

# Note from the Field

## ***Wiwa v. Royal Dutch Petroleum Co.:* A New Standard for the Enforcement of International Law in U.S. Courts?**

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*U.S. courts have traditionally been reluctant to exercise jurisdiction over human rights violations committed abroad against foreign persons, often invoking forum non conveniens to dismiss cases. The Second Circuit's ruling in *Wiwa v. Royal Dutch Petroleum Company* altered the balance of forum non conveniens, making it easier to bring claims based on a foreign human rights violation despite the availability of an alternative forum. The court's reasoning emphasized the interest of the United States in vindicating human rights abroad and would hold wealthy parties to a greater standard of inconvenience than poorer parties. The decision may mark a turning point away from judicial indifference and hostility to international human rights law.*

The traditional reluctance of U.S. courts to exercise jurisdiction over human rights violations committed against foreign persons abroad has been partially reversed. The U.S. Court of Appeals for the Second Circuit issued its opinion in the case *Wiwa v. Royal Dutch Petroleum Company* on September 14, 2000, affirming jurisdiction of U.S. courts over a case involving a foreign corporation alleged to have committed torture in Nigeria.<sup>1</sup> The decision reversed the district court's previous dismissal of

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1. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).

the case on grounds of *forum non conveniens*.<sup>2</sup> On March 26, 2001, the U.S. Supreme Court denied certiorari, allowing the case to stand as law within the circuit. The case is consequential not only in its positive pronouncement of the law, but also insofar as it may mark a sea change in the judicial attitude toward international human rights law in the influential Second Circuit.

The *Wiwa* case, like an increasing number of human rights cases, was brought before the court under the 1789 Alien Tort Claims Act (ATCA),<sup>3</sup> as supplemented by the 1991 Torture Victim Protection Act (TVPA).<sup>4</sup> The laws allow foreign nationals to bring suit in U.S. federal court for a tort committed in violation of international law or U.S. treaties.<sup>5</sup>

The ACTA and TVPA laws do not guarantee that U.S. courts will hear a case. *Forum non conveniens* must also be considered. The analysis of *forum non conveniens* commonly applied in federal courts calls for the court to weigh several factors in its decision about the appropriateness of the venue chosen by the plaintiff. If the U.S. court is inconvenient for both the parties involved and the court itself, then the balance of equities may favor deferring to an alternative forum. Factors considered in the decision of *forum non conveniens* include both the convenience to the parties to the litigation ("private interests") and the convenience of the courts and the governments of affected states to hear the case ("public interests").<sup>6</sup> The specific private interests weighed in the court's decision are the relative ease of access to germane evidence, the ability to compel the testimony of witnesses, the costs of gathering evidence and testimony, and "all other practical problems that make trial of a case easy, expeditious and

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2. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998). The doctrine of *forum non conveniens* allows a court to decline to exercise jurisdiction if it determines that it is an unnecessarily inconvenient forum for the trial, as long as a more appropriate forum is available to the plaintiff. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (3d Cir. 1981); see also RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 84 (1967).

3. 28 U.S.C. § 1350.

4. Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified as amended at 28 U.S.C. § 1350 App. (2001)).

5. Section 2 of the Torture Victim Protection Act provides:

(a) Liability. - An individual who, under actual or apparent authority, or 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.

(b) Exhaustion of Remedies. - A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations. - No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

28 U.S.C. § 1350(2) (2001).

6. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

inexpensive.”<sup>7</sup> The consideration of public interests include the relative court congestion, the fairness of burdening citizens in the forum court with jury duty unrelated to that locale, and the consideration of other conflicts of law. The “local interest in having localized controversies decided at home” and the desire for courts to avoid applying unfamiliar foreign laws are also influential factors.<sup>8</sup>

