PROCEDURAL DISMISSALS UNDER THE ALIEN TORT STATUTE

Rosaleen T. O'Gara*

In recent years, foreign plaintiffs have paired with individual do-gooders and international nonprofits to step up litigation in U.S. courts under the 1789 Alien Tort Statute (ATS). Burmese villagers and Nigerian environmental-justice advocates are among the plaintiffs trying to use the ATS to hold multinational corporations responsible for human rights abuses in foreign countries. The ATS employs simple, direct language to provide for U.S. jurisdiction over tort claims that violate the law of nations, but its interpretation in the context of corporate liability has raised a number of complicated and difficult legal issues for U.S. courts. Instead of addressing these difficult issues head on, some courts are using procedural doctrines to dismiss the cases and to avoid untangling difficult substantive issues. This Note argues that the clear language of the ATS should provide a procedural "trump" to assist these claims in overcoming procedural hurdles and reaching substantive determinations by courts. Part I of this Note examines the history and current scope of the ATS. Part II goes on to discuss the use of procedural doctrines as a proxy for dealing with complicated legal substance. Part III provides a close look at a number of the procedural doctrines used by federal courts to dismiss ATS cases, including forum non conveniens, heightened pleading standards, comity, and the act-of-state doctrine. In Part IV, this Note examines whether the use of these procedural doctrines to dismiss ATS cases is justified. It concludes that, given the Act's direct language, courts should aim to address the merits of cases under the ATS instead of dismissing them on procedural grounds, thus providing ATS plaintiffs with access to justice and defendants with guidance on acceptable actions abroad.

INTRODUCTION

A surge in lawsuits against corporate defendants under the Alien Tort Statute ("ATS" or "the Act") over the past decade[1] is making multinational

---

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2011. Thanks to Professor David Marcus for his helpful comments and guidance on this Note, as well as to the editorial staff of the Arizona Law Review.

1. Over one hundred ATS cases have been brought against corporate defendants, most since 2000. Jonathan Drimmer, *How to Steer Clear of the U.S. Human Rights Litigation Trend*, 210 ENGINEERING & MINING J. 66, 66 (2009).

corporations nervous. Suits against U.S. companies acting abroad that attempt to hold those companies responsible for human rights abuses have the potential to cost parties millions of dollars. But it is not clear that corporate defendants have much to be nervous about. Despite the surge of litigation in this realm, some federal courts are dealing with ATS suits against corporations by dismissing them on procedural grounds before they ever reach the merits of the cases.

These procedural dismissals are reminiscent of a phenomenon in American law: where substantive law is contentious and uncertain, courts have occasionally relied on procedural safeguards either to address or avoid addressing difficult issues.[2] This may be because, despite some Supreme Court decisions under the ATS, there is very little guidance from the Court on substantive questions, such as what constitutes an international norm under the Act or how to assess vicarious liability for corporate actors. Therefore, instead of decisions that define the Act's substantive scope, some ATS decisions focus on classic procedural issues such as forum non conveniens, heightened pleading standards, or exhaustion and comity. Federal courts that rely on these grounds to dismiss ATS cases avoid tricky questions about the application of international law in domestic courts.

These procedural dismissals are troublesome because they not only prohibit plaintiffs from recovering, they also provide little guidance as to what corporate actions are acceptable. They also seem particularly odd in light of the Act's language, which seems to require federal courts to exercise jurisdiction despite these procedural issues. The language of the Act orders courts to expand traditional notions of subject matter jurisdiction and implicitly encourages courts to move beyond questions of procedure in situations where human rights are at stake.[3] The lack of ATS decisions on the tricky substantive issues seems to ignore the breadth of the Act's expansive language. In the end, this leaves both corporate defendants and plaintiffs in the dark about who can and will be held responsible for human rights violations that may be attributed, at least in part, to multinational corporations.

This Note will examine the phenomenon of procedural dismissal under the ATS and argue that procedural dismissals in lieu of substantive decisions on these claims harm both plaintiffs and defendants. Part I describes the history of the ATS and background to the Act's current applications. Part II describes the use of procedure as a proxy for substance in ATS jurisprudence. Part III examines the various procedural approaches used to dismiss ATS claims, including forum non conveniens, heightened pleading standards, and political deference doctrines.

---

2. *See, e.g.*, Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994) (discussing the Warren Court's assertion of jurisdiction over civil rights cases); Jenny Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008) (discussing procedural dismissals in terror cases).

3. "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." Alien's Action for Tort, 28 U.S.C. § 1350 (2006) (commonly referred to as the "Alien Tort Statute").

Finally, Part IV analyzes whether procedural dismissals under the ATS are justified and concludes that, in light of the ATS's expansive language, procedural issues should not prevent courts from reaching substantive questions.

