Of Foreign Plaintiffs and Proper Fora: Forum Non Conveniens and ATCA Class Actions

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Of Foreign Plaintiffs and Proper Fora:  
*Forum Non Conveniens* and ATCA 
Class Actions  

*John F. Carella*  

The Alien Tort Claims Act ("ATCA") provides federal courts with jurisdiction over cases brought by aliens for violations of international law. In 1980, the Second Circuit, in *Filartiga v Pena-Irala*, held that the ATCA provides a cause of action for violations of international law. Since then, foreign plaintiffs have used the ATCA to bring cases alleging human rights violations into U.S. federal courts. Recent ATCA cases invariably involve claims based in the international law of human rights—one of the only areas of international law where consensus has produced standards enforceable in U.S. courts. Today, foreign plaintiffs often avail themselves of the federal class action device when bringing suit under the ATCA. Yet these class actions, and ATCA cases generally, have met considerable resistance from the judicial doctrine of *forum non conveniens*, which allows courts to resist jurisdiction when the convenience of the parties and "the ends of justice" dictate that the case should take place elsewhere.

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3 630 F2d 876 (2d Cir 1980).  

4 Id (finding that the allegation of deliberate torture perpetrated under the color of official authority violates norms of international law and thereby provides federal jurisdiction when an alleged torturer is found and served with process by an alien within the borders of the United States).  

5 See, for example, *Aguinda v Texaco, Inc*, 303 F3d 470 (2d Cir 2002), affg as modified, 142 F Supp 2d 534 (S D NY 2001) (dismissing an ATCA class action against Texaco for environmental damage caused in Peru and Ecuador); *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88 (2d Cir 2000) (allowing ATCA class action suit by survivors alleging human rights violations committed in Nigeria); *Sarei v Rio Tinto, PLC*, 221 F Supp 2d 1116 (C D Cal 2002) (dismissing ATCA class action against corporation alleging that it committed human rights violations in the course of its mining operation in Papua New Guinea).  

6 See, for example, *Kadic v Karadzic*, 70 F3d 232 (2d Cir 1995) (allowing a class action lawsuit under the ATCA for alleged violations of international law by the Bosnian-Serb entity "Srpska").  

Courts have often used the doctrine to dismiss cases brought by foreign plaintiffs who hope to avail themselves of advantageous U.S. laws.\(^7\)

One difficulty for courts arises from the clash between Congress's intent in passing the ATCA and the purpose of the *forum non conveniens* doctrine. In resolving this clash, the courts must balance considerations of judicial economy and foreign relations against the difficulties plaintiffs face in bringing human rights cases in inhospitable fora in other countries. In order to account for the special considerations of human rights class actions, several courts have tried to alter the weight given to the traditional factors in the *forum non conveniens* analysis or, alternatively, to add new considerations.\(^8\) As a result, there has been significant judicial uncertainty about applying the doctrine to ATCA class actions.\(^9\)

Another challenge to the application of *forum non conveniens* in ATCA class action cases stems from the class action mechanism itself. The *forum non conveniens* analysis gives little weight to the possibility of an unfavorable change in substantive law in the alternative forum and does not explicitly consider procedural matters at all. The only question in the traditional *forum non conveniens* analysis is whether the change in substantive law effectively leaves the plaintiff with "no remedy at all."\(^{10}\) Regarding remedies, however, the unavailability of the procedural device of the class action may alter the landscape as much as any nominally substantive law.\(^{11}\) This leaves courts with the additional conundrum of how, and whether, to consider the existence of the class action device in an alternative forum as part of the *forum non conveniens* analysis.

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\(^7\) See, for example, *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S D NY 1986) (holding that dismissal on *forum non conveniens* grounds was appropriate where the Indian legal system was better able to determine causation and liability, the nation had a substantial stake in the outcome, and a majority of the witnesses and evidence were present in India).

\(^8\) See, for example, *Wiwa*, 226 F3d at 101 (citing the interest of the United States in human rights litigation as an additional factor in the *forum non conveniens* analysis).

\(^9\) Compare *Wiwa*, 226 F3d at 106, with *Aguinda*, 303 F3d at 480 n 3 (declining to consider the *Wiwa* court's interpretation).


\(^{11}\) See, for example, *In re Agent Orange Products Liability Litigation*, 597 F Supp 740, 842 (E D NY 1984) ("Thus, while the class action is deemed procedural and distinct from substantive considerations for most purposes, it may become, in a case like 'Agent Orange,' the only practicable way to secure a remedy."). aff'd, 818 F2d 145 (2d Cir 1987).
This Comment will explore the special difficulties inherent in ATCA class actions and, based on the recent case law, will propose a unified approach to the *forum non conveniens* analysis. This approach incorporates both the importance of human rights cases and the special nature of the class action into the traditional *forum non conveniens* analysis. Such modification to, and clarification of, the doctrine is essential for both judges and lawyers involved in future human rights cases. This Comment will also highlight the importance of the class action device in ATCA human rights cases.

Although ATCA class actions constitute a relatively small portion of the caseload of federal courts, their resolution often involves hundreds or thousands of individual claims and the rights of large multinational corporations and private actors. This area of the law has grown suddenly and rapidly over the last twenty years and will most likely continue to do so.

Part I of this Comment will review the history of the ATCA and its companion, the Torture Victim Protection Act ("TVPA"), in order to highlight the main considerations and guiding principles of this body of law. Part II describes the doctrine of *forum non conveniens* and examines some of its basic components and difficulties. Part III considers the issues peculiar to class actions and what effect they have on *forum non conveniens* and ATCA cases. Part IV assesses the current state of ATCA class action law as reflected in recent cases. Part V proposes possibilities for a consistent *forum non conveniens* analysis in ATCA cases based on the considerations in the prior sections.

