionable conduct under the ATS, as established in Kadic and Sosa. For one, Aguinda and Flores involved suits against private actors, without any claims to state action. And secondly, environmental harm does not fall into the category of jus cogens norms, nor the “specific, universal, and obligatory” classification set out by the Supreme Court. In fact, a substantive human right to the environment does not yet exist in international law. While the Southern District of New York in Flores acknowledged the lack of subject matter jurisdiction, the court in both cases recognized that the environmental injury claims could be dismissed on forum non conveniens grounds because they were insufficient to trigger Wiwa’s consideration of U.S. interest in adjudicating human rights cases. The court’s decisions do not mean that had the cases involved actionable conduct under the ATS, the district court and the Second Circuit would have limited or refused to apply Wiwa. Indeed, the court could not get to a full analysis of Wiwa because it was halted at the subject matter jurisdiction question.

This interpretation of Aguinda and Flores is partially consistent with the district court’s reasoning in Abdullahi. In this case, the court was able to find that it had subject matter

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80 Sosa, 542 U.S. at 725, 748.

jurisdiction because illicit medical experimentation is a violation of the law of nations\textsuperscript{82} and because Pfizer received assistance from the Nigerian government. This comports with Kadic’s state action requirement, and it is possible that the unauthorized administering of experimental antibiotics can even be considered a violation of a \textit{jus cogen} norm or a norm that is “specific, universal and obligatory.” What lacks reason here is why the district court proceeded, nevertheless, to grant a conditional forum non conveniens dismissal, or why it failed to subsequently discuss \textit{Wiwa}.\textsuperscript{83}

Thus, these cases that immediately followed \textit{Wiwa} in the Southern District of New York and the Second Circuit did not necessarily limit \textit{Wiwa}, but neither did they strongly endorse nor apply the case’s recognition of a substantial U.S. interest in balancing the forum non conveniens factors. The court instead had to first grapple with the question of subject matter jurisdiction, a hurdle that the environmental injury claims of \textit{Aguinda} and \textit{Flores} were unable to clear.

\textbf{2. Applying \textit{Wiwa}}

The argument that the district court and the Second Circuit were adhering to \textit{Kadic} and \textit{Sosa}, as opposed to limiting \textit{Wiwa}, is made very apparent in the 2003 case, \textit{Presbyterian Church of Sudan v. Talisman Energy}.\textsuperscript{84} In \textit{Presbyterian Church}, the Southern District of New York applied the \textit{Wiwa} standard to dismiss a forum non conveniens challenge. The case involved Sudanese plaintiffs who brought suit under the ATS against a Canadian energy company,

\textsuperscript{82} International Convention on Civil and Political Rights, art. 7.

\textsuperscript{83} The Second Circuit reversed the district court’s decision in 2009, Abdullahi v. Pfizer, 562 F.3d 163 (2d Cir. 2009).

\textsuperscript{84} 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
Talisman Energy, for allegedly colluding with the Sudanese government to implement a policy of ethnic cleansing in order to engage in oil exploration and extraction. The court found Canada to be an available alternate forum, but when it weighed the public interest factors of the forum non conveniens test, it applied the Wiwa approach and held that “the United States has a substantial interest in affording alleged victims of atrocities a method to vindicate their rights” where jus cogens violations were involved.

In finding subject matter jurisdiction over the prohibition of ethnic cleansing as a jus cogens norm, the court complied with the framework established in Kadic and Sosa as to conduct that is actionable under the ATS. Moreover, Talisman Energy allegedly collaborated with the Sudanese government, which would have met the requisite state action component under Kadic. Moreover, the court itself distinguished the present case from its prior decisions in Aguinda, Flores, and Abdullahi, stating that unlike the “grave nature” of the Sudanese plaintiffs’ claims of ethnic cleansing, the plaintiffs in the previous three cases did not amount to violations of jus cogens violations. The court thus signaled its willingness to apply the Wiwa standard where subject matter jurisdiction was appropriate; absent a subject matter finding, the court is unable to weigh the U.S. interest in its forum non conveniens evaluation.