I. THE ALIEN TORT STATUTE

The ATS, first passed in 1789, provides 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."[4] In order to present a claim under the ATS, a plaintiff must: be an alien, allege a tort, and demonstrate that the defendant committed the tort in violation of the law of nations or a treaty of the United States.[5] The third element—the violation of the law of nations or treaties—is one issue that has caused many problems for judicial interpretation.[6]

The ATS is a strange creature in American legal jurisprudence. For nearly 200 years, the Act lay dormant until its resurrection in *Filartiga v. Peña-Irala* in 1980.[7] The plaintiffs in *Filartiga* were Paraguayan citizens that alleged that the inspector general of police in Asunción, Paraguay—who was served while in the United States on a visitor's visa—tortured and killed their son.[8] The court found that, because torture is a clear violation of international law, the ATS provides federal jurisdiction whenever an alleged torturer is found and served with process by an alien within the United States.[9] The renewed use of the statute firmly established that U.S. courts have jurisdiction over torts that occur outside U.S. borders.

The Act's scope was expanded in 1995 with the Second Circuit Court of Appeals' ruling in *Kadic v. Karadžić*.[10] There the court held that a defendant did not need to be a government official to be liable under the ATS.[11] In *Kadic*, residents of Bosnia–Herzegovina filed suit against an individual who had proclaimed himself president of the State.[12] The plaintiffs claimed that he was responsible for repeated acts of genocide; rape; forced prostitution and impregnation; torture and other cruel, inhuman, and degrading treatment; assault and battery; gender and ethnic inequality; summary execution; and wrongful death.[13] Kadic was in the United States as an invitee of the United Nations when he was personally served with a summons and complaint.[14] The court accepted that Kadic was not a representative of a true state, but found no requirement that the

---

4. *Id.*
5. *Id.*
6. *See, e.g.*, Nilay Vora, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARV. INT'L L.J. 196 (2009).
7. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
8. *Id.* at 876.
9. *Id.* at 877.
10. Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995).
11. *Id.*
12. *Id.* at 236.
13. *Id.* at 236–37.
14. *Id.* at 237.

defendant be a state actor.[15] Instead, the Second Circuit found that torture was a violation of "the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[16] Thus, private actors that were found guilty of aiding and abetting state actors in human rights violations could be held liable under the Act.[17]

The final step in defining the current scope of the ATS was including liability for corporate actors. While early cases under the ATS focused on individual perpetrators and aiders and abettors of torture, the most recent wave of lawsuits and decisions have addressed abuses by corporations acting abroad.[18] After *Kadic*, it was no great leap for federal courts to expand liability from individuals to corporations. In *Doe v. Unocal Corp.*, Burmese citizens claimed that Unocal and other oil and gas companies were complicit in, provided funding for, and benefitted from the Burmese government's use of forced labor.[19] The allegations were made in the context of a pipeline project that was a joint venture between the company and the government.[20] *Unocal* eventually settled, but not before the U.S. District Court for the Central District of California found that a corporation could be treated as a private actor under the ATS.[21]

Thus, within just a few decades, the ATS went from a two-hundred-year period of hibernation to an era of tremendous activity, opening the door for liability against corporations acting internationally in concert with foreign governments to violate human rights. *Kadic* and *Unocal*, recognizing claims against corporate defendants, made it possible for private noncitizens to bring cases against multinational corporations benefitting from human rights abuses abroad.

Since *Unocal*, plaintiffs have lined up to bring actions against solvent corporate defendants. Over one hundred ATS cases have been brought against corporate defendants—most since 2000.[22] Multinational corporations are soliciting legal advice and guidance to avoid this high-stakes litigation, since ATS suits can cost parties tens of millions of dollars.[23]

In conjunction with the expansion of the Act's scope, the use of procedural dismissals by federal courts has also grown. Perhaps because of the relatively recent recognition of the immense reach of liability under the Act, some

---

15. *Id.* at 239.
16. *Id.*
17. *Id.* at 236.
18. *See* Romero v. Drummond Co., 480 F.3d 1234 (11th Cir. 2008) (the first case in which a jury issued a decision against a corporation); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2002) (recognizing vicarious liability for a corporation's complicity with the violation of international rights by foreign governments by imposing liability on "aiders and abetters" of violators of international law); Aguinda v. Texaco, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
19. Doe v. Unocal Corp., 963 F. Supp. 880, 885 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).
20. *Id.*
21. *Id.* at 880.
22. Drimmer, *supra* note 1, at 66.
23. *Id.* at 66–67.