I. ATCA/TVPA LAW

Over the past twenty-three years the ATCA and the TVPA have become, respectively, the basis for jurisdiction and a cause of action in a wide range of human rights cases. This section discusses the history and expansion of the ATCA from its first application to human rights claims to its subsequent expansion through legislation and judicial action.

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See, for example, *Sarei*, 221 F Supp 2d 1116 (aggregating claims by thousands of Papua New Guineans against Rio Tinto, Ltd, a large multinational corporation) and *Wiwa*, 226 F3d 88 (handling hundreds of claims by Nigerian citizens against the actions of Royal Dutch Petroleum, the parent company of Shell Oil).

A. The Alien Tort Claims Act

The ATCA states that "[t]he 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." Although Congress passed the ATCA in the Judiciary Act of 1789, courts rarely invoked it until 1980, when the Second Circuit held that it provided jurisdiction and created a cause of action for individual claims of violations of the international law of human rights. The Filartiga case established that the "law of nations" referred to in the ATCA now includes the international law of human rights and, in particular, the law against torture. The court in Filartiga also stated that "[t]he constitutional basis for the [ATCA] is the law of nations, which has always been part of the federal common law," and that a nation has a "legitimate interest" in resolving disputes between those individuals within its borders, regardless of where the original wrong occurred.

Although Filartiga involved an individual plaintiff and defendant and a specific act of torture, the decision opened the door for the application of the class action device in human rights cases. Since Filartiga, the ATCA has provided federal courts with jurisdiction over human rights class actions originating in locations as distant and disparate as Bosnia, the Philippines, and Nigeria.

Four years after the decision, the holding of Filartiga encountered a potential roadblock in the fractured opinion of the D.C. Circuit in Tel-Oren v Libyan Arab Republic. In one of three

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14 Id.
16 See Filartiga, 630 F2d at 876.
17 See id at 880.
18 Id at 885.
19 Id.
20 Kadid v Karadzic, 70 F3d 232 (2d Cir 1995).
21 Hilao v Marcos, 103 F3d 767 (9th Cir 1996) (granting jurisdiction over a class of approximately ten thousand Filipinos allegedly tortured, executed, or "disappeared" by Philippine military groups during defendant's fourteen-year reign from 1972 to 1986).
22 Wiwa v Royal Dutch Petroleum Co, 226 F3d 88, 92 (2d Cir 2000) (granting jurisdiction over a class of citizens allegedly imprisoned, tortured, or killed by the Nigerian government at the instigation of Shell Oil Nigeria).
23 726 F2d 774 (DC Cir 1984).
concurring opinions, Judge Bork argued that courts should be wary of separation of powers principles and should find a cause of action under the ATCA only if one was explicitly provided by a body of law, such as an international treaty or a grant from Congress. This opinion directly contradicted Filartiga's holding that the ATCA itself created a cause of action. The Supreme Court denied certiorari, and the meaning of the ATCA remained in doubt, leading Congress to pass further legislation to clarify the matter.

B. The Torture Victim Protection Act of 1991

In 1991, Congress endorsed the ATCA human rights cases by passing the TVPA, which provided a specific cause of action for extrajudicial killing and torture. The preamble of the TVPA states that its purpose is "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights." The TVPA was, in part, a direct response to the concurring opinion of Judge Bork in Tel-Oren and his denial of the existence of any private right of action under the ATCA absent a specific grant from Congress. The TVPA and its legislative history show a clear congressional intent to support at least some human rights claims brought under the ATCA, essentially codifying the holding in Filartiga and ending any judicial debate about the ability of plaintiffs to bring such claims. The ATCA still covers actions for violations of the law of nations other than those alleging torture and extrajudicial killing. Even cases that fall under the TVPA still generally cite both the ATCA and the TVPA as a basis for jurisdiction.

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24 Id at 799, 801 (Bork concurring).
25 Id at 801 (Bork concurring) ("The assumption in Filartiga . . . that Congress' grant of jurisdiction also created a cause of action . . . seems to me fundamentally wrong and certain to produce pernicious results.").
27 28 USC § 1350.
28 Id.
30 The Senate report on the TVPA established that the ATCA itself should "remain intact" despite the TVPA so that it would continue to cover cases other than those based on torture or extrajudicial killing. Torture Victim Protection Act of 1991, S Rep No 102-249, 102d Cong, 1st Sess 5 (1991). The preamble of the Act itself refers to general U.S. obligations "under the United Nations Charter and other international agreements" to protect human rights. 28 USC § 1350.
Several aspects of international law support Congress's endorsement of the ATCA. The numerous international human rights resolutions and treaties,\(^1\) to which the TVPA preamble refers, and the international consensus over the establishment of the International Criminal Court\(^2\) ("ICC"), lend the approach validity. Although not currently a member of the ICC, the United States recognizes the international law doctrine of universal jurisdiction, which grants a state jurisdiction "for certain offenses recognized by the community of nations as of universal concern."\(^3\) This doctrine allows countries such as the United States to exercise jurisdiction individually in cases that members of the ICC would refer to the court.

C. Subsequent Expansion to Private Actors

In 1995, Kadic v Karadzic\(^4\) expanded the reach of the ATCA by allowing a suit against the self-proclaimed leader of an unrecognized Bosnian-Serb entity for human rights violations. Although the ATCA was never limited to state actors by its own terms, all prior cases under the ATCA had been brought against states or those acting under color of state law. In Kadic, the Second Circuit held that the modern law of nations does not confine itself to state action, and concluded that the ATCA therefore permitted suits against private actors.\(^5\) Since Kadic, plaintiffs have repeatedly used the ATCA to sue not only private individuals, but also national and multinational corporations that allegedly have committed, encouraged, or aided in human rights violations.\(^6\)

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\(^1\) See, for example, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Assembly Resolution 3452, 30 UN GAOR Supp (No 34) 91, UN Doc A/1034 (1975) (condemning torture or cruel punishment as a denial of the purpose of the U.N. Charter and "an offense to human dignity"); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (Dec 9, 1948); and Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec 10, 1948) (recognizing the inalienable rights of all humans and proclaiming the Universal Declaration of Human Rights to be a "common standard" of "all peoples and nations").


