

# STELLUNGNAHMEN UND BERICHTE

## Domestic Adjudication of International Human Rights Abuses and the Doctrine of *Forum Non Conveniens*

The Decision of the U.S. Court of Appeals for the Second  
Circuit in *Ken Wiwa v. Royal Dutch Petroleum Company*

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### *I. Introduction*

On September 14, 2000, the U.S. Court of Appeals for the Second Circuit, in *Ken Wiwa v. Royal Dutch Petroleum Company*<sup>1</sup>, reversed in part a judgment of the U.S. District Court for the Southern District of New York in which this latter court had dismissed on *forum non conveniens* grounds a suit against the Royal Dutch Petroleum Company and the Shell Transport and Trading Company, P.L.C. The defendants were alleged to have participated with the Nigerian government in human rights violations committed in Nigeria. The decision of the Second Circuit emphasizing the interests of the United States in providing a forum for the adjudication of claims alleging international human rights abuses, as expressed in the 1991 Torture Victim Protection Act (TVPA)<sup>2</sup>, marks a further important step in the enforcement of international human rights through U.S. civil courts which started with the landmark decision of the U.S. Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*<sup>3</sup>. In 1980, *Filártiga* was the first successful use of the 212-year-old Alien Tort Claims Act (ATCA)<sup>4</sup> to enable individual victims of international human rights abuses anywhere in the world to sue the person responsible in a U.S. federal court<sup>5</sup>. Although the court in *Ken Wiwa* did not hold that the *forum non conveniens* doctrine generally did not provide a check against

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<sup>1</sup> 2000 WL 1290355 (2d Cir. 2000).

<sup>2</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note.

<sup>3</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>4</sup> 28 U.S.C. sec. 1350.

<sup>5</sup> See *infra* text accompanying note 34 et seq.

the use of the *Filártiga* precedent and its progeny, it stated that the policy expressed in the TVPA favored the federal courts' exercise of the jurisdiction conferred by the ATCA in cases of torture and extrajudicial killings committed abroad. As a result, it will be more difficult for potential defendants in disputes under the TVPA now to raise successfully a motion for *forum non conveniens* dismissal in such cases. Under international law, however, doubts remain as to the suitability of U.S. courts as fora for the adjudication of human rights abuses occurring in other countries, which will be addressed at the end of this article<sup>6</sup>.

## II. Background: International Human Rights Litigation in U.S. Civil Courts

The adjudication of international human rights abuses in foreign civil courts is a relatively new phenomenon. Outside the U.S., only one case is worthy of note: In *Al-Adsani v. Government of Kuwait*<sup>7</sup>, the plaintiff brought proceedings in the English courts against the Government of Kuwait and three individual defendants in respect of alleged acts of torture committed in that state's country on him; whilst he won a default judgment against one of the individual defendants<sup>8</sup>, the English Court of Appeal decided that the sovereign state of Kuwait was entitled to immunity in respect to events alleged to have taken place on its territory<sup>9</sup>. By contrast, U.S. federal courts, since 1980, have already decided on a remarkable number of cases involving human rights violations committed abroad<sup>10</sup>. Several additional cases are pending before the courts. The complaints rely on the so-called Alien Tort Claims Act (ATCA)<sup>11</sup>, a somewhat obscure provision in the United States Code.

<sup>6</sup> See *infra* text accompanying note 126 et seq.

<sup>7</sup> *Al-Adsani v. Government of Kuwait* (1994), 100 ILR 465 (1995); 103 ILR 420 (1996); 107 ILR 536 (1997); see Fox, *Enforcing Human Rights*, 1994 *Solicitors Journal* 854; Garwood-Cutler/Pritchard, *Domestic Adjudication of International Law Violations*, 1996 *New Law Journal* 527.

<sup>8</sup> See Garwood-Cutler/Pritchard, *id.*, at 527.

<sup>9</sup> *Al-Adsani v. Government of Kuwait*, 107 ILR 536 (1997).

<sup>10</sup> See generally Randall, *Federal Courts and the International Human Rights Paradigm* (1990); Stephens/Ratner, *International Human Rights Litigation in U.S. Courts* (1996). Cf. also Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 *HRQ* 205 (1993); Rabkin, *Universal Justice: the Role of Federal Courts in International Civil Litigation*, 95 *Columbia Law Review* 2120 (1995); Rau, *Schadensersatzklagen wegen extraterritorial begangener Menschenrechtsverletzungen: der US-amerikanische Alien Tort Claims Act*, 2000 *IPRax* 558; Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 40 *GYIL* 117 (1997); Walker, *Domestic Adjudication of International Human Rights Violations under the Alien Tort Statute*, 41 *St. Louis University Law Journal* 539 (1997); Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law*, 62 *Brooklyn Law Review* 753 (1996).

<sup>11</sup> 28 U.S.C. sec. 1350.

1. The Alien Tort Claims Act and the *Filártiga* Case

## a) History and scope of the ATCA

The ATCA<sup>12</sup>, which provides, pursuant to its modern reading, both federal courts' subject matter jurisdiction and a federal cause of action for violations of international law<sup>13</sup>, was enacted by the First Congress in sec. 9 of the Judiciary Act of 1789. In its current version it states:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>14</sup>

The original intent of the statute, which is of practical importance inasmuch as defendants in ATCA cases often argue that the statute was not intended to reach the human rights violations alleged by the plaintiff<sup>15</sup>, is not clear<sup>16</sup>. Some authors believe that the ATCA was designed to make sure that tort claims of foreigners based on international law were cognizable in federal courts, thus avoiding the denial of justice (*déni de justice*) to an alien by state courts which was regarded as a justification for wars of reprisal launched by the alien's home nation<sup>17</sup>. In support of this "denial of justice theory" (Burley)<sup>18</sup>, which is sometimes combined with the idea that the ATCA was also intended to provide for uniform adjudication in

<sup>12</sup> For a detailed analysis of the statute see, e.g., Cicero, The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States, 23 Columbia Human Rights Law Review 315 (1991/92); Heidbrink, Der Alien Tort Claims Act (1989); Scheffler, Die Bewältigung hoheitlich begangenen Unrechts durch fremde Zivilgerichte, at 127 et seq. (1997); Simon, The Alien Tort Claims Act: Justice or Show Trials?, 11 Boston University International Law Journal 1 (1993); Steinhardt/D'Amato (eds.), The Alien Tort Claims Act (1999); Stephens/Ratner (note 10), at 7 et seq.

<sup>13</sup> See, e.g., *Forti v. Suarez-Mason*, 672 F.Supp. 1531, at 1540 (N.D.Cal. 1987); *Xuncax v. Gramajo*, 886 F.Supp. 162, at 182 et seq. (D.Mass. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844, at 847 et seq. (11th Cir. 1996); *Iwanowa v. Ford Motor Company*, 67 F.Supp.2d 424, at 443 (D.N.J. 1999); *Doe v. Unocal Corp.*, 2000 WL 1239935, at \*9 (C.D.Cal. 2000).

<sup>14</sup> 28 U.S.C. sec. 1350.

<sup>15</sup> See Stephens/Ratner (note 10), at 13.

<sup>16</sup> For a comprehensive discussion of the purpose of the ATCA see Burley, The Alien Tort Statute and the Judiciary Act of 1789: a Badge of Honor, 83 AJIL 461 (1989); Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Connecticut Law Review 467 (1986); D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 AJIL 62 (1988); Dodge, The Historical Origins of the Alien Tort Statute: a Response to the "Originalists", 19 Hastings International and Comparative Law Review 221 (1995/96); Randall (note 10), at 34 et seq.; Stephens/Ratner (note 10), at 12 et seq.; Sweeney, A Tort only in Violation of the Law of Nations, 18 Hastings International and Comparative Law Review 445 (1995).