courts have responded to the flood of cases through one dismissal after another. These dismissals by federal district and appellate courts are primarily based on the doctrines of forum non conveniens,[24] political question,[25] and comity.[26] Courts are also applying heightened pleading standards to federal ATS suits.[27]

II. USE OF PROCEDURE AS PROXY FOR SUBSTANCE

Using procedural safeguards to dispose of cases in the context of highly contentious or uncertain areas of the law is nothing new. At the root of the phenomenon lies the question of what constitutes procedure and what constitutes substance—an issue that has been the source of legal debate for hundreds of years.[28] While that discussion is outside the scope of this Note, its impact on federal court decisions is important. Procedure has been used by federal courts to both expand and constrict review on the merits of contentious legal issues. For example, under the Warren Court during the civil rights era, federal jurisdictional doctrines were overhauled in order to "eliminate obstacles to . . . review and to enlist the help of lower federal courts in hearing the mounting number of claims that threatened to overwhelm [federal courts'] capacity to intervene."[29] In that context, the Supreme Court took unprecedented action to limit the ability of state courts to insulate their decisions from federal review, and made it possible for federal courts to rule on substantive issues of discrimination by substantially changing the doctrines of abstention and exhaustion.[30]

Procedure has also been used to constrict review of the merits of a case. In the detention cases resulting from the "war on terror," for example, courts summarily dismissed cases on procedural issues such as jurisdiction, political

---

24. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., 578 F.3d 1283 (11th Cir. 2009); Mastafa v. Australian Wheat Bd., No. 07-cv-7955, 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008); Carijano v. Occidental Petroleum Corp., 548 F. Supp. 2d 823 (C.D. Cal. 2008); Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005); Abdullahi v. Pfizer, Inc., No. 01-cv-8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005).

25. *See, e.g.*, Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007); Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005).

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

27. *See, e.g.*, *Aldana*, 416 F.3d at 1247–50; *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006).

28. Scholars argue that on one side there is value in procedure in its own right, while others argue that the value of procedure only exists insofar as it advances substance. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (addressing these different arguments more thoroughly). Martinez, in her article *Process and Substance in the "War on Terror,"* provides a number of sources for discussion of this as well. Martinez, *supra* note 2; *see also* Jeremy Bentham, *Principles of Judicial Procedure with the Outlines of a Procedure Code*, *in* 2 THE WORKS OF JEREMY BENTHAM 5, 5 (John Bowring ed., 1943) (asserting the utilitarian view that procedure is only helpful as it advances substance); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918) (discussing the argument that the distinction between the two is artificial). The Supreme Court has wrestled with the question of what constitutes substantive law repeatedly, most famously in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

29. Glennon, *supra* note 2, at 870.

30. *Id.*

question, standing, and the state secrets doctrine.[31] Arguably, the novel character and highly contentious and political nature of the allegations against defendants in cases like *Rumsfeld v. Padilla*[32] and *Hamdan v. Rumsfeld*[33] compelled the Supreme Court to use procedure to avoid addressing difficult questions of individual rights.[34]

The value of procedure as a proxy for substance is highly debated,[35] but federal courts have employed procedural doctrines to this end to different extents. They are doing so now in ATS cases against corporate defendants. As they have in the war on terror cases, federal courts sometimes decide ATS cases on procedural grounds in lieu of reaching substantive issues. Federal courts are struggling to deal with the difficult substantive issue in the third element of the Act: what constitutes a violation of the law of nations or a treaty of the United States?[36] Other ancillary issues—such as how far aiding and abetting liability should extend to nonstate actors like corporations—are also difficult for courts, and may compel them to make decisions on more familiar procedural grounds.

The reason for the lower federal courts' avoidance of substantive issues may stem in part from the Supreme Court's lack of guidance. In 2004, the Supreme Court attempted to clarify the rights covered in the Act in *Sosa v. Alvarez-Machain*.[37] As applied by lower federal courts, however, it is not clear that the Court was successful in that attempt to un-muddy the waters.

Sosa did two things. First, it firmly established a cause of action under the Act.[38] While the Court recognized that "the statute is in terms only jurisdictional,"[39] it found that "the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[40] This final statement alludes to the Court's second finding in *Sosa*: only egregious and clear violations of international law would be acknowledged, precluding expansive use of the Act.[41] The Court adamantly restated this assertion in a myriad of ways, including stating that: "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction;"[42] there should be a "high bar to new private causes of action for

---

31. Martinez, *supra* note 2, at 1015.

32. 542 U.S. 426 (2004) (holding that the petitioner's habeas petition should have been filed in South Carolina rather than New York).

33. 548 U.S. 557 (2006) (holding that the executive was not the proper branch of government to make the determination of policy surrounding the petitioner's detention).