\(^3\) Restatement (Third) of Foreign Relations Law § 404 (ALI 1987).

\(^4\) 70 F3d 232 (2d Cir 1995).

\(^5\) Id at 239.

\(^6\) See, for example, Aguinda v Texaco, Inc, 303 F3d 470 (2d Cir 2002) (affirming dismissal of ATCA class action against Texaco for environmental damage caused in Peru and Ecuador); Wiwa v Royal Dutch Petroleum Co, 226 F3d 88 (2d Cir 2000) (allowing suit by survivors of executed Nigerian activist for human rights violations committed with the
II. FORUM NON CONVENIENS

ATCA class actions have encountered a number of hurdles, the most common of which is the judicial doctrine of forum non conveniens. This section discusses the history of the doctrine and notes the scholarly debate over its applicability to ATCA cases.

A. History of the Doctrine

The Supreme Court defined the doctrine of forum non conveniens as it applies to U.S. federal courts in the companion cases of Gulf Oil Corp v Gilbert\(^7\) and Koster v American Lumbermans Mutual Casualty Co.\(^8\) The Court explained that, in a situation where the defendant is amenable to process in at least two fora, "the doctrine furnishes criteria for choosing between them."\(^9\) When a case meets the general requirements of jurisdiction and venue, forum non conveniens allows a court to decline jurisdiction where it is in the interest of justice for the trial to occur elsewhere.\(^10\) It is a prerequisite for the doctrine that there be an adequate alternative forum, and the defendant bears the burden of raising the issue, suggesting an alternative forum, and showing the court why private and public interest factors weigh heavily in favor of dismissal.\(^11\) Otherwise, the plaintiff's choice of forum should be deemed conclusive.

In Gilbert, the Court listed the factors that a court should consider when ruling on a forum non conveniens dismissal.\(^12\) The Court divided the factors into the categories of private interest and public interest.\(^13\) The private interest factors include access to proof; availability of witnesses and the means to secure their attendance; proximity of the premises, if relevant to the action; and considerations of the enforceability of a judgment.\(^14\) The public interest factors include the congestion of the courts, the burden of jury duty, and the appropriateness of having localized controver-

\(^7\) 330 US 501 (1947).
\(^8\) 330 US 518 (1947).
\(^9\) Gilbert, 330 US at 507.
\(^10\) See id at 504.
\(^11\) See id at 506–08.
\(^12\) See id at 508–09.
\(^13\) Gilbert, 330 US at 508–09.
\(^14\) See id at 508.
sies litigated in their home forum. Because *Gilbert* involved a choice of two domestic fora (New York and Virginia), the Court did not describe how courts should weigh the factors when a foreign country provides the alternate forum.

The Court explained these factors and their application to a foreign forum in greater detail in 1981, in *Piper Aircraft Co v Reyno*, a case stemming from a plane crash in Scotland. Six Scottish subjects died in the crash, and an administratrix sued the Pennsylvania-based aircraft manufacturer. *Piper* firmly established that the decision of foreign plaintiffs to bring a case in a U.S. court should receive substantially less deference than the same decision by U.S. citizens or residents. It also stated that an unfavorable change in law (for example, when one forum has a more liberal standard of proof for a certain claim or allows bigger damage awards) is not a relevant consideration unless “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” The Court declined to emphasize any one part of the *forum non conveniens* analysis, stating that “[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable.” Instead, the Court left it to the lower courts to apply the doctrine and weigh the competing factors in individual cases.

B. Scholarly Debate on *Forum Non Conveniens* in ATCA Cases

Commentators have disputed the appropriateness of the *forum non conveniens* doctrine in ATCA human rights cases. Articles such as Kathryn Lee Boyd’s *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation* and Aric K. Short’s *Is The Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*
illustrate the wide range of opinions on the matter. Boyd describes the doctrine as an outdated test unsuited for the world of modern communication and unfairly weighted against victims in human rights cases, and claims that the federal statutory interests expressed in the TVPA override the concerns of convenience embodied in the doctrine. Short claims that the doctrine is not only well-suited for such cases, but is essential for the selection of claims appropriate for adjudication in the United States. This debate, however, has had little direct effect on courts, which continue to apply the doctrine to ATCA cases.

III. CLASS ACTION CONSIDERATIONS

The ATCA and the class action device are both peculiar features of the American legal system. Assuming both can be considered "favorable substantive law," Piper prohibits their absence from being a factor used to disqualify a potential forum absent a showing that the alternative remedy is "so clearly inadequate or unsatisfactory that it is no remedy at all." Courts can easily determine whether the absence of a specific substantive legal claim (such as a cause of action like the ATCA) will leave plaintiffs with no remedy by comparing U.S. law with the substantive law of the alternative forum. The effect of the absence of the class action device, however, is more difficult to assess. At first blush, it seems that the absence of an equivalent to Federal Rule of Civil Procedure ("Rule 23") would only delay and complicate matters by requiring joinder or separate lawsuits, and might not actually