<sup>17</sup> See, e.g., D'Amato (note 16), at 65; Randall, Further Inquiries into the Alien Tort Statute and a Recommendation, 18 New York University Journal of International Law and Policy 473, at 484 (1986); Randall (note 10), at 22; Rosen, The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: a Policy Solution, 6 Cardozo Journal of International and Comparative Law 461, at 463 et seq. (1998); Scoble, Enforcing Customary International Law of Human Rights in Federal Court, 74 California Law Review 127, at 133 et seq. (1986).

<sup>18</sup> Burley (note 16), at 465; see also Fox, Reexamining the Act of State Doctrine, 33 Harvard International Law Journal 521, at 560 (1992).

the field of international law in order to avoid state courts provoking foreign nations by making inconsistent rulings on similar cases<sup>19</sup>, scholars quote Hamilton's "The Federalist (No. 80)":

"As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."<sup>20</sup>

Other commentators believe that the ATCA was enacted in response to the assault of a French nobleman on the French Consul General Marbois in Philadelphia in 1784, the so-called *Marbois* affair<sup>21</sup>, in the wake of which the Continental Congress recommended that the States "pass laws for the exemplary punishment of such persons as may in future by violence or by insult attack the dignity of sovereign powers in the person of their ministers or servants"<sup>22</sup>, and which was, according to some, fresh in the minds of the drafters of the ATCA<sup>23</sup>. This "ambassador protection approach"<sup>24</sup> also forms the basis of Judge Bork's famous concurring opinion in *Tel-Oren v. Libyan Arab Republic*<sup>25</sup> in which Bork held that the scope of the ATCA was limited to the infringement of the rights of ambassadors, violation of safe-conducts or passports and piracy<sup>26</sup>, the three "principal offenses" Blackstone enumerated in his list of violations of the law of nations<sup>27</sup>.

By contrast, Burley has tried to prove that the ATCA was not only enacted to protect the national security of the young and weak American nation, as the aforementioned theories about the original intent of the statute argue, but also as "a direct response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct"<sup>28</sup>, thus upholding the law of nations as "a moral imperative" and "a matter of national honor"<sup>29</sup>.

However, as definitive proof of the purpose of the ATCA does not seem to be possible, courts since the famous *Filártiga* decision of the Second Circuit<sup>30</sup> have been reluctant to restrict the scope of the statute simply for alleged historical rea-

<sup>19</sup> See, e.g., Murray, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 *Columbia Journal of Transnational Law* 673, at 683 (1987); Scoble (note 17), at 133; cf. also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, at 427 (1964).

<sup>20</sup> *The Federalist* No. 80, at 444 (Hamilton) (Clinton Rossiter ed., 1999).

<sup>21</sup> *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

<sup>22</sup> 21 *Journals of the Continental Congress 1774-1789*, at 111 (Library of Congress, 1912).

<sup>23</sup> See, e.g., Dodge (note 16), at 229 et seq.; Randall (note 10), at 35 et seq.

<sup>24</sup> See Burley (note 16), at 469; Fox (note 18), at 562.

<sup>25</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, at 798 et seq. (Bork, J., concurring) (D.C.Cir. 1984).

<sup>26</sup> *Id.*, at 813 et seq.

<sup>27</sup> Blackstone, *Commentaries on the Laws of England*, Vol. IV, at 66 et seq. (1769).

<sup>28</sup> Burley (note 16), at 475.

<sup>29</sup> *Id.*, at 482.

<sup>30</sup> See *infra* text accompanying note 34 et seq.

sons and have constantly held that courts must interpret the law of nations, considered coterminous with customary international law<sup>31</sup>, “not as it was in 1789, but as it has evolved and exists among the nations of the world today”<sup>32</sup>. In doing so, they have rejected the statist view of the law of nations expressed, *inter alia*, by Judge Bork<sup>33</sup>.

#### b) The *Filártiga* Precedent

The first case to realize the potential use of the ATCA in international human rights litigation was the 1980 decision of the U.S. Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*<sup>34</sup>. Previously, the statute had been successfully invoked in only two cases in its 191 years history<sup>35</sup>. In *Filártiga*, the Second Circuit held that a U.S. district court had subject matter jurisdiction in an action between Paraguayan nationals, one of whom being a former police inspector-general of Paraguay, for official torture and wrongful death. To reach this conclusion, the court stated that official torture was now prohibited by customary international law and therefore the requirement of the ATCA of alleging a “violation of the law of nations” was fulfilled<sup>36</sup>. Implicitly alluding to the principle of universal jurisdiction, which will be addressed later<sup>37</sup>, the court said that “the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”<sup>38</sup>. On remand, the U.S. District Court for the Eastern District of New York, in 1984, implemented the court of appeals’ holding and granted the remedy of punitive damages of no less than US\$ 5 million to each of the two plaintiffs<sup>39</sup>.

<sup>31</sup> See, e.g., *Doe v. Islamic Salvation Front*, 993 F.Supp. 3, at 7 (D.D.C. 1998); *Iwanowa v. Ford Motor Company* (note 13), at 438 note 14.

<sup>32</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, at 881 (2d Cir. 1980); see also, e.g., *Kadic v. Karadzic*, 70 F.3d 232, at 238 (2d Cir. 1995).

<sup>33</sup> The most restrictive theory as to the original intent and the scope of the ATCA had been “‘wrongs’ under the law of prize”, Sweeney (note 16), at 475. In *Kadic v. Karadzic*, 74 F.3d 377 (2d Cir. 1996), the Second Circuit explicitly rejected Sweeney’s theory. For a comprehensive discussion of Sweeney’s approach see Dodge (note 16), at 243 et seq.

<sup>34</sup> 630 F.2d 876 (2d Cir. 1980). For a discussion of the decision see, e.g., Barenblat, *Torture as a Violation of the Law of Nations: an Analysis of 28 U.S.C. § 1350*, 16 *Texas International Law Journal* 117 (1981); Blum/Steinhard, *Federal Jurisdiction over International Human Rights Claims: the Alien Tort Claims Act after Filártiga v. Peña-Irala*, 22 *Harvard International Law Journal* 53 (1981); Doko, *Enforcement of International Human Rights in the Federal Courts after Filártiga v. Peña-Irala*, 67 *Virginia Law Review* 1379 (1981); George, *Defining Filártiga: Characterizing International Torture Claims in United States Courts*, 3 *Dickinson Journal of International Law* 1 (1984); Hassan, *A Conflict of Philosophies: the Filártiga Jurisprudence*, 32 *ICLQ* 150 (1983).

<sup>35</sup> *Bolchos v. Darrell*, 3 F.Cas. 810 (D.S.C. 1795); *Adra v. Clift*, 195 F.Supp. 857 (D.Md. 1961).

<sup>36</sup> *Filártiga v. Peña-Irala* (note 34), at 884.

<sup>37</sup> See *infra* text accompanying note 126 et seq.

<sup>38</sup> *Filártiga v. Peña-Irala* (note 34), at 890.

<sup>39</sup> *Filártiga v. Peña-Irala*, 577 F.Supp. 869 (1984).

The *Filártiga* decision, which had been prepared by attorneys from the Center of Constitutional Rights in New York, has been regarded among human rights activists as a great success in the worldwide struggle for the effective protection and enforcement of human rights<sup>40</sup>. However, there have also been doubts regarding the legitimacy of the *Filártiga* jurisprudence<sup>41</sup>. Nonetheless, subsequent cases have almost unanimously adopted the Second Circuit's holdings<sup>42</sup>.