34. Martinez, *supra* note 2, at 1072.

35. *See infra* Part IV (discussing theories that both support detailed analysis of procedural issues in areas of difficult substantive law, and the problems with focusing on these procedural issues).

36. 28 U.S.C. § 1350 (2006).

37. 542 U.S. 692 (2004).

38. *Id.* at 724.

39. *Id.* at 698.

40. *Id.* at 712.

41. *Id.* at 725–29.

42. *Id.* at 725.

violating international law;"[43] "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations;"[44] and "the jurisdiction was originally understood to be available to enforce a *small* number of international norms."[45]

While the *Sosa* clarification did succeed in firmly establishing a cause of action under the Act, despite reservation about its application, the Court did not clearly define the substantive reach of the ATS. The Court did make it clear that it envisioned a limited use of the ATS, focused on whether the activity was a violation of a "norm of customary international law so well defined as to support the creation of a federal remedy."[46] But even that clarification left unanswered questions about what is required for an international norm to be "well-established" and what sources courts should use to make that determination.

While those questions may be worked out by both the Supreme Court and lower federal courts in time, the Court has not directly addressed many ancillary issues. For example, the questions of what constitutes vicarious liability, or what type of conduct a multinational corporation must engage in to be liable for aiding and abetting under the Act, remain largely unaddressed.[47] Additionally, the question of what source of law should be used in ATS claims has renewed an old debate about whether federal common law exists and what it consists of.[48]

The large sums of money at stake in ATS claims against corporate defendants make ATS jurisprudence a contentious area of law. When ATS claims were brought against individuals, recovery of millions of dollars was not common, even if awarded by a court. For example, in *Filartiga*, a court ordered that the torture victims receive $10 million,[49] yet attorneys continue to investigate ways to enforce the award.[50] With oil companies and mining conglomerates as the defendants, however, insolvency is no longer a barrier to recovery of tens of millions of dollars if the plaintiff is successful. Additionally, because the bad press associated with these lawsuits can wreak havoc on a company's reputation, defendants—eager to remove their names from headlines that associate them with genocide and torture—are seeking settlements in early stages of litigation, before the suits reach a discussion on the merits.[51] Luckily for these defendants, many

---

43. *Id.* at 727.
44. *Id.* at 728.
45. *Id.* at 729 (emphasis added).
46. *Id.* at 738.
47. *See* Drimmer, *supra* note 1, at 68.
48. *See* Vora, *supra* note 6. For a discussion of the Revisionist view that contradicts this argument, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 878–81 (2007).
49. Filartiga v. Peña-Irala, 630 F.2d 876, 879 (2d Cir. 1980); *see also Filártiga v. Peña-Irala*, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala (last visited Aug. 26, 2010).
50. *Filártiga v. Peña-Irala*, *supra* note 49.
51. Jordan Cowman, *The Alien Tort Statute—Corporate Social Responsibility Takes on a New Meaning*, CSR DIGEST (July 17, 2009), *available at*

courts are relying on a slew of procedural doctrines to remove these cases from their dockets at an early stage in the proceedings.

III. PROCEDURAL DISMISSALS

Many ATS cases run the gamut of procedural dismissals. Some common examples raised by suits under the ATS—including forum non conveniens, heightened pleading standards, international comity and the political question doctrine—are discussed below.

A. Forum Non Conveniens

The doctrine of forum non conveniens permits a federal court to dismiss a case that otherwise satisfies jurisdictional and venue requirements. It requires that both an adequate alternative forum exists and that the balance of private and public factors weighs strongly in favor of that alternative forum adjudicating the case.[52] The Supreme Court developed this two-part test in *Piper Aircraft Co. v. Reyno*, a tort case that involved an alternative, foreign forum.[53] Under the test, the defendant has the burden of proving that the alternative forum is adequate. Courts, however, are very reluctant to deem a foreign court inadequate.[54] Also, while courts generally defer to the plaintiff's choice of forum, the Court in *Piper* specifically noted that a *foreign* plaintiff's choice of forum deserves less deference than a resident plaintiff's choice.[55]

The forum non conveniens doctrine is an attractive tool to use against plaintiffs in the ATS context. The plaintiffs in these cases are often, though not always, foreign plaintiffs, so U.S. courts do not automatically defer to their choice to file suit in the United States. In fact, the choice by foreign plaintiffs to file suit in the United States is often looked at with suspicion. Given that these plaintiffs are often poor community members with limited ability to travel to the United States for litigation, convenience does not appear to be their biggest concern. This may lead some courts to believe that the plaintiff's choice of a U.S. forum is more related to their preference for favorable U.S. law than to convenience.[56] While some have argued that courts are not more likely to dismiss ATS cases for forum non conveniens than for other reasons,[57] in just the past five years, a number of courts have dismissed ATS cases on grounds of forum non conveniens.[58]

---

http://www.csrdigest.com/2009/07/the-alien-tort-statute-corporate-social-responsibility-takes-on-a-new-meaning/.

52. Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 750 (2007).

53. 454 U.S. 235 (1981).

54. *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997). For more information about courts' reluctance to pass judgment on courts of other countries, see *infra* Part IV.C.

55. *Piper Aircraft Co.*, 454 U.S. at 255–56.

56. *Id.*

57. *Compare* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 46 (1998), *with* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens*

Regardless of whether the doctrine is used more or less than other procedural dismissals in ATS cases, its use is particularly troublesome in this context because its language seems to directly contradict the language of the statute. The purpose of the Act is explicit on its face: to provide a forum for acts that do not occur in the United States.[59] And yet, the doctrine of forum non conveniens orders U.S. courts to be deferential to foreign forums and wary of foreign plaintiffs' desires to litigate in the United States.[60]

Unfortunately, little legislative history of the ATS exists that could shed light on whether or how Congress intended to reconcile the statute and the doctrine of forum non conveniens.[61] Some have argued that the purpose behind the Act at its inception was political. They argue that the Act's aim was to show compliance by the young country with international norms at a time in the nation's history when it was trying to garner international respect.[62] Given that the Act may have been written with broad language to appease political allies, its purpose may not have been to provide the expansive jurisdictional reach suggested by its language.

But even if the history surrounding the Act's passage suggests a constricted interpretation, subsequent history does not. The Act has been modified by Congress three times since 1791.[63] Each time Congress has made only small changes to ensure that it would not be overly expansive, and has never restricted it or changed the language in a way that would address the seemingly direct contradiction with the doctrine of forum non conveniens. Further, the Supreme Court in *Sosa* specifically noted that, while it did not endorse an expansive view of the ATS's scope, violations covered by the ATS could include violations of international norms not necessarily recognized at the time of the statute's passage in 1791.[64] This tacit endorsement of a modern interpretation of the Act further

---

in Human Rights Litigation, 33 N.Y.U. J. INT'L L. & POL. 1001, 1006–14 (2001) (arguing that application of forum non conveniens will not result in cases being thrown out of federal courts en masse).

58. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., 578 F.3d 1283, 1300 (11th Cir. 2009); Mastafa v. Australian Wheat Bd., No. 07-cv-7955, 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008); Carijano v. Occidental Petroleum Corp., 548 F. Supp. 2d 823 (C.D. Cal. 2008); Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005); Abdullahi v. Pfizer, Inc., No. 01-cv-8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005).

59. 28 U.S.C. § 1350 (2006).

60. *Piper Aircraft Co*., 454 U.S. at 255–56.

61. Short, *supra* note 57, at 1005.

62. *Id.* at 1005–10.

63. Modifications occurred in 1878, 1911, and 1948. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093; H.R. REP. NO. 80-308, app. at 124 (1947); REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS, § 563 (1878).

64. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world . . . ."); *see also id.* at 732 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when§ 1350 was enacted.").

disputes the argument that the political climate surrounding the Act's passage should determine its interpretation in modern day courts.

One way one court has tried to reduce the harsh impact of forum non conveniens on ATS cases is by using the second part of the test from *Piper*, emphasizing the United States' strong public interest in hearing this type of case. Once a court determines that an adequate alternative forum exists, it must then weigh the private interests of the parties and the public interests of the competing forum.[65] In *Wiwa v. Royal Dutch Petroleum*, the Second Circuit overturned a trial court's dismissal of a claim using this second prong of the test.[66] The court found that the trial court failed to give sufficient weight to the United States' strong public interest in litigating human rights claims.[67]

While *Wiwa* provides one way to deal with the issue, admittedly the case is distinguishable from many human rights claims because the plaintiffs were U.S. citizens.[68] In addition to noting the strong public interest the United States has in hearing human rights claims, the court in *Wiwa* also explicitly and repeatedly emphasized deference to a *U.S. citizen's* choice of forum in rejecting the application of the doctrine of forum non conveniens.[69] Nevertheless, *Wiwa* may provide some authority for allowing substantial deference to the public interest in litigating ATS human rights claims that could help lower courts reconcile the difficult issue of applying forum non conveniens. Thus far, however, no court has found that public interest alone, as expressed in the statute, trumps any concerns about alternative, foreign forums.