Unfortunately, Sosa’s murky standards for actionable conduct under the ATS may likely continue the trend found in Aguinda, Flores, and Abdullahi: lack of subject matter jurisdiction that would allow an application of Wiwa. The extreme vagueness of “specific, universal, and obligatory” norms that are consistent with the international character of 18th-century paradigms

85 Id. at 296.
86 Id. at 340.
87 Id.
will make the determination of subject matter jurisdiction very difficult and time-consuming. And given the Supreme Court’s caution that actionable claims under the ATS should be “limited” and “modest,” the type of violations that trigger ATS jurisdiction, and hence *Wiwa*, will likely be very narrow. Courts may be tempted to simply forego a subject matter inquiry and instead dismiss the case on forum non conveniens grounds without having to apply *Wiwa*.

However, federal courts should refrain from choosing this simpler route. In order to properly enforce international law, courts must “develop a body of [ATS] jurisprudence clarifying which international norms supply them with jurisdiction.” Continual avoidance of subject matter jurisdiction stalls the ATS jurisprudence and keeps the courts from enunciating clearer standards for actionable conduct under the *Sosa* rubric.

V. Reforming the Doctrine of Forum Non Conveniens in ATS Human Rights Cases

Given these considerations, the doctrine of forum non conveniens should be reformed in ATS cases involving human rights violations. The key to reform is to make a subject matter jurisdiction finding before the forum non conveniens inquiry. Subject matter jurisdiction is integral for the public interest factors stage because it can trigger an application of *Wiwa*. Subject matter jurisdiction is also pivotal for the alternative forum stage because it impacts considerations of whether the parties, namely the plaintiff-victim, will be “treated fairly” in a particular alternative forum.

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88 Baldwin, *supra* note 73, at 779.
A. Public Interest Factors

In order to promote U.S. interest in shaping international law by adjudicating human rights cases, a reform of forum non conveniens should allow the courts to consider this interest by requiring a subject matter finding before conducting a forum non conveniens analysis. Indeed, with the exception of court congestion, all of the public interest factors outlined in *Gilbert* implicate the need to determine the subject matter jurisdiction of the claims: the burden on a jury to decide matters that do not concern them, the local interest of deciding controversies, court familiarity with the law, and avoidance of conflict-of-law problems. As to the latter two factors, given that human rights suits will almost always involve international law, conflict-of-law problems are minimal and U.S. federal courts are likely well equipped for – if not most familiar with – adjudicating the human rights law in question. This leaves the burden on the jury and the local interest, factors that *Wiwa* has been clear in deciding on in the human rights context. In holding that adjudicating human rights claims are very much the concern of U.S. courts and promote U.S. global interest, the *Wiwa* court tipped the balance of the public interest factors evaluation in favor of the plaintiff in ATS human rights litigation.

What *Aguinda, Flores, Abdullahi*, and *Presbyterian Church* demonstrate is that, at least in the Southern District of New York and the Second Circuit, the court is willing to apply *Wiwa* as long as it has subject matter jurisdiction under the ATS. The emphasis in *Wiwa* on the U.S. interest in litigating human rights claims has made subject matter jurisdiction critical to making a forum non conveniens determination in ATS cases because U.S. interest is triggered only when the conduct in question is of a “grave nature.”

Thus, for human rights plaintiffs bringing suits under the ATS, the larger hurdle in harnessing the potential of *Wiwa* is not necessarily the courts’ unwillingness to apply the
standard to the public interest balancing scheme, but rather the courts’ consideration of forum non conveniens before determining subject matter jurisdiction. Without discerning the subject matter of the suit, the court cannot decide whether the U.S. has a substantial interest in adjudicating the claim. In such an instance, the court would therefore apply a traditional forum non conveniens analysis, which has proven fatal to many ATS claims and has significantly disadvantaged victims of human rights violations.