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55 See also Matthew R. Skolnik, Comment, The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After Wiwa, 16 Emory Int'l L Rev 187 (2002) (arguing that Wiwa appropriately raises the bar for forum non conveniens dismissal in ATCA cases); Christopher M. Marlowe, Comment, Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America, 32 U Miami Inter-Am L Rev 295 (2001) (arguing for rejection of the forum non conveniens doctrine as a benefit "power domestic interests" use to "embrace[] the unaccountable"); and Margaret G. Perl, Note, Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations, 88 Georgetown L J 773 (2000) (arguing that the class action mechanism is vital to plaintiffs where international norms have been violated and should not be subjected to strict analysis of the requirements for certification).
58 See, for example, Aguinda v Texaco, Inc, 303 F3d 470 (2d Cir 2002) (affirming forum non conveniens dismissal of ATCA class action).
59 Piper, 454 US at 254.
60 See, for example, Phoenix Canada Oil Co Ltd v Texaco, Inc, 78 FRD 445, 455–56 (D Del 1978) (refusing to dismiss to Ecuador on forum non conveniens grounds when a legal remedy for plaintiffs claims cannot be shown to exist in Ecuador).
prevent plaintiffs from bringing their claim. Courts have held that such delay can render a forum inadequate, but only in extreme cases.\textsuperscript{61} It appears unlikely that any court would seriously take into account the absence of a class action if delay were the only question. Cases have shown, however, that the analysis can become far more complicated.

A. The Class Action and Remedies

\textit{Forum non conveniens} consideration of the class action device runs into immediate difficulties because Rule 23 is not technically "substantive law." A number of courts have ignored the difficulty of assessing the class action in \textit{forum non conveniens} decisions by labeling the class action "procedural."\textsuperscript{62} Other courts, however, have given the matter more careful consideration. \textit{Bodner v Banque Paribas}\textsuperscript{63} was an ATCA case brought by descendants of Holocaust victims against French financial institutions that allegedly failed to disgorge assets misappropriated during Nazi occupation. The \textit{Bodner} court noted that unfavorable substantive law was entitled to little weight in the \textit{forum non conveniens} analysis under \textit{Piper}, but stated that the absence of the class action device in France strengthened plaintiffs' claim that France would not be an adequate alternative forum.\textsuperscript{64} The court put the burden on the defendants to show that \textit{forum non conveniens} dismissal "would not strip plaintiffs of class-based relief or of a cause of action," and found that the defendants had not met that burden.\textsuperscript{65} In \textit{Sarei v Rio Tinto, PLC},\textsuperscript{66} a case involving human rights violations associated with a mine in Papua New Guinea, the federal district court in its adequacy test attempted to assess the differences be-

\textsuperscript{61} Compare \textit{Bhatnagar v Surrendra Overseas Ltd}, 52 F3d 1220, 1227–28 (3d Cir 1995) (holding that a potential twenty-five year delay in India's courts could render it an inadequate forum), with \textit{Eastman Kodak Co v Kaulin}, 978 F Supp 1078, 1085–86 n 6 (S D Fla 1997) (citing \textit{Bhatnagar} and holding that a five year delay in Bolivia did not render it an inadequate forum).

\textsuperscript{62} See, for example, \textit{Aguinda v Texaco, Inc}, 303 F3d 470 (2d Cir 2000) (dismissing case on \textit{forum non conveniens} ground despite absence of class action procedures in alternative forum of Ecuador); \textit{Blanco v Banco Industrial de Venezuela SA}, 997 F2d 974, 982 (2d Cir 1993) ("[S]ome inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate.") (internal citations omitted).

\textsuperscript{63} 114 F Supp 2d 117 (E D NY 2000).

\textsuperscript{64} See id at 132.

\textsuperscript{65} Id.

\textsuperscript{66} 221 F Supp 2d 1116 (C D Cal 2002).
between Rule 23 and Australia's analogous representative action.67
These cases demonstrate how different courts have considered
the effects of the class action device on the adequacy of an alter-
native forum without violating the framework of Piper.

A number of cases outside the *forum non conveniens* context
highlight the quasi-substantive nature of the class action. Al-
though the Rules Enabling Act forbids a Rule of Civil Procedure
from enlarging "any substantive right,"
68 courts have recognized
that in the context of remedies the class action is more than just
a procedural device.69 Courts have also noted that the class action
device often makes available a remedy to those otherwise unable
to obtain one.70 This view of the class action puts it within Piper's
requirement that a change in substantive law must lead to "no
remedy at all" in order for a court to give it weight in the *forum
non conveniens* analysis. Therefore, consideration of the availabil-
ity of the class action may be proper even under the strict lan-
guage of Piper.

B. Limited Fund Considerations

In the ATCA case of *Doe v Karadzic*,71 the court found that
the ATCA human rights class action at issue should be certified
as a Rule 23(b)(1)(B) "limited fund" class action.72 By its own
terms, Rule 23 allows certification of a "limited fund" class action
where separate actions would risk "adjudications with respect to
individual members of the class which would as a practical mat-
ter be dispositive of the interests of the other members not par-
ties to the adjudications or substantially impair or impede their
ability to protect their interests."73 If such would be the result of

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67 Id at 1175-78.
68 28 USC § 2072(b).
69 See *In re American Reserve Corp*, 840 F2d 487, 489 (7th Cir 1988) ("Substantively,
the class action permits the aggregation and litigation of many small claims that other-
wise would lie dormant.").
70 See, for example, *Amchem Products, Inc v Windsor*, 521 US 591, 617 (1997) ("[T]he
Advisory Committee had dominantly in mind vindication of the rights of groups of people
who individually would be without effective strength to bring their opponents into court at
all."); *Deposit Guaranty National Bank v Roper*, 445 US 326, 338 (1980) ("[T]he class action procedure . . . may motivate [plaintiffs] to bring cases that
for economic reasons might not be brought otherwise."); *In re Agent Orange Product Li-
ability Litigation*, 597 F Supp 740, 842 (E D NY 1984) ("[W]hile the class action is deemed
procedural and distinct from substantive considerations for most purposes, it may become
the only practicable way to secure a remedy [in certain cases].").
71 176 FRD 458 (S D NY 1997).
72 See id at 462–63.
73 FRCP 23(b)(1)(B).
separate actions, dismissal to a forum that does not have a class action or analogous device would almost certainly result in "no remedy" for many members of the class. The first few plaintiffs to bring suit individually would exhaust the potential fund, leaving subsequent plaintiffs with no chance of obtaining a remedy. The Rule 23(b)(1) action provides a practical solution to this problem by dividing the fund equitably between all of the plaintiffs.