## 2. Post-*Filártiga* Developments

### a) *The Adoption of the Torture Victim Protection Act in 1991*

As a reaction to the *Filártiga* decision, Congress, in 1991, adopted the Torture Victim Protection Act (TVPA)<sup>43</sup>. Unlike the ATCA, the TVPA is not a jurisdictional statute but an explicit federal cause of action for torture and extrajudicial killings committed anywhere in the world, as the Second Circuit in its decision in *Kadic v. Karadzic*<sup>44</sup> emphasized<sup>45</sup>. The legislative history of the act clearly reveals that Congress intended to clarify the courts' role in adjudicating international human rights claims by confirming the Second Circuit's interpretation of the ATCA<sup>46</sup>, which had been questioned shortly after the *Filártiga* decision by Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*<sup>47</sup>, and by establishing "an unambiguous and modern basis for a cause of action"<sup>48</sup>. In sum,

<sup>40</sup> See, e.g., Rohlik, *Filartiga v. Pena-Irala: International Justice in an American Court?*, 11 Georgia Journal of International and Comparative Law 325, at 332 (1981), who considers the *Filártiga* decision "an important, goal-oriented decision of an American court, which is to be applauded"; Stephens/Ratner (note 10), at 12, who speak of the "historic contribution [of the Second Circuit] to the drive to punish and prevent human rights abuses".

<sup>41</sup> See, e.g., Bradley/Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham Law Review 319 (1997); Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 Cornell International Law Journal 153 (1998); Simon (note 12).

<sup>42</sup> See *infra* text accompanying note 53 et seq.

<sup>43</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note. For a comprehensive analysis of the TVPA see Drinan/Kuo, *Putting the World's Oppressors on Trial: the Torture Victim Protection Act*, 15 HRQ 605 (1993); Murray (note 19); Pryor, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 Vanderbilt Journal of International Law 969 (1989); Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 Arizona Journal of International and Comparative Law 271 (1994).

<sup>44</sup> 70 F.3d 232 (2d Cir. 1995).

<sup>45</sup> *Id.*, at 246; see also Kochan (note 41), at 166 et seq. Some courts, however, tend to regard the TVPA not only as a cause of action but also as conferring subject matter jurisdiction, see *Xuncax v. Gramajo* (note 13), at 176; *Doe v. Islamic Salvation Front* (note 31), at 9.

<sup>46</sup> See Murray (note 19), at 696 et seq.; Pryor (note 43), at 1011 et seq.; Stephens/Ratner (note 10), at 26 et seq.; cf. also *Abebe-Jira v. Negewo* (note 13), at 848.

<sup>47</sup> *Tel-Oren v. Libyan Arab Republic* (note 25). For a discussion of Bork's opinion see, e.g., D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AJIL 92 (1985).

<sup>48</sup> H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1, at 3 (1991).

"[t]he Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Claims Act"<sup>49</sup>.

It may be added that the right to sue under the TVPA is subject to some restrictions. First, the TVPA permits a court to dismiss a claim based on the ATCA "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred"<sup>50</sup>; this so-called "local remedies" requirement is well known from many international human rights agreements<sup>51</sup>. Second, all action under the TVPA must also be "commenced within 10 years after the cause of action arose"<sup>52</sup>. Thus, unlike the ATCA, the TVPA explicitly imposes a statute of limitations.

#### b) Further Proceedings against State Officials

Until the early 1990's, post-*Filártiga* cases, like *Filártiga* itself, primarily involved state officials alleged to have committed human rights violations. As the U.S. Supreme Court in *Argentine Republic v. Amerasia Hess Shipping Corp.*<sup>53</sup> has construed the Foreign Sovereign Immunities Act (FSIA)<sup>54</sup> as being the sole basis for obtaining jurisdiction over a foreign state<sup>55</sup>, the FSIA, which does not provide a general exception to sovereign immunity for violations of international law, generally precludes human rights claims against foreign sovereigns<sup>56</sup>.

The first case to confirm the *Filártiga* precedent was the decision of the U.S. District Court for the Northern District of California in *Forti v. Suarez-Mason*<sup>57</sup>. This case concerned a civil action brought against a former Argentine general by two Argentine citizens, seeking damages for actions which included, *inter alia*, torture, murder, and prolonged arbitrary detention, allegedly committed by military and police personnel under the defendant's control. In its final decision, the district court awarded compensatory as well as punitive damages to the two plaintiffs<sup>58</sup>. In another case, the U.S. District Court for the District of Massachusetts entered a default judgment against the Indonesian general Sintong Panjaitan for summary execution by Indonesian troops in East Timor, awarding US\$ 14 mil-

<sup>49</sup> *Kadic v. Karadzic* (note 44), at 246.

<sup>50</sup> TVPA, sec. 2 (b).

<sup>51</sup> See, e.g., art. 5 sec. 2 (b) of the Optional Protocol to the International Covenant on Civil and Political Rights of December 19, 1966, 999 U.N.T.S. 171.

<sup>52</sup> TVPA, sec. 2 (c).

<sup>53</sup> 488 U.S. 428 (1989).

<sup>54</sup> 28 U.S.C. sec. 1330, 1602 et seq.

<sup>55</sup> *Argentine Republic v. Amerasia Hess Shipping Corp.* (note 53), at 434.

<sup>56</sup> See, e.g., *Denegri v. Republic of Chile*, 1992 WL 91914 (D.D.C. 1992); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). Cf. generally Bröhm, *State Immunity and the Violation of Human Rights*, at 68 et seq. (1997). For a comprehensive discussion of the relationship between the ATCA and the FSIA see Rosen (note 17).

<sup>57</sup> 672 F.Supp. 1531 (N.D. Cal. 1987).

<sup>58</sup> *Forti v. Suarez-Mason*, No. C-87-2058-DLJ (N.D. Cal. April 25, 1990).

lion in compensatory and punitive damages<sup>59</sup>. In *Xuncax v. Gramajo*<sup>60</sup>, nine expatriate citizens of Guatemala and one citizen of the United States sued a former Guatemalan minister of defense, seeking compensatory and punitive damages for injuries suffered from conduct of Guatemalan military forces. The court held that the plaintiffs had established subject matter jurisdiction under the ATCA and entered default judgment in favor of all plaintiffs. An action against a Ghanaian security officer was brought by a former Ghanaian trade counsellor, who resided in the State of New York, in *Cabiri v. Assasie-Gyimah*<sup>61</sup>. Finally, in *Abebe-Jira v. Negewo*<sup>62</sup>, former prisoners in Ethiopia filed a lawsuit against an official of the Ethiopian government alleging he was responsible for their torture.

Other ATCA (and TVPA) suits were directed against former or present heads of states<sup>63</sup>. In *Hilao v. Marcos*<sup>64</sup>, for example, families of victims of torture, summary execution, and disappearance brought a human rights class action against the estate of the former President of the Philippines, Ferdinand E. Marcos. The Ninth Circuit held that the FSIA did not apply to defendant's human rights violations and that the action was within the jurisdictional grant of the ATCA. The final judgment of the U.S. District Court for the District of Hawaii, awarding the class US\$ 1.2 billion in exemplary damages and US\$ 766 million in compensatory damages<sup>65</sup>, was affirmed by the Ninth Circuit on December 17, 1996<sup>66</sup>. The plaintiffs still seek satisfaction of the judgment<sup>67</sup>.

### c) Recent Developments: Suits against Non State Actors and Foreign Companies

Recent ATCA and TVPA cases concern suits against private individuals and foreign corporations<sup>68</sup>. The leading case is the decision of the Second Circuit in

<sup>59</sup> *Todd v. Panjaitan*, 1994 WL 827111 (D.Mass. 1994).

<sup>60</sup> 886 F.Supp. 162 (D.Mass. 1995).

<sup>61</sup> 921 F.Supp. 1189 (S.D.N.Y. 1996).

<sup>62</sup> 72 F.3d 844 (11<sup>th</sup> Cir. 1996).