An example of such an application is the 2006 case of Turedi v. Coca Cola Co.\textsuperscript{89} In Turedi, Turkish plaintiffs brought suit against Coca Cola, its subsidiary, and its Turkish bottler, alleging that managers at the bottling plant hired the Turkish police to beat former employees who were involved in a peaceful labor protest.\textsuperscript{90} Following Second Circuit precedent, the Southern District of New York addressed the motion for forum non conveniens dismissal before establishing subject matter jurisdiction, finding that cases involving complex questions of jurisdiction, as in ATS and TVPA claims, should be dismissed on forum non conveniens grounds because they require lengthy and expensive inquiries into jurisdiction that do not serve the interests of “justice, convenience, . . . and judicial economy.”\textsuperscript{91}

The court then proceeded to conduct its forum non conveniens analysis. It found that the dispute’s relationship to the U.S. was tenuous, and that the plaintiffs’ choice of forum should receive less deference because the plaintiffs were all foreign (and without U.S. residency).\textsuperscript{92} The court chose to focus on the Second Circuit’s explanation in Wiwa that the ATS and TVPA do not

\textsuperscript{89} 460 F. Supp. 2d 507 (S.D.N.Y. 2006), aff’d, 343 Fed. Appx. 623 (2d Cir. 2009).

\textsuperscript{90} Id. at 509-11.

\textsuperscript{91} Id. at 512, 517.

\textsuperscript{92} Id. at 522-23.
diminish forum non conveniens in any significant way, and stated that the controlling question was not simply whether the U.S had an interest in litigating a particular case, but whether that interest outweighed the interest of the alternative forum.\textsuperscript{93} The court held that since the alleged violations took place in Turkey and the case involved Turkish plaintiffs, employers, and police, Turkey’s interest in adjudicating the claim outweighed the U.S. interest.\textsuperscript{94} The district court dismissed the case on forum non conveniens grounds and the decision was upheld by the Second Circuit in 2009.\textsuperscript{95}

The error in the \textit{Turedi} decision is not so much the court’s forum non conveniens dismissal as it is the order in which it chose to conduct the analysis. Even if a prior subject matter determination had been made, it is uncertain whether or not the court would have found police beating of protestors to rise to the level of actionable content under the ATS and subsequently trigger the \textit{Wiwa} standard. However, the problem is that the court should have made the finding of subject matter jurisdiction before addressing the motion for forum non conveniens. Only by discerning the subject matter jurisdiction of the case can the court make a determination of the level of U.S. interest involved, as well as any potential prejudice that the alternative forum may pose against the plaintiff.

The Second Circuit articulated this position in \textit{In re Arbitration between Mongasque de Reassurances S.A.M. (Monde Re) v. Naz Naftogaz of Ukraine}, stating that federal courts are not “barred from passing over the question of jurisdiction and going directly to the forum non

\textsuperscript{93} \textit{Id.} at 522-23, 528 (quoting \textit{Wiwa v. Royal Dutch Petroleum Co.}, 226 F.3d 88, 105-06 (2d Cir. 2000), \textit{cert. denied}, 532 U.S. 941 (2001)).

\textsuperscript{94} \textit{Id.} at 528.

\textsuperscript{95} \textit{Id.} at 529; \textit{Turedi v. Coca-Cola Co.}, 343 Fed. Appx. 623 (2d Cir. 2009).
In arriving at this conclusion, the Second Circuit relied on the D.C. Circuit’s decision in *In re Papandreou*, which held forum non conveniens to be a merits-free analysis that “does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction.” The D.C. Circuit’s language here suggests that a forum non conveniens consideration does not automatically extinguish an inquiry into subject matter jurisdiction, and that the decision to abstain from such an inquiry remains discretionary.