As federal courts have heard more cases brought by foreign nationals for violations of international law committed abroad, pressure has mounted to define clear, manageable, and equitable rules for determining the propriety of the plaintiff’s chosen venue. Notwithstanding the ATCA and the TVPA, this pressure tends to push U.S. courts toward declining jurisdiction for foreign violations of international law. Most private factors weigh against U.S. jurisdiction over such violations. Evidence and witnesses tend to be located *in loco delicti*. U.S. courts have no power to compel testimony from foreign witnesses, and often the *locus delicti* is a distant country requiring burdensome and expensive travel for witnesses. In addition, witnesses and testimony may require costly and time-consuming translation. Moreover, the public interest factors traditionally considered discourage acceptance of jurisdiction in such cases. The caseloads of federal courts are notoriously heavy, the United States has not generally been considered to have a significant interest in deciding cases involving foreign conduct by foreign individuals, and U.S. jurors have not been considered to have a great personal stake in such conduct in any case.<sup>9</sup> While, as a general rule, the plaintiff’s choice of forum is given substantial deference, that deference is reduced for residents of foreign countries.<sup>10</sup> The discussion below will offer two lines of cases involving multinational oil companies (Texaco and Unocal) as examples of how *forum non conveniens* has sometimes offered powerful protection of alleged human rights abusers who sought to disrupt a plaintiff’s use of the ATCA and TVPA.

*Wiwa* shifted the traditional balance imposed by most federal courts in ATCA and TVPA cases. The crux of the Second Circuit’s holding was that, when a federal court is confronted with litigation involving foreign parties over human rights violations occurring in a foreign country, the court must carefully weigh “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” among the factors involved in a determination of *forum non*

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7. *Id.*

8. *Id.* at 509.

9. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987) (affirming dismissal of a case brought on behalf of Indian victims of an environmental disaster against the U.S. parent corporation of the Indian corporation involved in the disaster on grounds similar to those discussed here). *But see* Louise Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT’L L.J. 307 (1985) (arguing that the factors substantially similar to those mentioned in *Gulf Oil* weighed against dismissal of *In re Union Carbide* on grounds of *forum non conveniens*).

10. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

*conveniens*.<sup>11</sup> In so holding, the court created two innovations in that circuit, one theoretical and the other practical. First, the court raised the status of international human rights law in federal jurisprudence by emphasizing the interests of the United States in vindicating human rights in foreign countries. Second, the court altered the balance of *forum non conveniens* to make it easier for a claimant to assert a claim based on a foreign human rights violation against a foreign defendant in spite of the availability of an alternative forum. The authority of the *Wiwa* decision outside of the Second Circuit remains open to consideration, as the Supreme Court declined *certiorari* in the case. Nonetheless, *Wiwa* stands as the Second Circuit's authoritative pronouncement on the place of international human rights law in *forum non conveniens* analysis in its own jurisdiction.<sup>12</sup> Whether it will be rejected or accepted as a persuasive precedent by other circuits will be consequential to the future of human rights law in the United States.

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*Wiwa v. Royal Dutch Petroleum Co.* was brought by three Nigerian émigrés and an anonymous plaintiff who alleged that the defendants, Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Co, PLC ("Shell Transport"), had participated in grave human rights abuses against themselves or their relatives in Nigeria. Royal Dutch, a Netherlands corporation, and Shell Transport, a United Kingdom company, together control the Royal Dutch/Shell Group, a multinational corporate conglomerate with a wholly owned subsidiary in Nigeria ("Shell Nigeria"). Shell Nigeria, in turn, engages in oil exploration and extraction in Nigeria, particularly in the Ogoni region.

The political situation in the Ogoni region, although not discussed in great detail in the case itself, sets the stage for the importance of the case to the development of international human rights law. Even before Nigerian independence, Shell had been extracting oil from the Ogoni region through a concession, first from the British and then from the Nigerian government. Shell Nigeria owns some sixty percent of the commercially viable oil bearing land in Nigeria. Throughout the mineral extraction activity, the native inhabitants of the Ogoni region protested, claiming that the resulting air and water pollution poisoned and dislocated the local population, killed wildlife and plant life, and caused acid rain.<sup>13</sup> Moreover, the Nigerian government did not share the profits with the people on whose land Shell Nigeria had been granted drilling rights. Although most

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11. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2000).

12. As of the publication of this Note from the Field, *Wiwa* has been cited in 29 district court decisions within the Second Circuit.