<sup>63</sup> See, e.g., *Paul v. Avril*, 812 F.Supp. 207 (S.D.Fla. 1993); 901 F.Supp. 330 (S.D.Fla. 1994); *Lafontant v. Aristide*, 844 F.Supp. 128 (E.D.N.Y. 1994).

<sup>64</sup> 25 F.3d 1467 (9<sup>th</sup> Cir. 1994). For the *Marcos* human rights litigation see generally Kim, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction under the Alien Tort Claims Act – Trajano v. Marcos*, 27 Cornell International Law Journal 387 (1994); Lutz, *The Marcos Human Rights Litigation: Can Justice be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 Boston College Third World Law Journal 43 (1994); Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims against the Estate of Ferdinand Marcos*, 20 Yale Journal of International Law 65 (1995); Scheffler (note 12), at 37 et seq.

<sup>65</sup> *Hilao v. Estate of Ferdinand E. Marcos*, D.C. No. MDL 840 (D.Haw. February 3, 1995).

<sup>66</sup> *Hilao v. Estate of Ferdinand E. Marcos*, 103 F.3d 767 (9<sup>th</sup> Cir. 1996).

<sup>67</sup> See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F.Supp. 1470 (D.Haw. 1995); *Hilao v. Estate of Ferdinand E. Marcos*, 95 F.3d 848 (9<sup>th</sup> Cir. 1996); *Hilao v. Estate of Ferdinand E. Marcos*, 1997 WL 428544 (N.D.Ill. 1997); cf. Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 Vanderbilt Journal of Transnational Law 325, at 430 et seq. (1998).

<sup>68</sup> See, e.g., *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996); *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362 (E.D.La. 1997), affirmed, 197 F.3d 161 (5<sup>th</sup> Cir. 1999); *Doe v. Islamic Salvation Front*, 993 F.Supp. 3 (D.D.C. 1998); *Iwanowa v. Ford Motor Company*, F.Supp.2d. 424 (D.N.J. 1999); *Ken Wiwa v. Royal Dutch Petroleum Company*, 2000 WL 1290355 (2d Cir. 2000).



*Kadic v. Karadzic*<sup>69</sup> in which the court held that certain forms of conduct, such as genocide and war crimes, violated international law whether undertaken by those acting under the auspices of a state or only as private individuals, and might therefore be subject of ATCA claims against a private individual. Furthermore, where a private individual is engaged in official action, he can be held liable under the ATCA even for those human rights violations that require state action, like torture<sup>70</sup>. Thus, in the *Karadzic* decision, the Second Circuit stated that appellants had sufficiently alleged that defendant Karadzic had acted in concert with the former Yugoslavia for purposes of establishing international law violations under ATCA<sup>71</sup>. In this regard, the court noted that the “color of law” jurisprudence of 42 U.S.C. sec. 1983 was a relevant guide to whether a defendant had engaged in official action for the purposes of jurisdiction under ATCA<sup>72</sup>. Recently, the U.S. District Court for the Central District of California relied on this “sec. 1983 approach” in a suit against an American oil company for alleged human rights violations perpetrated by the Myanmar military in furtherance and for the benefit of a pipeline project in which the company had participated: In *Doe v. Unocal Corp.*<sup>73</sup> the court stated that in cases where the challenged acts had been committed by the government, the plaintiff must establish that the private individual was “the proximate cause of the violation” in order for the individual to be liable<sup>74</sup>.

<sup>69</sup> 70 F.3d 232 (2d Cir. 1995). For a discussion of the decision see Aceves, Affirming the Law of Nations in U.S. Courts: the Karadzic Litigation and the Yugoslav Conflict, 14 Berkeley Journal of International Law 137 (1996); Enslen, Filartiga's Offspring: the Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in *Kadic v. Karadzic*, 48 Alabama Law Review 695 (1997); Johnson, *Kadic v. Karadzic* and *Doe I and II v. Karadzic*: the Latest Stage in Alien Tort Act Jurisprudence, 39 GYIL 434 (1996); Kunstle, *Kadic v. Karadzic*: Do Private Individuals Have Enforceable Rights and Obligations under the Alien Tort Claims Act?, 6 Duke Journal of Comparative and International Law 319 (1996); Lu, Jurisdiction over Non-State Activity under the Alien Tort Claims Act, 35 Columbia Journal of Transnational Law 531 (1997); Schuyler Black, *Kadic v. Karadzic*: Misinterpreting the Alien Tort Claims Act, 31 Georgia Law Review 281 (1996).

<sup>70</sup> See art. 1 sec. 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984, 23 I.L.M. 1027. But see Art. 7 sec. 1 (f) of the Rome Statute of the International Criminal Court of July 17, 1998, reprinted in Roggemann, Die Internationalen Strafgerichtshöfe, Ergänzungsband, at 23 et seq. (2d ed., 1999).

<sup>71</sup> *Kadic v. Karadzic* (note 69), at 245.

<sup>72</sup> Id.

<sup>73</sup> 2000 WL 12399035 (C.D.Cal. 2000). Cf. also *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, at 374 et seq. (E.D.La. 1997). For a discussion of the liability of private corporations under the ATCA for human rights violations committed abroad see Anderson, Respecting Human Rights: Multinational Corporations Strike out, 2 University of Pennsylvania Journal of Labor and Employment Law 463 (2000); Boyd, Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level, 1999 Brigham University Law Review 1139; Sacharoff, Multinationals in Host Countries: Can They be Held Liable under the Alien Tort Claims Act for Human Rights Violations?, 23 Brooklyn Journal of International Law 927 (1998); Tzeuschler, Corporate Violator: the Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad, 30 Columbia Human Rights Law Review 359 (1999).

<sup>74</sup> *Doe v. Unocal Corp.* (note 73), at \*13. For an analysis of the decision see Rau, Haftung privater Unternehmen für Menschenrechtsverletzungen?, 2001 IPRax (forthcoming).

### III. International Human Rights Litigation and the Question of the Suitability of the Forum

#### 1. The Problem

In most of the ATCA and TVPA cases the alleged human rights violations have little connection to the United States: The actions took place outside American territory, and sometimes neither the offender nor the victim is an American citizen. This is the reason why the Bush administration opposed passage of the TVPA, arguing that the adjudication of international human rights abuses in U.S. courts risked provoking retaliatory lawsuits against U.S. officials and involved individual litigants in foreign policy decisions<sup>75</sup>. Likewise, in the Second Circuit's *Karadzic* decision, Chief Judge Jon O. Newman opened his opinion by observing that "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan"<sup>76</sup>, before holding that the District Court did indeed have jurisdiction under the ATCA. However, in the United States, unlike in most civil law countries, a court may in its discretion dismiss an action under the judicial doctrine of *forum non conveniens*, even though the plaintiff's choice of forum meets all statutory and constitutional requirements<sup>77</sup>. Given the very nature of suits alleging human rights violations committed anywhere in the world, *forum non conveniens* issues constantly arise in disputes under the ATCA and the TVPA.

#### 2. Existing Jurisprudence of U.S. Courts and Positions in Legal Doctrine

To prevail on a motion to dismiss based on *forum non conveniens*, a defendant must show that an alternative forum exists and that the private and public interests weigh strongly in favor of trial in the foreign forum<sup>78</sup>. The U.S. Supreme Court has listed the factors to be balanced in deciding the issue of *forum non conveniens*:

"Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expedi-

<sup>75</sup> See Stephens/Ratner (note 10), at 27. For the question of the suitability of American courts in suits alleging human rights abuses abroad from the perspective of international law see *infra* text accompanying note 126 et seq.

<sup>76</sup> *Kadic v. Karadzic* (note 69), at 236.