This position, however, is not uniform across the federal circuits. According to the Third Circuit, forum non conveniens is a non-merits decision, but the court still holds that a jurisdictional determination must be made before issuing a dismissal. In *Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co., Ltd.*, the Third Circuit ruled that a court should establish jurisdiction before deciding forum non conveniens because “the very nature and definition of forum non conveniens presumes that the court deciding the issue has valid jurisdiction.” This reasoning echoes Gilbert’s statement that “forum non conveniens can never apply if there is absence of jurisdiction.” Meanwhile, the Fifth Circuit finds a forum non conveniens analysis to necessarily involve a consideration of the merits and hence requires a prior verification of jurisdiction. In *Dominquez-Cota v. Cooper Tire & Rubber Co.*, the court held that “[i]n order to apply [a forum non conveniens] analysis, the court must look at the particular facts of the case, and to this extent, it must reach the merits.”

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96 311 F.3d 488, 498 (2d Cir. 2002).
97 139 F.3d 247, 255 (D.C. Cir. 1998).
98 436 F.3d 349, 361 (3d Cir. 2006).
99 Gilbert, 330 U.S. at 504.
100 396 F.3d 650, 654 (5th Cir. 2005).
In 2007, the Supreme Court settled the question when it reviewed *Malaysia Int'l Shipping* and reversed the Third Circuit’s decision. In a unanimous holding, the Court found that “a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has . . . [subject matter jurisdiction] or personal jurisdiction.”101 The Court distinguished *Malaysia Int’l Shipping* from *Gilbert* by noting that the former case involved a situation where jurisdiction was unclear, whereas in *Gilbert*, the lack of jurisdiction was easily and conclusively determined.102 In cases like *Gilbert*, jurisdictional issues should be disposed of from the outset. But in cases where jurisdictional questions require a more searching inquiry and the forum non conveniens balance tips in favor of the defendant, the court should select the “less burdensome course” and dismiss the suit.103

While the Court’s ruling may be prudent for most suits involving foreign plaintiffs, such a standard should not apply for ATS cases involving human rights violations. The magnitude of *jus cogens* violations dictates that the “less burdensome course” cannot trump the grave nature of human rights abuses. Horrific assaults on human dignity and human life should be treated with the utmost priority, and it is this unique quality of the subject matter in ATS human rights cases that must push judicial analysis toward dismissal of a forum non conveniens motion. This is not to say that forum non conveniens should be eliminated altogether. When it is proper, a traditional forum non conveniens analysis that takes place before determining jurisdiction should be conducted for other ATS cases that do not involve human rights claims, or for cases that

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102 *Id.* at 434-35.

103 *Id.* at 436.
encompass other federal statutes. But where the ATS case alleges human rights violations, subject matter jurisdiction should be decided before forum non conveniens.

In ATS human rights cases, a determination of subject matter jurisdiction is important to the public interest factors analysis insofar as it triggers an application of the Wiwa approach. In other words, if a court proceeds to a forum non conveniens examination without first making a subject matter finding, it is unable to give substantial weight to the U.S.’s interest in adjudicating human rights norms. By ignoring the merits of a human rights claim brought under the ATS, the court passes up an opportunity to enforce – and shape – international law, and risks giving the impression that U.S. courts condone the violations.

Absent an exception to the Supreme Court ruling for ATS human rights cases, federal courts should still apply Wiwa to their forum non conveniens analysis, even if jurisdiction has not been established. Jeffrey E. Baldwin argues that “if forum non conveniens is to result in a non-merits decision, the court will have to assume [the ATS claims] are substantively valid.”

If the courts will not first establish jurisdiction, they are left with little choice but to take the plaintiff’s allegations at face value and give appropriate weight to the U.S. interest in litigating human rights claims when considering the public interest factors. This is obviously the less desirable approach, since the ATS might not have subject matter jurisdiction over the claims, or the allegations may be altogether without merit.