13. Shell has admitted the existence of extensive environmental damage in the area, including acid rain. *Shell Sued by Family of Nigerian Eco-Activist Ken Saro-Wiwa*, ENV. N. SERV., May 26, 1999, at <http://ens.lycos.com/ens/may99/1999L-05-26-04.html> (last visited Oct. 14, 2001) [hereinafter *Shell Sued by Family*].

of the protests were peaceful, the Nigerian government repeatedly sent police and military troops to suppress the protests by wounding and killing local villagers and arresting the leaders.<sup>14</sup>

The most prominent of these leaders were the playwright Ken Saro-Wiwa and John Kpuinen, the President and the youth wing leader, respectively, of the Movement for the Survival of the Ogoni People ("MSOP"). The Nigerian government began by seizing Saro-Wiwa's passport when he attempted to attend a U.N. conference on human rights. Saro-Wiwa and Kpuinen were repeatedly arrested by Nigerian police, detained, intimidated, and tortured because of their roles in the MSOP. These tactics failed to quiet the protest activity, however, and the Nigerian government took more violent measures. In 1995, Saro-Wiwa, Kpuinen, and several other Ogoni leaders were arrested, tried before a "special military tribunal" on fabricated charges of murder of four Ogoni leaders, and hanged. The trial suffered from numerous procedural irregularities, including the denial of legal representation and medical attention to the defendants and, most notably, the state's complete failure to present any evidence against Wiwa or Kpuinen. These murders resulted in the suspension of Nigeria from the British Commonwealth.<sup>15</sup> The *Wiwa* plaintiffs themselves, including Saro-Wiwa's brother and mother, and other Ogoni villagers, were also beaten, shot, and illegally detained.

The gravamen of the *Wiwa* complaint was that Shell Nigeria, under the direction of Royal Dutch and Shell Transport, "instigated, orchestrated, planned, and facilitated" *inter alia* summary executions; crimes against humanity; torture; cruel, inhuman, and degrading treatment; arbitrary arrest and detention; and violations of the right to peaceful assembly and association by the Nigerian government in order to silence the protests against Shell Nigeria's oil exploration and extraction activities in the Ogoni region. While Shell had denied throughout the early 1990s that it was at all complicit in the repression in the Ogoni region and had specifically denied that it had paid money to the Nigerian police or had any links with the military, it suddenly admitted in 1996 that it had purchased weapons for the Nigerian police who guard Shell's facilities.<sup>16</sup> The complaint alleged that Royal Dutch and Shell Transport provided money, weapons, ammunition, vehicles, and logistical support to the Nigerian military for their attacks on Ogoni villages and bribed witnesses to render false testimony against Saro-Wiwa and Kpuinen at the murder trial. The plaintiffs brought claims under the ATCA, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), customary international law and human rights treaties, Nigerian law, and various New York common law torts. However, before the court could reach the merits of the complaint, it

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14. For a detailed description of the course of Shell oil exploitation activities in Nigeria, see Steve Kretzmann, *Nigeria's "Drilling Fields"*, MULTINAT'L MONITOR, Jan./Feb. 1995, at 8.

15. *Shell Sued by Family*, *supra* note 13.

16. See Cameron Duodu, *Shell Admits Importing Guns for Nigerian Police*, OBSERVER (Lagos), Jan. 28, 1996, at <http://www.greenpeace.org/~comms/ken/observer.html> (last visited Oct. 14, 2001).

was necessary to resolve the defendants' objections to jurisdiction in the federal district court in New York City.

The defendants maintained only limited contacts with the forum. They listed their shares on the New York Stock Exchange, maintained an investor relations office in New York City, had World Wide Web sites accessible in New York, had long retained New York counsel, and owned subsidiaries that did extensive business in New York and the United States in general. As for the four plaintiffs, two lived in the United States, but none in New York, at the time of the filing.

The federal district court for the Southern District of New York accepted personal jurisdiction over the defendants based on their indirect maintenance of an investor relations office in New York, but the court found that England would be a suitable alternative forum, and that the balancing of public and private interests made England a superior choice. The district court's opinion then offered the defendants a deal. The court would dismiss the case on grounds of *forum non conveniens* if the defendants would submit to the jurisdiction of English courts and comply with any judgment rendered by such courts.<sup>17</sup>

On appeal, the U.S. Court of Appeals for the Second Circuit agreed that the district court had properly evaluated the issue of personal jurisdiction, but took a different approach to the issue of *forum non conveniens*. Normally, U.S. courts consider determination of this issue to be properly within the discretion of the trial court. Although the legal standard applied to the determination is reviewed *de novo* by an appellate court, the considerations of the various factors, if based upon sound legal principles, immunize the district court against reversal except where there has been a clear abuse of discretion.<sup>18</sup> In the appeal at bar, the Second Circuit decided that the district court did not properly weigh the legal factors in making its determination of *forum non conveniens* for unusual, but compelling, reasons.