The Supreme Court has also identified the Rule 23(b)(1) action as one where the class action device is more clearly needed than in the context of the Rule 23(b)(3) action.\textsuperscript{7} The (b)(3) class action is motivated by common questions of law or fact and "fair and efficient adjudication," rather than concerns about the availability of remedies.\textsuperscript{25} While Karadzic dealt with a situation where numerous plaintiffs each sued a single individual defendant for large damage awards, that court also noted that ATCA cases often have led to multimillion dollar verdicts.\textsuperscript{76} It requires only a glance at American mass tort litigation to see that even a corporate defendant might have insufficient means to satisfy all the claims at issue in an ATCA case. These observations strengthen the conclusion that the availability of a class action procedure is a proper subject of the forum non conveniens assessment of an adequate alternative forum.

IV. ATCA CLASSES UNDER FORUM NON CONVENIENS

Three points from the Piper decision have proved to be the most challenging for courts applying forum non conveniens to ATCA class actions. First, there is the distinction between foreign plaintiffs and citizen or resident plaintiffs.\textsuperscript{77} When litigation in the plaintiff’s home country is impossible or dangerous, courts must decide how much deference to give to a non-citizen’s choice between two inconvenient fora.\textsuperscript{78} Second, Piper flatly stated that less favorable substantive law is never a basis for finding a forum inadequate unless the remedy available is really no remedy at all.\textsuperscript{79} Determining exactly what remedy would be available to

\textsuperscript{74} Amchem Products, Inc v Windsor, 521 US 591, 615 (1997).
\textsuperscript{75} FRCP 23(b)(3).
\textsuperscript{76} See Doe v Karadzic, 176 FRD at 462–63.
\textsuperscript{77} See Piper, 454 US at 255.
\textsuperscript{78} See, for example, Sarei, 221 F Supp 2d at 1175–78 (discussing the possibility of Australia, rather than the United States or the plaintiff’s home forum of Papua New Guinea, as an alternative forum).
\textsuperscript{79} 454 US at 254.
plaintiffs in a foreign jurisdiction has proved difficult for federal
courts, especially when confronted with conflicting evidence about
the procedures and practices of foreign courts.\textsuperscript{80} Third, lower fed-
eral courts must work within the Supreme Court’s statement in
\textit{Piper} that courts should not allow any one factor to control the
\textit{forum non conveniens} analysis.\textsuperscript{81} This has proved difficult for
courts that perceive a need to apply a slightly different \textit{forum non
conveniens} analysis to ATCA class actions.\textsuperscript{82}

A. Recent Case Law

Several recent cases have dealt with all of these issues, though
without articulating a clear and unified standard. One recent Second Circuit
decision, \textit{Aguinda v Texaco, Inc},\textsuperscript{83} affirmed
dismissal of an ATCA class action on \textit{forum non conveniens}
grounds.\textsuperscript{84} The case was an ATCA class action brought by citizens
of Peru and Ecuador alleging that Texaco had caused environ-
mental damage and personal injuries in violation of international
law.\textsuperscript{85} The court found that general allegations of corruption and
the absence of the class action device did not render Ecuador an
inadequate alternative forum, and that the \textit{Gilbert} factors fa-
vored dismissal.\textsuperscript{86} The court made its dismissal conditional on
Texaco waiving its statute of limitations defense in order to allow
plaintiffs more time to join parties in the absence of the class ac-
tion device in Ecuador.\textsuperscript{87}

In the case of \textit{Wiwa v Royal Dutch Petroleum Co},\textsuperscript{88} an ATCA
suit brought against the parent company of Shell Oil Nigeria for
Shell’s alleged complicity in human rights violations perpetrated
by the Nigerian government, the Second Circuit reversed the dis-

\textsuperscript{80} See, for example, \textit{Sarei}, 221 F Supp 2d at 1167 (leaving as unresolved due to con-
flicting evidence the question of whether Papua New Guinea’s representative action is
analogous to FRCP 23) and \textit{In re Union Carbide Corp Gas Plant Disaster at Bhopal, India
in December, 1984}, 634 F Supp 842, 848–52 (S D NY 1986) (speculating as to the nature of
the “representative” suit in India and the possibility that the legislature may extend it in
this case, or enact specific laws pertaining to class actions).

\textsuperscript{81} See 454 US at 249–50.

\textsuperscript{82} See, for example, \textit{Wiwa v Royal Dutch Petroleum Co}, 226 F3d 88, 101 (2d Cir 2000)
(reversing the district court’s \textit{forum non conveniens} dismissal on the ground that it did not
adequately consider the United States’s interest in human rights litigation or the proper
defense due to plaintiffs as U.S. residents).

\textsuperscript{83} 303 F3d 470 (2d Cir 2002).

\textsuperscript{84} Id at 554.

\textsuperscript{85} Id at 537.

\textsuperscript{86} See id at 478–80.

\textsuperscript{87} See \textit{Aguinda}, 303 F3d at 478–79.

\textsuperscript{88} 226 F3d 88 (2d Cir 2000).
district court’s *forum non conveniens* dismissal of the case. The court found that the passage of the TVPA evidenced a new policy favoring adjudication in U.S. courts of cases involving violations of the law of nations, and held that this policy was an important factor in the *forum non conveniens* analysis of ATCA cases. The court defined this factor as “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 held that the TVPA and the policy it expressed did not nullify or even impair *forum non conveniens*, but “communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.”