B. Heightened Pleading Standard

Another way that some courts deal with the tricky questions under the ATS is to apply a heightened pleading standard to the claims. This requires that plaintiffs meet a higher standard of review in the pleading stage for claims that allege either a conspiracy between a state actor and a corporation, or aiding and abetting by a corporate actor.[70]

Prior to two seminal cases in the Court's recent jurisprudence, *Bell Atlantic Corp. v. Twombly*[71] and *Ashcroft v. Iqbal*,[72] traditional notice pleading was all that was required to state a claim under the ATS.[73] Under that standard, plaintiffs had only to allege facts that made the plaintiff's claim plausible. Historically, when pleading a claim against a corporation for aiding and abetting or for vicarious liability under the ATS, a plaintiff was required to show that the

---

65. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).
66. 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).
67. *Id.* at 101–06.
68. *Wiwa*, 226 F.3d 88.
69. *Id.* at 101.
70. Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2178 (2009).
71. 550 U.S. 544 (2007).
72. 129 S. Ct. 1937 (2009).
73. Nichols, *supra* note 70, at 2178.

corporate actor had knowledge of the violations of international law and that its actions amounted to complicity in those violations.[74] This was, in essence, a *mens rea* requirement drawn from the Ninth Circuit's decision in *Doe v. Unocal Corp.*[75] It was interpreted to require specific knowledge and intent to assist in the violation, as well as actual assistance and recognition of the defendant's assisting role in the violation.[76] Courts allowed a corporate actor's complicity to be shown through joint action by the corporate defendant and the state actor,[77] through the nexus test, through the symbiotic relationship test, or through the public function test.[78] While an examination of each test is not material to this Note, it is important to note that each test required the plaintiff to demonstrate the defendant's knowledge and intent in the complaint to varying extents.[79]

Traditional notice pleading, as interpreted by the Supreme Court in *Conley v. Gibson*, provides that no claim should be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[80] While the length and detail of the set of facts stated in the complaint will vary depending on the specific claim and its circumstances, the Supreme Court has repeatedly confirmed the notice requirement, and asserted that nothing beyond the requirement of sufficient facts is necessary.[81]

Nevertheless, in recent situations, the Court has allowed the application of higher pleading standards.[82] *Twombly* and *Iqbal*, in particular, have the potential to greatly alter the pleading standards in federal cases that are not specifically governed by a particular statutory pleading requirement.[83] In *Twombly*, the Court

---

74. *Id.* at 2186.

75. Doe v. Unocal Corp., 395 F.3d 932, 950–51 (9th Cir. 2002), *reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

76. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

77. Aldana v. Del Monte Fresh Produce N.A., 305 F. Supp. 2d 1285, 1304 (S.D. Fla. 2003).

78. *Id.*

79. *Compare* Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 123 (1999) (describing the decision in *Doe v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), as an instance in which the court was "willing to entertain claims based on allegations of corporate complicity in egregious human rights abuses, and will[ing] [to] give plaintiffs some leeway in stating the factual base of their claims"), *with id.* at 113 (describing the decision in *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1289 (S.D. Fla. 2006), as requiring plaintiffs to "plead specific details of [their] allegations [which] forces [them] to engage in the kind of pre-litigation fact-finding generally absent from American cases").

80. 355 U.S. 41, 45–46 (1957).

81. *See, e.g.*, Erickson v. Pardus, 551 U.S. 89, 93–94 (2007) (per curiam); Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).

82. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011–59 (2003) (discussing heightened pleading requirements in the areas of antitrust, civil rights, conspiracy, copyright, defamation, negligence and RICO claims).

83. Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010). Although Steinman argues that the effect of *Iqbal* and *Twombly* may be overstated by legal

upheld the application of a plausibility pleading standard that required the plaintiff in an antitrust suit to allege facts that made the plaintiff's claims *plausible*,[84] as opposed to just *possible*.[85] While the Supreme Court in *Twombly* took pains to note that this was *not* a heightened pleading requirement, the decision did require that complaints alleging conspiracies in restraint of trade under section one of the Sherman Act provide facts sufficient to show more than just parallel conduct between two parties.[86] Instead, to plead a sufficient claim under section one, facts that tend to show a conspiracy and agreement were required.[87] The Court's 2009 decision in *Iqbal*, a *Bivens* action against the federal government for discriminatory detainment, made it clear that the plausibility standard would apply beyond the reach of antitrust law.[88]