The doctrine of *forum non conveniens* permits a court to dismiss a claim even if the court determines that its jurisdiction is proper, but only when an adequate alternative forum exists and the weight of the private and public interests strongly favors the use of the alternative forum. Although the parties in *Wiwa* vigorously disputed whether England offered an adequate alternative forum for the plaintiff's claims, the Second Circuit bypassed this question, finding that the United States had at least as strong an interest as England in deciding the dispute.

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17. It is probable that the district court implicitly relied upon the precedential holding of *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), discussed in greater detail *infra*, in which the Court of Appeals for the Second Circuit reversed a dismissal for *forum non conveniens* because the district court had granted the dismissal before procuring assurances that the defendants would submit to the alternative jurisdiction.

18. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (3d Cir. 1981). *But see* Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 748-54 (1982) (arguing that the Supreme Court in *Piper* went too far in deferring to the district court because analysis of *forum non conveniens* is a matter of law); *see also* *Overseas Nat'l Airways v. Cargolux Airlines Int'l*, 712 F.2d 11, 15 (2d Cir. 1983) (Oakes, C.J., dissenting) (agreeing with Judge Friendly's analysis of *Piper Aircraft*).

Although the appellate court listed three factors to which, in its view, the district court had failed to accord sufficient weight, the crux of this determination was the second factor: the district court's failure to consider adequately "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." The court inferred this interest from the ATCA and TVPA. "The TVPA . . . recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law."<sup>19</sup> The court reached this conclusion after determining that the TVPA was intended by Congress as a legislative ratification of *Filartiga v. Pena-Irala*—a case that interpreted the ATCA to provide federal jurisdiction over "claims for international human rights abuses occurring abroad."<sup>20</sup> The court, therefore, interpreted the TVPA to institute a "policy favoring receptivity" by federal courts to suits grounded on claims of foreign human rights abuses, particularly in light of the statutory shift in emphasis from the ATCA's concern with jurisdiction to the TVPA's concern with substantive rights. In a remarkable statement reminiscent of an earlier (but far less significant) holding with respect to international environmental law,<sup>21</sup> the court held that the TVPA "convey[s] the message that torture committed under color of law of a foreign nation in violation of international law is our business, as such conduct not only violates the standards of international law but also as a consequence violates our domestic law."<sup>22</sup>

Yet, the court did not rest its opinion entirely upon statutory language. Instead, it described the difficulty for torture victims of finding an adequate forum—a matter of public policy. Obviously, local remedies would be impossible in many cases because those who suffer from human rights violations are often victimized by their own governments. Dismissal for *forum non conveniens* may also deny the plaintiffs an effective forum in a third country because of the cost and inconvenience of traveling abroad to conduct a litigation, because foreign courts are often inhospitable to human

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

20. *Id.* at 105 n.10, citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filartiga* was one of the first modern cases applying the ATCA. The case was based on a claim by a Paraguayan citizen against a Paraguayan police officer who had allegedly tortured and murdered the plaintiff's son. The district court had dismissed the case for lack of subject matter jurisdiction. The Second Circuit reversed, making several highly consequential findings of law. One finding relevant here was that the Alien Tort Claims Act authorized a foreign resident to bring a claim based on a violation of international law in U.S. federal courts because international law "forms an integral part of the common law." *Filartiga*, 630 F.2d at 886. The court further held that the torture of a citizen of a state by an official of that same state violated international human rights law because modern human rights law protects citizens even against their own governments. *Id.* at 884. Although *forum non conveniens* was raised as a defense by the defendant, neither the district court nor the Second Circuit considered the defense, as the issues were decided on the prior question of subject matter jurisdiction. See *id.* at 880 n.6.

21. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).

22. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d at 106.

rights claims and, perhaps most notably, because of the political sensitivity of such lawsuits against foreign governments.<sup>23</sup> Thus, the court concluded that the TVPA establishes a federal policy in favor of federal courts exercising jurisdiction over the violation of human rights by foreign governments.