<sup>77</sup> See Kane, Civil Procedure, at 81 et seq. (4th ed., 1996); Schack, Einführung in das US-amerikanische Zivilprozeßrecht, at 33 et seq. (2d ed., 1995). For a comprehensive analysis of the American *forum non conveniens* doctrine see Dorsel, Forum Non Conveniens, at 23 et seq. (1996).

<sup>78</sup> See *Gulf Oil v. Gilbert*, 330 U.S. 501, at 506 et seq. (1947); *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

tious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial. [...]. [U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>79</sup>

Regarding human rights litigation under the ATCA and the TVPA, the Second Circuit, in *Filártiga*, did not comment on the question of *forum non conveniens*, since the only dispute before the court was the issue of subject matter jurisdiction under the ATCA<sup>80</sup>. Similarly, in the *Forti* case, the Californian District Court only addressed the question of an act of state<sup>81</sup>, noting that since violations of international law virtually all involve acts practiced or encouraged by states, the application of the *act of state* doctrine would in effect preclude litigation under the ATCA<sup>82</sup>. Finally, in *Trajano v. Marcos*<sup>83</sup>, a suit against the daughter of Ferdinand E. Marcos, the issue of the suitability of the forum did not have to be considered because of defendant's default.

By contrast, the question of *forum non conveniens* was raised in the *Cabiri* case. Although the plaintiff had argued that dismissing the complaint on the ground of *forum non conveniens* would seriously undermine the purposes of the TVPA<sup>84</sup>, the district court did not enter into a general debate on the relationship between the ATCA, the TVPA and the doctrine of *forum non conveniens*, but instead stated:

"Since this action is brought pursuant to United States caselaw and statutes [...], this Court has an interest in having the issues of law presented decided by a United States court. Moreover, the Court is unconvinced that the courts of Ghana provide an adequate alternative forum for this action. Presuming Cabiri's allegations to be true, he would be putting himself in grave danger were he to return to Ghana to prosecute this action."<sup>85</sup>

Likewise, in *Eastman Kodak Company v. Kavlin*<sup>86</sup>, a suit involving an American photographic equipment manufacturer and one of its employees, alleging that the employee was wrongfully imprisoned in Bolivia, the U.S. District Court for the Southern District of Florida held that corruption in the Bolivian justice system precluded dismissal of action on grounds of *forum non conveniens*.

The failure of the plaintiff to show that an adequate alternative forum existed was also the reason why the Second Circuit, in its *Karadzic* decision, did not dis-

<sup>79</sup> *Gulf Oil v. Gilbert*, id., at 508.

<sup>80</sup> *Filártiga v. Peña-Irala* (note 34), at 890.

<sup>81</sup> For the American *act of state* doctrine see *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); Fox (note 18); Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AJIL 68 (1985).

<sup>82</sup> *Forti v. Suarez-Mason* (note 57), at 1546.

<sup>83</sup> 978 F.2d 493 (9<sup>th</sup> Cir. 1992).

<sup>84</sup> See *Cabiri v. Assasie-Gyimah* (note 61), at 1198.

<sup>85</sup> Id., at 1199.

<sup>86</sup> 978 F.Supp. 1078 (S.D.Fla. 1997).

miss the action pursuant to the doctrine of *forum non conveniens*. Here, the Court of Appeals held that:

"[N]o party has identified a more suitable forum, and we are aware of none. [...] [I]t seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not available to entertain plaintiff's claims, even if circumstances concerning the location of witnesses and documents were sufficient to overcome the plaintiff's preference for a United States forum."<sup>87</sup>

On the other hand, in *Denegri v. Republic of Chile*<sup>88</sup>, a case involving a suit by two Chilean citizens alleging human rights violations in Chile during the Pinochet regime, the U.S. District Court for the District of Columbia noted that the transformation of Chile into a democracy in 1990 and the introduction of legislation which would reduce the influence of the Pinochet appointed judges in Chile's Supreme Court "weigh heavily against exercising jurisdiction in a *forum non conveniens* argument"<sup>89</sup>. Thus, the court suggested that an adequate alternative forum might be available when an intervening change of governments had occurred. Nonetheless, since the court lacked subject matter jurisdiction over the action under the FSIA<sup>90</sup>, it did not have to settle the question.

The general issue of how the *forum non conveniens* balance for ATCA claims is to be struck was raised by the Second Circuit in *Jota v. Texaco, Inc.*<sup>91</sup>, an action brought against an American oil company alleging environmental abuses in Ecuador and Peru. In its judgment of October 5, 1998, the court recognized the plaintiff's argument that "to dismiss the case would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations"<sup>92</sup>. However, the court expressed no view on the issue but directed the district court to consider the question on remand<sup>93</sup>.

Finally, in *Xuncax*, the U.S. District Court for the District of Massachusetts did not reach the question of the suitability of the forum, but discussed the related issue of exhaustion of local remedies according to sec. 2 (b) of the TVPA<sup>94</sup>, stating that the requirement must be read against the background of existing judicial doctrines under which exhaustion of remedies in a foreign forum was generally not required when foreign remedies were "unobtainable, ineffective, inadequate, or obviously futile"<sup>95</sup>.

In sum, no court has dismissed an ATCA or TVPA suit on *forum non conveniens* grounds yet. Nevertheless, the reluctance of courts to rely on the doctrine of *forum non conveniens* in human rights cases has, up to now, not been due to pol-

<sup>87</sup> *Kadic v. Karadzic* (note 69), at 250.

<sup>88</sup> 1992 WL 91914 (D.D.C. 1992).

<sup>89</sup> *Id.*, at \*3 note 9.

<sup>90</sup> See *id.*, at \*2 et seq.

<sup>91</sup> 157 F.3d 153 (2d Cir. 1998).

<sup>92</sup> *Id.*, at 159.

<sup>93</sup> *Id.*, note 6.

<sup>94</sup> See *supra* text accompanying note 50 et seq.

<sup>95</sup> *Xuncax v. Gramajo* (note 60), at 178.

icy considerations in the field of international human rights law, but, as has become obvious from the cases cited above, due to courts either not having to deal with the issue or not being able to identify an adequate alternative forum.

By contrast, scholars, since *Filártiga*, have not so much relied on a case-by-case approach, but have instead tried to give special weight to the general interest of the United States – as well as of the international community – in providing a forum for the adjudication of international human rights abuses. Thus, it has been stated that to dismiss ATCA suits on the grounds of *forum non conveniens* would “subvert the human rights norms endorsed by the international community”<sup>96</sup>. Likewise, Rohlik has argued that “the commitment to the cause of human rights demands judicial attention”<sup>97</sup>. Finally, Steinhardt, though stressing that *forum non conveniens* does not operate as an automatic bar to the litigation of human rights claims under the ATCA and the TVPA, has suggested that courts, in applying the doctrine of *forum non conveniens*, should take into account “the interest of the United States in the vindication of accepted human rights standards”<sup>98</sup>.

The United States, however, in their statement of interest in the *Karadzic* case, noted that:

“[W]e do not wish to stress, however, the general importance of considering the *forum non conveniens* doctrine in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here.”<sup>99</sup>

#### IV. The Decision of the Second Circuit in *Ken Wiwa*

##### 1. Facts<sup>100</sup>

Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, P.L.C., jointly control and operate the Royal Dutch/Shell Group, a vast network of affiliated but formally independent oil and gas companies which includes Shell Petroleum Development Company of Nigeria, Ltd. (“Shell Nigeria”), a subsidiary of the defendants which engages in extensive oil exploration and development activity in the Ogoni region of Nigeria. The company’s activities have resulted in substantial pollution of the air and water in the homeland of the Ogoni people, causing immense health problems for the villagers. On January 4, 1993, 300.000 Ogonis gathered in peaceful protest against the environmental devastation

<sup>96</sup> Blum/Steinhardt (note 34), at 104.