Hence, the best scheme is to require a determination of subject matter jurisdiction before a forum non conveniens analysis in human rights cases brought under the ATS. There is currently no jurisprudence on whether an exception can be carved out of the Supreme Court’s ruling in Malaysia Int’l Shipping, or on whether Wiwa can be applied in a forum non conveniens

104 Baldwin, supra note 73, at 778.
inquiry that comes before a subject matter finding. Needless to say, these are not the only options for promoting the U.S. interest in adjudicating human rights claims as articulated by the 
Wiwa court. Matthew R. Skolnik contends that Wiwa’s U.S. policy interest “should tip the forum non conveniens analysis in favor of [ATS] plaintiffs in all but the most inconvenient cases.” Such a proposal would require establishing metrics of convenience. Kathryn Lee Boyd suggests eliminating forum non conveniens altogether for human rights cases, arguing that the common law doctrine is “inappropriate” in this context and “undermines unique federal interests in human rights litigation.”

For human rights suits brought under the ATS, the subject matter of the case is pivotal for determining whether the U.S. has a significant interest in litigating human rights claims, and thus influence and enforce the standards of international law, while simultaneously demonstrating its condemnation of human rights abuses. The merits of the case also tend to implicate egregious violations that oftentimes involve state action, which bears heavily on the adequacy of that state’s judicial system to hear the plaintiff’s case. In these contexts, subject matter jurisdiction is extremely important and should not be dismissed unexamined in favor of a forum that, while perhaps convenient for the defendants, may not be fair to the plaintiffs.

B. Alternative Forum

While a forum non conveniens inquiry usually begins with the question of an alternative forum, a reform of the doctrine should require that subject matter jurisdiction be established first. This is necessary not only to prevent the courts from immediately dismissing for forum non

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105 Skolnik, supra note 52, at 190.

106 Boyd, supra note 67, at 48.
conveniens, as previously discussed, but it is also needed because it implicates the threshold question of an alternative forum. Given how intrinsically fundamental human rights are to human existence, courts should strongly consider the fairness of process for the victim in the legal forum of the home country.

The traditional forum non conveniens analysis requires that an alternative forum exists when the forum is both available and adequate. Availability is satisfied when the defendant is amenable to service in the other forum, and a forum is adequate where any remedy exists and there is proof that all parties will be treated fairly.\textsuperscript{107} Generally speaking, these requirements for an alternative forum are tipped in favor of the defendant, necessitating her/him to merely be amenable to another forum (and since the defendant brought the dismissal motion, s/he will almost always be compliant), and demanding a relatively low burden to show only that some remedy is available.

Unlike the standard tort claims involving foreign plaintiffs, the stakes of the alternative forum inquiry for human rights plaintiffs under the ATS are significantly higher. Core human rights enjoy the highest status as \textit{jus cogen} norms that can never be derogated from and must receive absolute protection over other rights.\textsuperscript{108} In its forum non conveniens analysis, the court should ensure this protection, namely when evaluating the adequacy of the home country as a viable alternate forum. The country where the alleged violations occurred may be run by a corrupt legal system or the presence of violence in the country can threaten the safety of the plaintiff. If the court deems “available” and “adequate” a country where the plaintiff has been targeted for abuse before, litigating a case in such a forum can potentially compromise the

\begin{footnotesize}
\begin{enumerate}
\item[107] \textit{Piper}, 454 U.S. at 254, n.22, 255.
\item[108] \textit{See} Boyd, \textit{supra} note 67.
\end{enumerate}
\end{footnotesize}
physical and psychological security of the plaintiff. Additionally, the forum can so prejudice the plaintiff as to offer a minimal remedy relative to the scale of suffering the plaintiff had to endure. This would effectively result in a failure to guarantee absolute protection for the highest level of rights.