In the case before it, the court acknowledged that the trial court should also weigh the inconvenience to the plaintiffs of litigating in a distant forum (Shell Transport being an English corporation, and England being closer to Holland and Nigeria than New York) and the presumably greater costs of flying a Nigerian to New York than to London, but the court found that the "vast resources" of the defendants and the meager resources of the plaintiffs counterbalanced this consideration.<sup>24</sup> After considering and rejecting the defendants' remaining arguments, the Second Circuit reversed the district court's dismissal of the case and remanded for further proceedings.

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It has been observed that "[p]ursuit of individualized monetary relief for a large class of persons in a foreign country growing out of events implemented abroad presents substantial difficulties, even though those events were partially initiated in the United States."<sup>25</sup> While the court in that case intended to refer to procedural difficulties, the comment also applies to a roadblock to U.S. adjudication of foreign tort claims with a strong presence in the judicial imagination. As one judge on the Ninth Circuit confessed to me, even federal judges at the highest levels rarely confront cases involving international law (or, perhaps more accurately, rarely perceive the relevance of international law to the cases before them), and, therefore, they believe that they have little need of expertise in international law. Nonetheless, over the past two decades, the traditional judicial reluctance to confront issues of international law has increasingly yielded to statutory insistences that a breach of the "law of nations" confers a right upon plaintiffs—even foreign plaintiffs—to seek relief in U.S. courts.<sup>26</sup>

The new willingness to sanction this search for relief may reflect an augmented understanding among judges of the importance of international human rights law in U.S. foreign policy and the often considerable role of U.S. corporations in supporting foreign governments or militaries that deny basic human rights to the subject population. Many U.S. companies or international corporations with a significant U.S. presence will not hesitate to do business with foreign dictatorships, and

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23. *Id.*

24. *Id.* at 107.

25. *Aguinda*, 1994 WL 142006 at \*2.

26. *See, e.g., Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001) (holding that ATCA confers jurisdiction in U.S. courts over violation of international law committed against a foreign resident, and that kidnapping is contrary to international law).

this business brings in revenue that the dictatorships may use to purchase weapons and recruit troops to augment oppression of the subject population. While these corporations may generally regret these consequences (if for public relations reasons alone), their own activities can not only undermine international human rights law, but tarnish the image of the United States as a vigorous sponsor of human rights.

The Second Circuit's emphasis in *Wiwa* on the U.S. interest in vindicating human rights marks a milestone of the curial treatment of international human rights law claims under the ATCA. Before *Wiwa*, courts had commonly asserted that international law was part of the law of the United States, but, in general, the judicial understanding of international law was crude and often unsympathetic. While it is well established in federal jurisprudence that international law forms part of the federal common law,<sup>27</sup> no court had unequivocally pronounced a U.S. interest in the worldwide enforcement of international human rights norms. The defense of *forum non conveniens*, therefore, represented a powerful stumbling block to foreign litigants seeking vindication of human rights norms against their own oppressive governments. In these cases, evidence and witnesses are commonly located primarily or exclusively in the country where the alleged human rights violations have taken place. While the plaintiffs may stand little chance of obtaining justice in the courts of that country, litigation in the United States entails substantial expense for the defendants. For these reasons, courts have generally been at least equivocal about allowing cases to survive a motion for dismissal for *forum non conveniens*, even in cases brought under the Alien Tort Claims Act.

One prominent example is the Ecuador/Texaco series of cases, which involved suits by foreign nationals against U.S. corporations for cooperating with an oppressive foreign government in mineral extraction activities, resulting in widespread and severe environmental damage. The cases have not yet been resolved, partly due to the volatile political situation in Ecuador.

The series began with *Sequihua v. Texaco, Inc.*, in which the plaintiffs (citizens of Ecuador) had alleged massive environmental damage in their country resulting from Texaco's oil drilling operations, causing them illness and death and forcing them to relocate without compensation.<sup>28</sup> Texaco sought dismissal for *forum non conveniens* using arguments similar to those mentioned above (e.g., evidence located in a foreign country, inconvenience and expense, etc.). The court quickly determined that Ecuador was an adequate and available alternative forum based on (presumably biased) affidavits by two former Ecuadorian Supreme Court justices. It then accepted Texaco's argument that the balance of private interest factors favored Ecuador based on the fact that most of the evidence was in Ecuador, and none could be found in the Southern District of Texas.