<sup>97</sup> Rohlik (note 40), at 333.

<sup>98</sup> Steinhardt (note 64), at 92.

<sup>99</sup> Cited in Johnson (note 69), at 460.

<sup>100</sup> See *Ken Wiwa v. Royal Dutch Petroleum* (note 1), at \*1 et seq.; cf. also Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, 15 Boston University International Law Journal 261, at 264 et seq. (1997); Skogly, Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria, 15 Netherlands Quarterly of Human Rights 52 (1997).

of their land, water and air. While further protests led Shell Nigeria to temporarily suspend its operations in Ogoniland, Shell finally requested assistance from the Nigerian police and military. After a mob murdered four pro-government Ogoni leaders in May 1994, the Nigerian military conducted a series of punitive raids on Ogoni villages, and as of September 1996, Ogoniland remained under a strong security force presence. On November 10, 1995, Ken Saro-Wiwa, an opposition leader and president of the Movement for the Survival of the Ogoni People (MSOP), and eight other MSOP leaders who had been repeatedly arrested, detained and tortured by the Nigerian government because of their leadership roles in the protest movement, were hung after being sentenced to death by a special court for allegedly inciting the murder of the four pro-government leaders. According to the complaint, the diverse human rights violations carried out by the Nigerian government and military were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants.

## 2. The Question of Personal Jurisdiction Over the Defendant

Before dealing with the defendants' motion to dismiss for *forum non conveniens*, the Second Circuit had to discuss the issue of whether the court could exercise personal jurisdiction over the defendants. This question is in some ways, as a matter of fact, interrelated to the issue of whether the chosen forum is suitable, although it has to be stressed that from a purely legal point of view, the *forum non conveniens* inquiry presupposes that the court can assert personal jurisdiction over the defendant.

Under the New York "long arm-statute"<sup>101</sup>, which lists in detail the kinds of activities for which personal jurisdiction may be asserted, a foreign corporation is subject to general personal jurisdiction if it is "doing business" in that state<sup>102</sup>. In *Ken Wiwa*, however, neither of the defendants had extensive contacts with New York. Nonetheless, as defendants maintain an Investor Relations Office in New York City which is nominally a part of Shell Oil, the Second Circuit found that jurisdiction could be predicated upon activities performed in New York by the Investor Relations Office and its manager as agents for the defendants for jurisdictional purposes<sup>103</sup>. Regarding the fairness requirement of the Fifth Amendment's Due Process Clause<sup>104</sup>, which requires that the defendant must have "certain minimum contacts" with the forum state "such that the maintenance of the suit does

<sup>101</sup> See generally Teitz, *Transnational Litigation*, at 29 et seq. (1996).

<sup>102</sup> See N.Y.C.P.L.R., sec. 302 (a) (1): "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; [...]" Cf. Müller, *Die Gerichtspflichtigkeit wegen "doing business"* (1992).

<sup>103</sup> *Ken Wiwa v. Royal Dutch Petroleum* (note 1), at \*5 et seq.

<sup>104</sup> The Fifth Amendment Due Process Clause reads: "No person shall be [...] deprived of life, liberty, or property, without due process of law [...]."

not offend traditional notions of fair play and substantial justice”<sup>105</sup>, the court stated that the inconvenience to the defendants involved in litigating in New York would not be great and that therefore, the Due Process Clause did not preclude New York from exercising jurisdiction over the defendants<sup>106</sup>.

### 3. The Applicability of the *Forum Non Conveniens* Doctrine

The Second Circuit then turned to the question of the applicability of the *forum non conveniens* doctrine to the suit which the court identified as the principal issue of the case<sup>107</sup>. Given that Shell Transport is incorporated and headquartered in England, the U.S. District Court for the Southern District of New York had dismissed the action for *forum non conveniens* after having determined that England was an adequate alternative forum and that balancing of public interest and private interest factors made the British forum preferable<sup>108</sup>. The Second Circuit, too, acknowledged that British courts were “exemplary in their fairness and commitment to the rule of law” and stated that there were “no rules of British law that would prevent a British court from reaching the merits”<sup>109</sup>. However, the court noted that the district court had failed to give weight to three significant considerations that favored retaining jurisdiction for trial<sup>110</sup>: First, according to the Second Circuit, the district court should have counted in favor of the plaintiff’s choice of a U.S. forum that two of them were residents of the United States. “The greater the plaintiff’s ties to the plaintiff’s chosen forum”, the Second Circuit noted, “the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction.”<sup>111</sup> Second, the court followed the plaintiff’s argument that the passage of the TVPA in 1991 expressed a policy permitting U.S. district courts to entertain suits alleging human rights violations committed anywhere in the world. “The statute”, the court explained in its holding, “has [...] communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.”<sup>112</sup> Finally, the Second Circuit found that defendants’ considerations in support of an English forum were not compelling, especially because one of the defendants was a Dutch corporation whose actions were not governed by British law. As these three factors, in connection with other factors weighing against dismissal on *forum non conveniens* grounds, such as “the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin litigation anew in Eng-

<sup>105</sup> *International Shoe v. Washington*, 326 U.S. 310, at 316 (1945).

<sup>106</sup> *Ken Wiwa v. Royal Dutch Petroleum* (note 1), at \*10.

<sup>107</sup> See *id.*, at \*1: “This case concerns the application of *forum non conveniens* doctrine to suits under the Alien Tort Claims Act [...], involving claimed abuses of the international law of human rights.”

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*, at \*11.

<sup>110</sup> *Id.*, at \*12 et seq.

<sup>111</sup> *Id.*, at \*13.

<sup>112</sup> *Id.*, at \*17.

land"<sup>113</sup>, were, according to the court, "more than sufficient to overcome the defendants' weak claim for dismissal based on *forum non conveniens*"<sup>114</sup>, the court concluded that the defendants had failed to meet the burden of establishing that the pertinent factors tilt strongly in favor of trial in the foreign forum.

### V. Commentary

#### 1. Human Rights Claims, the TVPA, and the Doctrine of *Forum Non Conveniens*

With the *Ken Wiwa* decision, an American federal court, for the first time in human rights litigation under the ATCA, explicitly took into account the United States policy interest, as expressed in the TVPA, in adjudicating international human rights abuses committed anywhere in the world in deciding a motion to dismiss on grounds of *forum non conveniens*. Indeed, it can hardly be denied that with the enactment of the TVPA, Congress intended to guarantee victims of torture and extrajudicial killings access to U.S. courts<sup>115</sup>. The House of Representatives TVPA Report, for example, states that:

"[J]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act [...] would respond to this situation."<sup>116</sup>

In addition, the Report describes the TVPA as explicitly authorizing American federal courts to hear cases brought by a victim of torture or extrajudicial killing, and, with regard to the "balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts", it mentions as a defense to suits under the TVPA only the existence of adequate remedies in the country where the violation allegedly occurred, not those existing in other countries<sup>117</sup>.

Bearing in mind Congress' intent in enacting the TVPA and given that it is generally accepted that certain statutes mandate that suits be heard in a U.S. forum<sup>118</sup>, one could even argue that once jurisdiction is obtained in an ATCA suit alleging torture or extrajudicial killing, the TVPA totally precludes a dismissal of the action based on *forum non conveniens* grounds. If, for example, the applicable law in a lawsuit is the so-called Jones Act<sup>119</sup>, a statute in the field of maritime law, several courts decided that an American court could not, on *forum non conveniens*

<sup>113</sup> Id., at \*18.

<sup>114</sup> Id.

<sup>115</sup> See already *supra* text accompanying note 43 et seq.

<sup>116</sup> H.R.Rep. No. 367 (note 48), at 3.

<sup>117</sup> Id., at 4.

<sup>118</sup> See *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, at 834 (5<sup>th</sup> Cir. 1993). Cf. Dorsel (note 77), at 68 et seq.