Two recent district court decisions, *Eastman Kodak Co v Kavlin* and *Sarei v Rio Tinto, PLC*, denied motions to dismiss for *forum non conveniens*, although one of them, *Sarei*, dismissed the claims under the political question doctrine. The *Eastman Kodak* case involved the alleged detention on false charges of a Kodak employee in Bolivia. The court found that, because the complaint alleged specific acts of judicial corruption orchestrated by the defendant, Bolivia would be an inadequate alternative forum. The *Eastman Kodak* court also found itself compelled to hear the claims once it established that they were covered by the ATCA, quoting former Chief Justice John Marshall’s statement that the judiciary has “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”

The *Sarei* court was less influenced by the fact that jurisdiction had been conferred under the ATCA, primarily because the Department of State had made a specific expression of policy stating that adjudication of this particular case might imperil an ongoing peace process and harm U.S. foreign relations. The case involved the actions of a large multinational corporation in conjunction with the civil and military power of Papua New Guinea.

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80 Id at 108.
81 See id at 105–06.
81 Id at 101.
82 *Wiwa*, 226 F3d at 106.
83 978 F Supp 1078 (S D Fla 1997).
84 221 F Supp 2d 1116.
85 Id at 1208–09.
86 *Eastman Kodak*, 978 F Supp at 1080–82.
87 See id at 1085–86.
88 Id at 1095, quoting *Cohens v Virginia*, 19 US 264, 404 (1821).
89 See *Sarei*, 221 F Supp 2d at 1205.
over a twenty-five year period. As such, the case fell well within the protected realm of internal politics. What is most notable about Sarei is the depth of the court’s analysis of the procedural and substantive differences between the four potential fora in that case, particularly its assessment of class actions in each of the four fora. For example, in its assessment of Papua New Guinea as an alternate forum, the court separately considered the nature of Papua New Guinea’s substantive law, class action mechanism, contingency fee contracts, and discovery in determining whether plaintiff’s claims were cognizable in that forum. This process required substantial testimony on the laws and procedures of Papua New Guinea. The court put great care into its attempt to determine whether any of the alternative fora were in fact an adequate substitute for litigation in the United States.

In Abdullahi v Pfizer, Inc, the district court dismissed an ATCA class action on forum non conveniens grounds and noted that the plaintiffs were entitled to no greater deference than other plaintiffs receive because they had alleged violations of international law. The complaint in the case alleged that Pfizer intentionally experimented on and under-medicated adolescent citizens of a Nigerian town in an attempt to skew the results of a study so that Pfizer could get approval for Trovan, a potentially lucrative new antibiotic. The court found, for the purposes of the forum non convenies motion, that the Nigerian government and Pfizer jointly participated in the event, but that the plaintiffs’ allegations of corruption in the home forum were general and conclusory (as opposed to the specific complaints alleged in Eastman Kodak.) The court thus conditionally dismissed the action with the expectation that it would proceed in a Nigerian court.

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100 Id at 1120–30.
101 Id at 1165–66.
102 Id at 1167.
103 *Sarei*, 221 F Supp 2d at 1167–69.
104 Id at 1170.
105 See id at 1167 (discussing the testimony of different experts on the nature of the class action in Papua New Guinea).
106 2002 US Dist LEXIS 17436 (S D NY).
107 See id at *31 n 2.
108 See id at *1–3.
109 See id at *2, 17–18.
111 See id at *36–38.
These decisions, along with other recent cases on *forum non conveniens* and the ATCA, provide a basis for articulating a new and more detailed standard for the *forum non conveniens* analysis in ATCA class actions.

B. Current Judicial Deference to ATCA Claims

It is clear that some courts have departed from the strict analysis of *Piper* in light of considerations peculiar to ATCA class actions. The Second Circuit in *Wiwa* cited "[t]he interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights" as a "significant" consideration in the *forum non conveniens* analysis. This is a public interest factor not mentioned in *Gilbert* or *Piper* that could often tip the balance against dismissal in ATCA cases. In *Sarei*, the district court held that the absence of class actions, contingency fee counsel, and certain discovery rules did not render Papua New Guinea an inadequate forum, but did weigh against dismissal as elements of private and public interest in the *Gilbert* analysis. The court tried to determine whether the procedural safeguards in Papua New Guinea and Australia were an adequate substitute for a class action in the United States. In *Aguinda*, the Second Circuit affirmed a dismissal for *forum non conveniens* despite the absence of class actions in Ecuador, but modified the district court’s judgment to ensure that plaintiffs could actually bring their claim by requiring Texaco to waive defenses based on the statute of limitations in Ecuador. The specific purpose of this waiver was to prevent plaintiffs from being prejudiced by the absence of the class action in Ecuador, and to enable to them bring a comparable lawsuit under the Ecuadorian system. In the procedural context of the statute of limitations, at least, the *Aguinda* court showed a concern for the ability of plaintiffs to bring their claims in a foreign forum, and acknowledged that the absence of the class action device can be prejudicial.

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112 *Wiwa*, 226 F3d at 101.
113 221 F Supp 2d at 1171–72.
114 Id at 1167, 1177.
115 303 F3d at 480.
116 See id at 478–79 (requiring defendant to waive statute of limitations defense because of the "formidable administrative task" presented by requiring signed authority to be obtained for each individual plaintiff under the Ecuadorian system, which does not have a class action mechanism).
These cases show an increasing effort among federal courts to ensure that plaintiffs can bring human rights class actions in some forum. While the Abdullahi court stated that such claims should receive no greater deference than other arguably foreign claims, it took pains to ensure that plaintiffs could in fact bring the action in Nigeria by conditioning dismissal on Pfizer's acceptance of process in Nigeria and waiver of the statute of limitations defense in that forum. Thus, even a court that denies any deference to ATCA claims may take care that such claims be preserved in some forum.