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27. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980); see generally JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (1996).

28. 847 F. Supp. 61 (S.D. Tex. 1994).

Examining the public interest factors, the court noted that the Ecuadorian government opposed the lawsuit, the state of Ecuador alone had an interest in the outcome of the suit, and that court congestion in the United States favored dismissal. An order of dismissal was accordingly entered. The court never considered whether the United States had any interest in ensuring that its own corporations do not commit human rights violations abroad or pollute the global ecosystem. Much less did the court overtly ponder whether the United States might have a general interest in the observance of international environmental and human rights law abroad.

The plaintiffs quickly refiled in the Southern District of New York where the defendant had its headquarters, and this time the judge allowed limited discovery on the issue of *forum non conveniens*.<sup>29</sup> That court took a remarkably international perspective on the issue before it, recognizing the possibility that the plaintiffs could establish "international recognition of the worldwide impact from effects on tropical rain forests as a result of any conduct alleged in their papers which may have been initiated in the United States." Citing a number of environmental statutes, the court continued:

Environmental damage is recognized in the domestic law of the United States as subject to legal restrictions . . . . The totality of these enactments bespeak an overall commitment to responsible stewardship toward the environment. See *Suss v. ASPCA*, 823 F. Supp. 181, 184-85 (S.D.N.Y. 1993).

Even more significant, United States laws governing hazardous wastes . . . may well prohibit the conduct alleged in the complaint if carried out in the United States. While this would not necessarily inhibit actions in the United States leading to conduct abroad permitted by foreign law, it is relevant as confirming United States adherence to international commitments to control such wastes. This tends to support the appropriateness of permitting suit under 28 U.S.C. 1350 if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law.<sup>30</sup>

Unfortunately, the original judge assigned to the case died before discovery was completed and the new judge was less sympathetic.<sup>31</sup> The new judge dismissed the action "on the same grounds of international comity and *forum non conveniens* so well stated in *Sequihua* [the original Texas case]. . . ." <sup>32</sup> The court accorded little weight to the defendant's activities in the forum state, and noted that the plaintiffs had failed to join indispensable parties (including the government of Ecuador), which in any

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29. *Aguinda*, 1994 WL 142006.

30. *Id.* at \*7.

31. See *Aguinda* [sic] v. *Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

32. *Sequihua*, 847 F. Supp. 61.

case would have been exempt from U.S. jurisdiction under the Foreign Sovereign Immunities Act.<sup>33</sup> As in *Sequihua* and unlike the original judge in the case before it, the new judge did not analyze whether the United States had any interest in the foreign activities of its resident corporations. Nor did the court consider whether the Ecuadorian government or military—each funded partly from oil revenues generated by Texaco's activities—might retaliate against the plaintiffs should they bring an action in Ecuadorian court.

By the time the case was argued before the U.S. Court of Appeals for the Second Circuit,<sup>34</sup> Ecuador had changed governments; the new government had reversed its predecessor's course and supported the plaintiffs' petition. However, this reversal had no evident effect on the outcome of the appeal. The Second Circuit reversed the district court's dismissal primarily on procedural grounds—the district court improperly relied upon the reasoning of another case (*Sequihua*) rather than undertaking its own legal analysis, which, in the case before it, should have prevented the court from dismissing for *forum non conveniens* without a stipulation from the defendants that they would voluntarily submit to jurisdiction in Ecuador. After all, the plaintiffs had contended that Texaco, Inc. would not be subject to Ecuadorian jurisdiction without such a stipulation.

More importantly, the plaintiffs had argued that, unlike in *Sequihua*, the case at bar involved an ATCA claim, and that dismissal would frustrate Congress' "intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations."<sup>35</sup> The plaintiffs clearly intended to draw upon the court's earlier holding that individuals could violate international law, expressed most strongly three years earlier in the seminal ATCA case *Kadic v. Karadzic*,<sup>36</sup> in which an objection of *forum non conveniens* had also been rejected.<sup>37</sup> Here, however, the court saw no need to consider the import of congressional intent in drafting the ATCA, but instead instructed the district court to consider it upon reconsideration of the *forum non conveniens* issue. On remand to the district court in January 2000, the court noted that a military coup had taken place ten days earlier, and that the possibility for justice for the plaintiffs in the allegedly venal and politicized Ecuadorian court system had come into doubt.<sup>38</sup> The court reopened the record to take submissions on that particular issue, but the

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33. 28 U.S.C. §§ 1603-04 (1996).