<sup>119</sup> 46 U.S.C. sec. 688.



grounds, decline to hear the case<sup>120</sup>. Furthermore, with regard to the new state-sponsor of terrorism exception to sovereign immunity<sup>121</sup>, which was enacted in 1996 as part of a comprehensive legislative initiative to combat international terrorism, the U.S. District Court for the District of Columbia, in *Flatow v. Islamic Republic of Iran*<sup>122</sup>, held that:

“Congress specifically created a certain forum in the United States for United States victims of state sponsored terrorism [...]. This Court therefore concludes that as a matter of law, the defense of *forum non conveniens* is not available in actions pursuant to 28 U.S.C. § 1605 (a) (7).”<sup>123</sup>

The Second Circuit, however, by holding that the TVPA had not nullified the doctrine of *forum non conveniens* in international human rights litigation based on the TVPA, but only communicated a policy that favored the federal courts’ exercise of jurisdiction conferred by the ATCA in cases of torture and extrajudicial killings, decided to adopt a more restrained approach, thereby upholding the general applicability of the *forum non conveniens* doctrine in lawsuits alleging human rights abuses anywhere in the world. Nonetheless, there is at least a strong presumption now in favor of the exercise of jurisdiction in TVPA cases, especially when the victim is a resident of the United States<sup>124</sup>. Hence, it will be very difficult for potential defendants in such cases to raise successfully a motion for a *forum non conveniens* dismissal.

Naturally, in cases involving human rights violations other than torture or extrajudicial killings, recourse on the TVPA in order to establish the United States policy interest in the adjudication of the claim is not directly possible. Nevertheless, as the House Report explicitly mentions litigation under the ATCA and highlights that the statute “should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”<sup>125</sup>, it might be possible to argue that the legislative history of the TVPA not only reveals Congress’ intent to provide for a forum for claims based on torture or extrajudicial killing but also proves that Congress accepts the general suitability of U.S. federal courts as fora for the adjudication of flagrant international human rights violations.

<sup>120</sup> See, e.g., *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, at 1018 (5<sup>th</sup> Cir. 1981); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, at 1483 (9<sup>th</sup> Cir. 1983). For a comprehensive discussion of the applicability of the doctrine of *forum non conveniens* in cases under the Jones Act see Edelmann, *Forum Non Conveniens: its Application in Admiralty Law*, 15 *Journal of Maritime Law and Commerce* 517 (1984); O’Shea, *The Jones Act’s Specific Venue Provision: Does it Preclude Forum Non Conveniens Dismissal?*, 14 *Fordham International Law Journal* 696 (1990/91).

<sup>121</sup> 28 U.S.C. sec. 1605 (a) (7). For an analysis of sec. 1605 (a) (7) see Buccì, *Breaking through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 *Journal of International Legal Studies* 293 (1997); Sealing, “State Sponsors of Terrorism” are Entitled to Due Process too: the Amended Foreign Sovereign Immunities Act is Unconstitutional, 15 *American University International Law Review* 395 (2000).

<sup>122</sup> 999 F.Supp. 1 (D.D.C. 1998).

<sup>123</sup> *Id.*, at 25.

<sup>124</sup> See *supra* text accompanying note 111.

<sup>125</sup> H.R.Rep. No. 367 (note 48), at 4.

## 2. The Suitability of the Forum under International Law

From the perspective of international law, however, doubts remain as to the suitability of U.S. civil courts as fora for the adjudication of international human rights abuses committed anywhere in the world. In the *Xuncax* decision, the Massachusetts District Court, unfortunately only in a footnote, relied on the doctrine of universal jurisdiction, which provides, according to the court, the legitimacy of United States civil jurisdiction over certain fundamental human rights violations under international law<sup>126</sup>. This theory, which was already alluded to in *Filártiga*, when the Second Circuit called the torturer *hostis humani generis*<sup>127</sup>, finds support among a number of American scholars<sup>128</sup> as well as in the Restatement of Foreign Relations Law of the United States<sup>129</sup>. Further, the Basic Principles and Guidelines on the Right of Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law proposed in 1997 by the former Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, call upon every state to "provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law"<sup>130</sup>. Nevertheless, it is not clear whether the principle of universality, which was developed in the field of international criminal law<sup>131</sup>, is applicable in civil proceedings<sup>132</sup>. Given that only one important case comparable to *Filártiga* and its progeny exists outside the U.S. so far<sup>133</sup>, one can certainly not speak of a uniform state practice necessary for the

<sup>126</sup> *Xuncax v. Gramajo* (note 60), at 183 note 25.

<sup>127</sup> See *supra* text accompanying note 38. For the doctrine of *hostis humani generis* in international law see, e.g., Blum/Steinhardt (note 34), at 60 et seq.; Kunstle (note 69), at 322.

<sup>128</sup> See, e.g., Bodansky, Human Rights and Universal Jurisdiction, in: Gibney (ed.), World Justice? U.S. Courts and Human Rights 1, at 8 et seq. (1991); Rabkin (note 10), at 2139 et seq.; Randall (note 10), at 163 et seq.; Rohlik (note 40), at 333; Rosen (note 17), at 483 et seq.; Stephens, Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?, 60 Albany Law Review 579, at 600 et seq. (1997); Weintraub (note 10), at 770.

<sup>129</sup> American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), sec. 404, comment b.

<sup>130</sup> Basic Principles and Guidelines on the Right of Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law of the United Nations, UN doc. E/CN.4/1997/104, Annex, para. 5.

<sup>131</sup> For a discussion of the principle of universality in the field of international criminal law see, e.g., Dinstein, The Universality Principle and War Crimes, in: Schmitt (ed.), The Law of Armed Conflict 17 (1998); Graefrath, Universal Jurisdiction and an International Court, 1 EJIL 67 (1990); Randall, Universal Jurisdiction under International Law, 66 Texas Law Review 785 (1988); Stern, La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda, 40 GYIL 280 (1997).

<sup>132</sup> Against the applicability of the principle of universality outside criminal proceedings see Lücke, Die Immunität staatlicher Funktionsträger, at 58 et seq. (2000); Tomuschat, in: Randelzhofer/Tomuschat (eds.), State Responsibility and the Individual 1, at 17 et seq. (1999). Cf. also Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Cherif Bassiouni, UN doc. E/CN.4/1999/65, para. 55: "[T]his raises the question whether modalities for redress should be deemed part of universal jurisdiction [...]."

<sup>133</sup> See *supra* text accompanying note 7 et seq.

formation of a customary international law rule providing for universal civil jurisdiction over certain fundamental human rights abuses<sup>134</sup>. It might be conceivable, however, that the principle of universal criminal jurisdiction is applicable *a maiore ad minus* in civil proceedings<sup>135</sup>.

Concerning specifically torture, some authors also argue that adjudication in American courts does no more than implement the requirement of art. 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention")<sup>136</sup> that victims of torture be afforded redress and compensation<sup>137</sup>. This view was also expressed by the U.S. Senate in its TVPA Report which states that the enactment of the TVPA

"will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [...]. The convention obliges state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that – by making sure that torturers and death squads will no longer have a safe haven in the United States."<sup>138</sup>

Similarly, the *Xuncax* court held that art. 14 of the Torture Convention contained an obligation incumbent upon individual nations to see that torture committed anywhere in the world was redressed<sup>139</sup>.

However, art. 14 of the Torture Convention is arguably directed toward the redress of torture occurring within the party's own territory and is thus referring only to the principle of territoriality<sup>140</sup>. This is also expressed in an understanding of the U.S. Senate attached to the Torture Convention stating that the Convention requires a state to grant a private right of action to victims only for acts committed within territory under the jurisdiction of that state<sup>141</sup>. Besides, as the Convention contains a system of universal criminal jurisdiction, resulting from articles 5, 6 and 7<sup>142</sup>, providing for civil jurisdiction outside the state of the wrongdoer is not necessarily needed in order to make it as difficult as possible for torturers to

<sup>134</sup> See also Lüke (note 132), at 58.