Post-*Iqbal*, causes of action under federal statutes with no specified standard may be amenable to a higher plausibility standard for pleading. The ATS is one such statute, and application of the heightened pleading standard from *Twombly* and *Iqbal* to ATS claims may be accepted in future cases before the Court. The Eleventh Circuit incorporated the *Twombly* and *Iqbal* standard into ATS jurisprudence in 2009 in *Sinaltrainal v. Coca-Cola*.[89] Reviewing a Florida District Court's dismissal of a claim against the soft drink company for aiding and abetting human rights abuses by the Colombian government, the circuit court required that the plaintiffs allege facts that made their claim of a conspiracy not just conceivable, but plausible.[90] Arguably, this requirement goes beyond the mere notice requirement commonly recognized under the Federal Rules. Some commentators argue that the Eleventh Circuit's pleading requirement forced plaintiffs to conduct pre-litigation fact-finding not normally required prior to filing a complaint.[91] Without this heightened requirement, courts hearing ATS claims have given plaintiffs some leeway in stating the factual bases of their claims.[92]

The imposition of the *Twombly* standard on ATS claims was not surprising.[93] The similarities between antitrust and ATS law when it comes to discovery costs—the main concern behind application of the heightened pleading standard[94]—also make it an easy step for courts to take. In both antitrust and ATS litigation, the defendants tend to be multi-billion dollar corporations, and in both

---

commentators, he notes that "[t]he current discourse . . . threatens to make *Iqbal*'s (and *Twombly*'s) effect on pleading standards a self-fulfilling prophecy." *Id.* at 1296–97.

84. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 549 (2007).

85. The possibility pleading standard is the requirement for complaints under traditional notice pleading. FED. R. CIV. P. 8(a).

86. Nichols, *supra* note 70, at 2196–97.

87. *Id.* at 2196.

88. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

89. Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1268 (11th Cir. 2009).

90. *Id.*

91. Zia-Zarifi, *supra* note 79, at 113.

92. *Id.* at 123 (describing a Louisiana District Court's willingness to allow plaintiffs to develop their factual allegations by providing the plaintiffs with multiple opportunities to amend their complaint).

93. *See, e.g.*, Nichols, *supra* note 70, at 2204–05 (discussing the applicability of *Twombly* to other areas of law besides antitrust).

94 Steinman, *supra* note 83, at 1304.

situations, discovery tends to be time consuming and costly. Further, establishing a conspiracy prior to discovery in order to state a claim is difficult and can often be accomplished only by circumstantial evidence in both ATS litigation and antitrust cases.[95] Because heightened pleading standards are accepted in antitrust litigation to reduce costs and avoid frivolous lawsuits, scholars argue that their application in ATS litigation is appropriate.[96] Further, modern ATS jurisprudence has been primed for this type of requirement. *Filartiga* set the stage for the possible application of a higher pleading standard when it recognized and endorsed a "more searching preliminary review" of the merits for ATS claims.[97] The perceived harms of ATS accomplice-liability litigation seem most effectively combated at this early stage in the litigation process, especially given the high payouts and potentially devastating effect liability could have on large U.S. companies' international business. Bad press for a company can be just as devastating to its economic well-being as any judgment for losing a case, so advocates of this heightened pleading requirement argue that it is better to get rid of frivolous cases as early in the litigation process as possible—thereby saving the court time and money and reducing the negative impact on the defendants and potential harm to foreign policy objectives.[98]

These arguments are extremely troublesome from the plaintiff's perspective, however, and plaintiffs have consistently rebelled against heightened pleading requirements.[99] The standard notice-pleading requirement outlined in the Federal Rules of Civil Procedure is designed to give litigants their day in court and to avoid penalizing plaintiffs with a dismissal before discovery has given them the opportunity to uncover facts that would support their claim. In special situations, where more than this is required, the rules explicitly provide for it.[100] Before *Twombly* was applied broadly through *Iqbal*, some argued that raising the pleading requirement would bar this opportunity for ATS plaintiffs who are victims of human rights abuses and may have no other option for redress.[101] Further, there is little evidence that ATS suits are curtailing corporate activity abroad or hindering the ability of multinational corporations to conduct global business.[102]

Heightened pleading standards in ATS suits are most troublesome from a cost perspective. One of the primary motivations for adopting the heightened standard in antitrust cases was to reduce the costs of discovery associated with

---

95. Nichols, *supra* note 70, at 2206.

96. *Id.* at 2221.

97. Filartiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

98. Nichols, *supra* note 70, at 2208–21. Potential harm to foreign policy objectives is discussed *infra* Part III.C.

99. *See, e.g.*, Brief of Petitioner-Appellant at 1, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (No. 91-1657) (arguing that all complaints should be subject to notice-pleading requirement absent clear and unmistakable language in the federal rules).

100. *See, e.g.*, FED. R. CIV. P. 9(b) (providing for a higher pleading standard "in alleging fraud or mistake").