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

35. *Jota*, 157 F.3d at 159.

36. 70 F.3d 232, 241-44 (2d Cir. 1995).

37. In *Kadic*, victims of atrocities in Bosnia brought an ATCA and TVPA action against the leader of the Bosnian-Serb forces for various human rights and humanitarian law violations. The Second Circuit was called upon to address *inter alia* "whether some violations of the law of nations may be remedied when committed by those not acting under the authority of the state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action . . ." *Id.* at 236. The court answered both questions resoundingly in the affirmative.

38. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (TSR), 2000 WL 122143 (S.D.N.Y. Jan. 31, 2000).

district court ultimately dismissed the case on the ground of *forum non conveniens* in May 2001, finding that Ecuador was an adequate alternate forum.<sup>39</sup>

This is not to say that the objection of *forum non conveniens* has been the only hurdle to a successful suit for violations of international human rights or environmental laws abroad. For example, in the Unocal/Burma cases, the defendants managed to dismiss a number of claims by showing lack of control over the government committing the human rights violations.<sup>40</sup>

As with the Texaco cases, the Unocal cases turned on claims under the ATCA. Unlike the Texaco cases, the Burmese plaintiffs brought claims against private defendants under the Torture Victims Protection Act for violations of public international law. Specifically, the plaintiffs alleged violations of the human rights to be free from torture, rape, and summary execution. The district court agreed that at least international legal norms holding the stature of *jus cogens* could support a claim against individuals or corporations under the ATCA. The court also acknowledged that "official torture" violated *jus cogens* norms.<sup>41</sup> Because the plaintiffs had alleged that the ruling military junta was an agent of the defendants, the court accepted that the allegations included such official torture. More importantly, the court recognized that "private actors may be liable for violations of international law even absent state actions," citing for support the Ferdinand Marcos estate litigation.<sup>42</sup> The court, however, limited recognition of this norm to forced labor and slave trading, both of which the plaintiffs had alleged that Unocal and Total were guilty.<sup>43</sup> The defense of *forum non conveniens* was not raised, probably because of the lack of a suitable alternative forum. Nobody could seriously entertain the notion that Burmese courts were unbiased. But most of the plaintiffs' claims were ultimately dismissed on one ground or another, most prominently because the plaintiffs could not show that the defendants controlled the State Law and Order Restoration Council ("SLORC") or conspired with the SLORC to repress them.<sup>44</sup>

Notwithstanding the difficulty of succeeding in this type of litigation against U.S. corporations, litigants have taken to the courts increasingly

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39. *Aguinda v. Texaco, Inc.*, 142 F.Supp. 2d 534 (S.D.N.Y. 2001).

40. *See, e.g., Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (*Doe I*).

41. *Id.* at 890.

42. *In re Estate of Ferdinand E. Marcos Hum. Rts. Litig.*, 978 F.2d 493, 501 (9<sup>th</sup> Cir. 1992) (*Marcos I*). This case was an ATCA action against Ferdinand Marcos, former dictator of the Philippines, and his daughter, a political appointee in the Philippines at the same time, for the torture and murder of the plaintiff's son. The defendants had allegedly killed the plaintiff's son for political reasons. The Ninth Circuit affirmed the district court's determination that torture and murder, being violations of *jus cogens*, could not have been acts in the defendant's capacity as a government official, but that the absent of state action did not prevent those acts from violating international law. *See id.* at 498-99.

43. *Doe*, 963 F. Supp. at 891-92.

44. *See id.*; *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073 (C.D. Cal. 1999); *Doe v. Unocal Corp.*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998); *National Coalition Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).

often to seek redress for perceived human rights violations abroad.<sup>45</sup> While U.S. courts have not always viewed lawsuits by foreign residents for torts committed abroad with favor,<sup>46</sup> this has not diminished the attraction of federal courts in the United States. U.S. courts often appear relatively unbiased and honor a tradition of respect for basic human rights. More pragmatically, compared to alternative fora, U.S. courts offer very broad discovery rights and U.S. awards are perceived as larger on average than in any other country.