The determination of subject matter jurisdiction can impact the alternative forum analysis by preventing the parties involved, especially the plaintiff, from being “treated unfairly.” The standards established in *Kadic* and *Sosa* are instructive here. Recall that *Kadic* recognized contextual wrongs and *per se* wrongs committed by private actors as actionable under the ATS, while *Sosa* found violations of “specific, universal, and obligatory” norms to be breaches of the law of nations that trigger ATS liability. In ascertaining subject matter jurisdiction, if the claims do not rise to the level of actionable content under the ATS (as with Alvarez-Machain in *Sosa*), the court can then proceed to reject the case for lack of subject matter jurisdiction (as in *Flores*) or conduct a standard forum non conveniens dismissal if the balance of factors weighs in that direction (as in *Aguinda*).

However, if the court finds that the alleged abuse *is* actionable under the ATS, the violations must necessarily fall into one of the categories of wrongs established in *Kadic* and *Sosa*, which would subsequently render the home country an inadequate alternative forum. If the violation was a contextual wrong committed by a state actor or by a private actor under color of law (with state action), then it is likely that the governing structure of the home country is corrupt or that corrupt elements remain in positions of authority so as to prejudice the plaintiff if s/he were to seek recourse in its legal system. This would make the home country an inadequate alternative forum because plaintiffs would not be treated fairly as prescribed by *Piper*.

109 *Piper*, 454 U.S. at 255.
If the violation was a *per se* wrong, this means a *jus cogens* norm was breached and the abuse was of such a “grave nature” as to be “specific, universal, and obligatory.” For example, a private or state actor can be liable under the ATS if s/he committed torture in the course of violating a *jus cogens* norm such as genocide or war crimes. But even under this category of wrongs, the home country should be deemed an inadequate forum because a violation of *jus cogens* indicates that the governing structure lacks sufficient control to prevent or preclude such grave abuses within its own borders. Therefore, whether the wrongs are contextual or *per se*, they implicate state complicity or failure of the state to protect victims, respectively. Either way, the home country is an inadequate alternative forum for victims of human rights abuses, and the motion for forum non conveniens dismissal must be denied.

If the alternative forum is not the home country, but rather another forum that had personal jurisdiction over the parties, then the court should apply *Wiwa* as it proceeds to balance the public interest factors of the forum non conveniens analysis. This is what the district court did in *Presbyterian Church*: because the defendant was Talisman Energy, a Canadian corporation, the court found that Canada could serve as an available and adequate alternative forum. In rejecting the motion for forum non conveniens, the court placed great significance on the fact that the plaintiffs alleged violations of *jus cogens* norms and underscored the fact that the U.S. has a substantial interest in adjudicating such abuses.

C. Private Factors

Little has been said of the private factors evaluation of a forum non conveniens analysis, largely because they remain peripherally relevant to the discussion about human rights ATS litigation, but should nonetheless be addressed briefly. A majority of the private factors outlined
in Gilbert involve the difficulty of obtaining evidence: access to evidence, availability of witnesses, and the possibility of the court to view the premises. In the international context, this can prove all the more challenging. However, gaining access to this information has become much easier since Gilbert in 1947, or even Piper in 1981. The U.S. became party to the Hague Evidence Convention in 1972 and amendments have been made to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. \(^\text{110}\) Both the convention and the amendments have made access to evidence in foreign countries much easier, streamlining the process of information requests and obligating compliance. \(^\text{111}\) Moreover, video technology has made witness deposition and testimony more accessible, and has improved the court’s ability to remotely view the premises. \(^\text{112}\)

**VI. Conclusion**

The doctrine of forum non conveniens has been important in promoting judicial expediency, but where claims of human rights violations are involved, special consideration must be given. The U.S. has a strong interest in shaping international law by adjudicating human rights cases and plaintiff-victims should not be forced to seek recourse in the legal system of a country that could not or would not protect them to begin with. Therefore, courts should determine the subject matter jurisdiction of ATS cases involving human rights claims before conducting a forum non conveniens analysis to ensure that the interests of both victims and the U.S. are promoted.


\(^\text{111}\) Id.

\(^\text{112}\) Id. at 325.