<sup>135</sup> In this sense Giegerich, in his book review of Stephens/Ratner, *International Human Rights Litigation in U.S. Courts*, 59 *ZaöRV* 885, at 888 (1999): "[D]as Völkerrecht [gestattet] nach dem Weltrechtsprinzip einem Staat die Bestrafung bestimmter Auslandstaten von Ausländern, die sich gegen das Weltgemeininteresse richten [...]. Dann kann es ihm aber nicht verwehrt sein, auch seine Zivilgerichtsbarkeit auf solche Auslandstaten zu erstrecken [...]."

<sup>136</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984, reprinted in 23 *I.L.M.* 1027 (1984).

<sup>137</sup> See Rosen (note 17), at 484; Schwartz (note 43), at 287.

<sup>138</sup> S.Rep. No. 249, 102d Cong., 1<sup>st</sup> Sess., pt. 1, at 3 (1991).

<sup>139</sup> *Xuncax v. Gramajo* (note 60), at 183 note 25.

<sup>140</sup> See Lüke (note 132), at 60 et seq. This is also admitted by Rosen (note 17), at 484, and Schwartz (note 43), at 287, who, nonetheless, believe that provision of a civil remedy in the courts of a country other than the one in which the torture occurred is consistent with the Torture Convention.

<sup>141</sup> 136 Cong. Rec. S17486, S17492 (1990).

<sup>142</sup> See Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement*, at 177 et seq. (1999); Burgers/Danielius, *The United Nations Convention against Torture*, at 3 (1989); Raess, *Der Schutz vor Folter im Völkerrecht*, at 145 et seq. (1989).

find "a safe haven" in the United States or in any other country being a party to the Convention<sup>143</sup>.

Yet it has to be borne in mind though that the applicability of the rules on personal jurisdiction in ATCA or TVPA litigation prevents American courts from adjudicating human rights claims without any contacts of the defendants to the forum<sup>144</sup>. In *Ken Wiwa*, as has been shown above<sup>145</sup>, personal jurisdiction was, somewhat questionably, based on the transaction of business of the defendant in the state of New York. In other ATCA cases, jurisdiction was obtained through personal service of process on the defendant within the district where the lawsuit was filed<sup>146</sup>. Finally, in *Filártiga* and in the *Marcos* human rights litigation, defendants were domiciled in the United States<sup>147</sup>. To be sure, some of these bases of personal jurisdiction have been labeled as "exorbitant"<sup>148</sup>, and are, from the point of view of international law, certainly somewhat problematic, given that international law, according to legal commentators, imposes a "genuine link" requirement on the exercise of adjudicative jurisdiction in international controversies<sup>149</sup>. However, the rules on personal jurisdiction are usually deemed sufficient in order to justify the assertion of extraterritorial judicial jurisdiction, independently of the subject matter of a claim. Hence, in order for the universality principle or a broad reading of art. 14 of the Torture Convention to be needed in the context of human rights litigation under the ATCA or the TVPA, it would have to be argued that unlike other transnational litigation, international human rights litigation in

<sup>143</sup> It has to be admitted, however, that criminal prosecution requires convincing a government official to take action, whereas in civil litigation, the victims of human rights violations may initiate a lawsuit themselves, see Stephens/Ratner (note 10), at 2. Cf. also Stephens (note 128), at 582.

<sup>144</sup> For a discussion of the issue of personal jurisdiction in ATCA and TVPA cases see Stephens/Ratner (note 10), at 100 et seq.

<sup>145</sup> See *supra* text accompanying note 101 et seq.

<sup>146</sup> See, e.g., *Kadic v. Karadzic* (note 69), at 246 et seq.; *Xuncax v. Gramajo* (note 60), at 193. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), the U.S. Supreme Court held that personal jurisdiction based on the mere presence of a nonresident defendant was constitutionally permissible; see, e.g., Peterson, US Supreme Court Upholds Use of Transient Jurisdiction, 1991 IPRax 267.

<sup>147</sup> See *Filártiga v. Peña-Irala* (note 34), at 878 et seq.; *Hilao v. Marcos* (note 64), at 1469.

<sup>148</sup> See, generally, Grothe, "Exorbitante" Gerichtszuständigkeiten im Rechtsverkehr zwischen Deutschland und den USA, 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 686 (1994).

<sup>149</sup> See, e.g., Dahm/Delbrück/Wolfrum, *Völkerrecht*, Vol. I/1, at 323 et seq. (2d ed., 1989); Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RdC* 1, at 73 et seq. (1964-I); Rau, "Minimum Contacts" und "Personal Jurisdiction" über auswärtige Gesellschaften im Cyberspace, 2000 *RIW* 761, at 772; Ziegenhain, *Extraterritoriale Rechtsanwendung und die Bedeutung des Genuine-Link-Erfordernisses*, at 219 et seq. (1992). The American Restatement of Foreign Relations Law (note 129), sec. 421, even demands that the relationship of the person or thing to the state be such "as to make the exercise of [...] jurisdiction reasonable"; cf. also Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 *Georgia Journal of International and Comparative Law* 1, at 16 et seq. (1987), who speaks of "an emerging principle of international law requiring assertions of judicial jurisdiction to be reasonable" (id., at 20). For a discussion of the influence of international human rights law on jurisdiction in international litigation see Schlosser, *Jurisdiction in International Litigation – the Issue of Human Rights in Relation to National Law and to the Brussels Convention*, 74 *Rivista di diritto internazionale* 5 (1991).

foreign courts cannot be justified by the rules on *in personam* jurisdiction alone, but requires a special mandate of the international community, explicitly assigning extraterritorial subject matter jurisdiction to domestic courts, as instruments of the decentralized enforcement of international human rights law, by means of a *dédoublement fonctionnel*<sup>150</sup>.

## VI. Conclusion

In the absence of an effective universal system for redress of individual rights, civil litigation in domestic courts has sometimes been endorsed as offering victims of human rights violations committed anywhere in the world a legal remedy for international human rights abuses which they control<sup>151</sup>. One distinguished scholar has objected that “a world of self-appointed human rights vigilantes is certainly more a trauma than a vision of paradise”<sup>152</sup>. In any event, the decision of the Second Circuit in *Ken Wiwa v. Royal Dutch Petroleum* is, as a matter of fact, one more step to grant victims of human rights violations perpetrated in other countries access to U.S. federal courts. From the point of view of the theory of international jurisdiction<sup>153</sup>, however, human rights litigation in U.S. civil courts demands further attention.

<sup>150</sup> For the concept of *dédoublement fonctionnel* in international law see Scelle, *Le phénomène juridique du dédoublement fonctionnel*, in: Schätzel/Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zum 70. Geburtstag* 324 (1956). For a discussion of the concept with regard to international human rights litigation under the ATCA see Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 *Georgia Journal of International and Comparative Law* 317, at 321 et seq. (1981).

<sup>151</sup> See, e.g., Stephens (note 128), at 581.

<sup>152</sup> Tomuschat (note 132), at 18. See also Rensmann, *Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit*, 1999 *IPRax* 268, at 273, who points out that in particular with regard to compensation for the large-scale commission of human rights violations, “national courts are overfaced by the task of reconciling the legitimate claims of all victims” and concludes that “[s]uch conflicts can only be adequately resolved by international compensation schemes”.

<sup>153</sup> See generally Mann (note 149); Mann, *The Doctrine of International Jurisdiction Revisited after 20 Years*, 186 *RdC* 9 (1986-III).