In response, courts have increasingly yielded to a more nuanced understanding of Congress' conception of the role of U.S. courts in the development of international law and the advancement of U.S. national interests under international law. What may have been an intuitive judicial acceptance of the neorealist model of international relations theory has gone the way of the Kissinger, and appears on its way to being replaced by a subtler model that acknowledges the long term interests of the United States in worldwide democratization, environmental integrity, and respect for human rights. Indeed, the Second Circuit's passing mention of the political hazards of human rights litigation leads to the conclusion that the TVPA, as interpreted by the Second Circuit, manifests Congress' disregard of the geopolitical consequences of providing a U.S. forum for such suits, even against governments that may be on good terms—indeed, allied—with the United States.

The most evident upshot of *Wiwa* is that, at least in the Second Circuit, the U.S. interest in the vindication of international human rights law will henceforth play some role in the analysis of a defense to the ATCA based on *forum non conveniens*. Multinational corporations subject to *in personam* jurisdiction in the United States can no longer simply assume that cases based upon their violations of international law committed abroad, insofar as U.S. courts have recognized any particular rule of international law, will be dismissed for their convenience, even when the inconvenience might be considerable. Corporations with significant U.S. assets put them more at risk than ever before when they collaborate with human rights abusers in foreign countries. This, in turn, may help discourage multinational corporations from seeking to exploit foreign resources or engage in foreign direct investment without regard for the cost to the environment or the

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45. See, e.g., *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand Marcos Human Rts. Litig.* Litigation, 25 F.3d 1467 (9th Cir. 1994); *Marcos I*, 978 F.2d at 501; *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Doe I v. Unocal Corp.*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000); *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

46. Several courts have refused to assume jurisdiction over ATCA claims, implicitly or explicitly rejecting the reasoning of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). See, e.g., *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774 (D.C. Cir. 1984); *Sequiha v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). Even the Second Circuit itself retreated somewhat from the pro-jurisdictional proclivities of *Filartiga* in the years following that decision. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987).

local population.

A less obvious implication of the *Wiwa* decision is the possibility that it may mark a turning point away from the relative U.S. judicial indifference, and occasional hostility, to international law. That an influential circuit has acknowledged the importance of international human rights law to the U.S. legal system creates the possibility for courts not only to entertain foreign human rights claims here, but to integrate an understanding of international human rights law into matters that the judicial mind has hitherto conceived of as "domestic," such as the definition of "cruel and unusual punishment," the permissibility of capital punishment, the force of patents on naturally occurring human genes, abortion rights, race and gender discrimination, the procedure for police arrests, the extent and limits of the free speech and press rights, personal data privacy, and a host of other legal issues with human rights implications. International human rights law is not just a body of substantive rules—it is also part of a constitutive system. And unfortunately, it is a system that appears alien to many American judges. To many judges, international human rights law still seems to be an idealistic enigma. The *Wiwa* decision holds the promise of moving at least some courts closer to appreciation of a body of law that will increasingly influence, and be influenced by, a large portion of the federal pandect.<sup>47</sup> However, whether the Second Circuit's reasoning will, in fact, persuade its fellow circuit courts or become an idiosyncrasy of that circuit remains unclear for now.

Finally, it is significant in an international human rights law context that the Second Circuit's analysis of *forum non conveniens* did not weigh the issue of convenience to the parties equally, but instead took a kind of "decreasing marginal utility of convenience" approach. Under this analysis, more wealthy parties will presumably be held to a higher standard of inconvenience than poorer parties, because they can better afford the inconvenience. In the *Wiwa* decision, the Second Circuit effectively rejected the notion that the convenience of the plaintiff and defendant must always be weighed equally and instead implied that the court would be slower to impose an inconvenience on a poorer party than on a wealthier one. In human rights litigation, which usually represents a means for less powerful parties to secure rights or obtain compensation for violations of their rights from more powerful parties, such as wealthy multinational corporations, this holding may prove extremely consequential. It avoids the double victimization of human rights plaintiffs, who have been injured first by the defendant, then again by the denial of access to justice where a more powerful defendant's convenience is considered as important as that of the victim.

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47. As a recent example, the Ninth Circuit has recently held that "[t]he United States, in enacting the ATCA, has expressed a policy to provide a cause of action and a federal forum to fashion remedies for violations of international law. . . . Potential violators of human rights norms should know that they will pay for their actions." *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001)