V. PROPOSALS FOR A CONSISTENT ANALYSIS

As the foregoing analysis shows, the current application of the forum non conveniens doctrine to ATCA class action cases is inconsistent and uncertain. Some courts have acknowledged that they should treat human rights cases differently from ordinary tort claims, and human rights class actions differently from other mass tort litigation. Even if one accepts that there should be some special treatment of ATCA cases, the question remains as to how a court can take these differences into account in the forum non conveniens analysis and still retain the ultimate value of the doctrine. A change in the characterization of deference to plaintiff's choice, the treatment of the class action mechanism, and the consideration of human rights concerns will go far toward creating a more consistent and useful forum non conveniens doctrine.

This Comment does not intend to create a new or substitute forum non conveniens analysis, but rather to resolve the inconsistencies and difficulties that have arisen when it is applied to ATCA cases. The value of this approach is that it preserves the doctrine as the outgrowth of judicial precedent but tailors it for consistent application to a new problem in the law. The goal is not to change the outcome in any individual case, but to refine and improve the analysis so that courts can handle future cases more consistently and predictably.

A. Residency and Citizenship Distinctions

The distinction between foreigners and citizens or residents for the purposes of forum non conveniens has been undisputed

118 See, for example, Wiwa, 226 F3d at 101 (holding the interest of the United States in the law of human rights to be a "significant consideration").
since \textit{Piper}.\textsuperscript{119} A foreign plaintiff’s choice of forum deserves less
deferecence than the forum selection of a U.S. citizen or resident.\textsuperscript{120} Recent cases have shown, however, that there may be more nu-
anced gradations of deference, many of which should be central to the \textit{forum non conveniens} analysis in ATCA cases.

A potential second level of distinction is between citizens and residents. In \textit{Wiwa}, the Second Circuit instructed the district
court “that deference increases as the plaintiff’s ties to the forum
increase,” and held that the lower court should have given more
deference to a non-citizen resident’s choice of forum.\textsuperscript{121} The Second Circuit explained that this was not a matter of bias, but was in-
tended as an approximation of how severely a change of forum
would inconvenience the plaintiff.\textsuperscript{122} The choice of the non-citizen
resident should still receive much deference, however, as any
resident plaintiff is likely to be inconvenienced by having to bring
suit in another country.

Another possible level of distinction of great importance in
ATCA cases is between foreign plaintiffs who can return to their
home forum to litigate their claims and those who either cannot
return for political reasons or have no meaningful access to their
home courts. Since an adequate alternative forum is a prerequi-
site to \textit{forum non conveniens},\textsuperscript{123} this distinction is between those
who can choose either a home or foreign forum and those who
must choose one of two remote fora. In \textit{Lacey v Cessna Aircraft
Co},\textsuperscript{124} which applied \textit{forum non conveniens} to a set of facts that
did not involve an ATCA claim, the Third Circuit suggested that
the plaintiff choosing between foreign fora should be given
greater deference because neither of the alternative fora was the
plaintiff’s home.\textsuperscript{125} In that case the plaintiff, an Australian injured
in a British Columbian air crash, had to choose between the two
inconvenient fora of Pennsylvania (where the plane and its alleg-
edly faulty exhaust system had been designed manufactured) and
British Columbia (where the crash occurred).\textsuperscript{126} While this choice
had nothing to do with the political climate or corruption of the

\textsuperscript{119} See, for example, \textit{Bodner}, 114 F Supp at 131 (noting appropriate deference to
American plaintiff’s choice of home forum).
\textsuperscript{120} See \textit{Piper}, 454 US at 255–56.
\textsuperscript{121} 226 F3d at 101.
\textsuperscript{122} See id at 102.
\textsuperscript{123} See \textit{Gilbert}, 330 US at 506–07.
\textsuperscript{124} 862 F2d 38 (3d Cir 1988).
\textsuperscript{125} Id at 45–46.
\textsuperscript{126} Id at 45.
judiciary in Australia, the plaintiff was in a similar position to those ATCA plaintiffs for whom the home forum is unavailable. As in every other *forum non conveniens* analysis, the court also gave some deference to the plaintiff's choice to litigate in the United States rather than elsewhere.

The *Wiwa* court objected to the district court's ruling on the grounds that the district court had not adequately considered the inconvenience to plaintiffs of taking the case to a British forum that was also foreign to them.\(^{127}\) When coupled with the *Wiwa* court's concern for proper deference to a resident plaintiff's choice of forum, this objection hints at a distinction similar to that made in *Lacey*. The court in *Sarei* also encountered this difficulty in weighing four different fora (Papua New Guinea, Australia, the United Kingdom, and the United States), and rejected the foreign fora other than Papua New Guinea more quickly than it did Papua New Guinea itself.\(^{128}\)

These cases suggest an evolution of the foreign plaintiff distinction into four levels of deference: 1) U.S. citizens (most deference); 2) non-citizen U.S. residents (much deference); 3) foreign plaintiffs for whom the home forum is not an option (some deference); and 4) foreign plaintiffs who could potentially litigate in their home forum (least deference). Although no case has expressly made this four-part distinction, it follows naturally from the current case law. While it might be argued that such an enumeration would restrict the flexibility of the *forum non conveniens* doctrine, the *Wiwa* court's statement that these distinctions correspond with possible inconvenience sufficiently answers that objection.\(^{129}\) Additionally, any loss of flexibility would be offset by across-the-board clarity, which is currently lacking.

Courts should adhere to the gradations of deference due to a plaintiff's choice under the rationale of *Lacey* and *Wiwa*, and should treat these gradations as an approximation of inconvenience, not as a rigid rule. By doing so, courts could retain flexibility while adding consistency to the doctrine of *forum non conveniens*.

\(^{127}\) 226 F2d at 106–07.

\(^{128}\) See 221 F Supp 2d at 1165–78.

\(^{129}\) See 226 F2d at 102.
B. Substantive Law and the Class Action

Courts should consider the availability of a class action device and other procedural safeguards in every ATCA forum non conveniens analysis. In the context of human rights cases brought by numerous, usually poor, plaintiffs against a limited fund, the availability of the class action device may be as important as a substantive legal remedy for many plaintiffs. Just as with the analysis of unfavorable substantive law in Piper, a court should not find a forum inadequate simply on the basis that it lacks these safeguards, as long as there exists some reasonable remedy. If the court finds that the absence of the class action device or a reasonable substitute will effectively deprive many plaintiffs of a remedy, it should find the alternative forum inadequate. While this approach may require more thorough analysis of the alternative forum in the early stages of trial, it has the best chance of achieving “the interest of justice” that Gilbert posited as the goal of the forum non conveniens doctrine.

The Sarei case illustrates how a court might approach the problem of weighing the availability of a class action procedure in the forum non conveniens analysis. In determining the adequacy of Papua New Guinea as an alternative forum, the court took into account the testimony of both the plaintiffs’ and the defendant’s experts on Papua New Guinean legal procedure, as well as a decision by the High Court of Australia. Although this inquiry proved inconclusive in Sarei, the methods used by that court provide an example for other courts that conduct the analysis. As more courts attempt to weigh the differences between the Rule 23 class action and its foreign counterparts, the decisions will produce a body of information that will make future determinations easier.

That the unavailability of the class action device may deprive plaintiffs of any remedy, particularly in a “limited fund” situation, cannot be denied. A court conducting the adequate alternative forum test of forum non conveniens ought to make the availability of the class action device part of its consideration. This additional consideration easily fits within the Piper frame-

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130 Piper, 454 US at 254.
131 See Gilbert, 330 US at 504.
132 Sarei, 221 F Supp 2d 1116.
133 Id at 1167–70.
134 See Part III A.
work, since the deprivation of a remedy without the class action
device is closely analogous to absence of any substantive law
remedy.

C. The Importance of Human Rights

_Forum non conveniens_ is a discretionary doctrine intended to
give federal courts a degree of flexibility in their jurisdiction.\(^{135}\) As
such, the doctrine should naturally be receptive to additional fac-
tors. Commentators have argued, however, that changes such as
those made by the _Wiwa_ court (adding the interest of the United
States in adjudicating human rights claims as a significant con-
sideration) substantially weaken the doctrine.\(^ {136}\) The difficulty
arises when, as the Supreme Court warned in _Piper_, too great an
emphasis on any one factor detracts from the doctrine's flexibility
and usefulness.\(^ {137}\)

Courts must seek out a balanced approach to the _forum non
conveniens_ analysis in ATCA class actions in order to retain the
value of the doctrine. An important aspect of such an approach to
the analysis would be to set the U.S. interest in adjudicating inter-
ternational human rights cases discussed in _Wiwa_ against the
acknowledgement that, as shown from the language of the TVPA,
that interest arises from international obligations. As all mem-
bers of the international community presumably share these ob-
ligations, courts cannot treat the U.S. interest in these cases as
exclusive. The establishment of the International Criminal Court,
which allows for criminal actions based on many of the same hu-
man rights violations covered by the ATCA,\(^ {138}\) evinces the inter-
national commitment to litigating these cases.\(^ {139}\) The _forum non
conveniens_ doctrine could serve the purpose of distributing the
burden of human rights claims among those nations capable of
shouldering them. Thus, the only preference given to human
rights claims under _forum non conveniens_ would be a heightened
concern that the case actually be litigated in some forum. As

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\(^{135}\) See _Gilbert_, 330 US at 507 ("The principle of forum non conveniens is simply that a
court may resist imposition upon its jurisdiction even when jurisdiction is authorized by
the letter of a general venue statute.").

\(^{136}\) See, for example, _Skolnik, Comment_, 16 Emory Intl L Rev at 222–25 (arguing that
the factors of plaintiff's residence and U.S. interest in human rights cases may "dwarf"
other factors in the _forum non conveniens_ analysis) (cited in note 55).

\(^{137}\) 454 US at 249–50.

\(^{138}\) See _Rome Statute of the International Criminal Court_, UN Doc A/CONF.183/9 (July
17, 1998).

\(^{139}\) See Part I B.
stated by the Wiwa court, such a concern would not imbalance the analysis in such a way as to unduly favor the U.S. forum or abolish *forum non conveniens* in ATCA cases.\textsuperscript{140}

It is certainly conceivable that changes in domestic or international law will someday expand the scope of the ATCA beyond human rights claims. In such cases, the concerns particular to human rights would not apply except insofar as the U.S. and international community reached a similar consensus on the importance of the issue at stake and had clearly articulated a body of applicable law.

**CONCLUSION**

A consistent approach such as that described above will benefit not only district court judges, but also potential plaintiffs and defendants in ATCA class actions. If courts make the *forum non conveniens* doctrine in these cases clearer, plaintiffs whose claims would not survive dismissal may be less likely to go through the trouble of certifying a class and attempting to gain access to U.S. courts. Such a situation would reduce the burden of cases flowing into federal courts (always a goal of *forum non conveniens*), although the court's approach might require more work in an individual case.

All of the elements of the approach described in this Comment—the four-tier deference analysis, the consideration of whether the absence of a class action leads to no "remedy," and the balancing of international interests in human rights litigation—have already been included in *forum non conveniens* decisions to some extent. The unified approach proposed here merely acknowledges the evolution that the doctrine has undergone in adapting to the relatively new ATCA class action. If it continues to adapt to such changes in the legal landscape, the doctrine of *forum non conveniens* will continue to serve a useful purpose for years to come.

\textsuperscript{140} 226 F3d at 106.