101. Julie Kay, *Federal Judge: Help Us Apply Alien Tort Claims Act*, PALM BEACH DAILY BUS. REV., Oct. 30, 2006, at A1.

102. Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379, 418 (2007).

complex litigation.[103] Courts reasoned that it was economically prudent to shift some of the costs of factual inquiry to the pleading stage to avoid pursuing expensive and futile claims through the discovery phase. In antitrust suits, the federal government, in the form of the U.S. Department of Justice or the Federal Trade Commission, bears the costs of shifting that burden, as it is commonly the plaintiff in those suits. By contrast, in ATS suits a very different type of party will bear the heavy costs of providing more factual information at the pleading stage. Instead of the U.S. Department of Justice having to do more work on the front end of a lawsuit, individuals who are suffering human rights abuses, often in the context of repressive regimes and depressed economies—and rarely on strong financial footing—will be burdened with the task.

The Supreme Court dispelled any doubts about whether the heightened standard would apply broadly when it decided *Iqbal*, and the Eleventh Circuit confirmed its application to ATS cases by dismissing cases for failure to state a claim under the new standard.[104] While the discovery phase of an ATS case could be just as costly as that in an antitrust suit, shifting the burden of factual inquiry onto plaintiffs in ATS suits is much more troublesome given that individual plaintiffs generally have far fewer resources than government plaintiffs. As the price of filing the complaint goes up, therefore, plaintiffs' access to justice may go down.

C. Political Deference: Political Question, International Comity, and the Act-of-State Doctrines

One of the major criticisms of recent ATS jurisprudence is that judicial opinions issued under the Act undermine the role of the executive branch in global politics. There is a fear, articulated by the Bush administration in a 2002 memo, that the federal government's ability to maintain or establish strong political ties with foreign governments will suffer if U.S. federal courts rule on the validity of acts committed abroad by multinational companies.[105] This issue is addressed by three doctrines cited in ATS decisions in the past few decades: the doctrine of international comity, the political question doctrine, and the act-of-state doctrine.[106] All three serve as prudential tools,[107] enabling the judiciary to weigh the value of proceeding with foreign claims under the ATS against the value of deferring to the U.S. political branches or to foreign governments to resolve the disputes.

---

103. Steinman, *supra* note 83, at 1304.

104. *See, e.g.*, Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1268 (11th Cir. 2009); Aldana v. Del Monte Fresh Produce N.A., 416 F.3d 1242, 1247–50 (11th Cir. 2005).

105. *See, e.g.*, Letter from William H. Taft, IV, Legal Adviser to the U.S. Department of State, to Hon. Louis P. Oberdorfer, Judge, U.S. Dist. Court for D.C., at 2 (July 29, 2002) [hereinafter State Dept. Letter].

106. Michael J. O'Donnell, Note, *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuses, and the Courts*, 24 B.C. THIRD WORLD L.J. 223, 227–28 (2004).

107. This phrase refers to the judiciary's ability to use these tools at their discretion in the interests of justice, judicial economy, separation of powers, or a number of other policy concerns.

1. Political Question Doctrine

The political question doctrine is a prudential and constitutional mechanism that stems from the Supreme Court's opinion in *Marbury v. Madison*.[108] The doctrine says that the court with jurisdiction over a dispute can decline to hear the case if it raises questions that should be addressed by the political branches of government.[109] In essence, the doctrine is based on the fundamental principle of separation of powers, which encourages courts to avoid stepping on the toes of the executive or legislative branch[110]—something easily done when decisions or actions by foreign governments are involved.

This deference to the political branches has been raised by defendants and discussed by courts in the context of ATS claims. For example, the Supreme Court's opinion in *Sosa v. Alvarez-Machain* sent a strong message to plaintiffs about the need for caution in issuing opinions under the ATS. While it did not address the political question doctrine explicitly, the Court made particular note of a "policy of case-specific deference to the political branches," mentioning ATS cases pending in federal court against companies for actions in South Africa under the apartheid regime, and the Statements of Interest submitted to the court by the U.S. government in those cases.[111] In the procedurally lengthy life of the *Sarei v. Rio Tinto, PLC* case,[112] the Court assessed the presence of a political question under the *Baker v. Carr* standard.[113] In *Sarei*, residents of Papua New Guinea alleged that an international mining group had destroyed their environment, harmed the health of their people, and incited a ten-year civil war.[114] While the Court concluded that there was no political question (despite the U.S. Department of State's Statement of Interest in the case), it specifically noted the possibility of a shifting political climate that *could* impose a political question on the court.[115]

---

108. 5 U.S. (1 Cranch) 137 (1803).

109. O'Donnell, *supra* note 106, at 228.

110. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 486–88 (D.N.J. 1999) (finding that, in considering application of the political question doctrine, adjudication on the merits would show a lack of respect for the political branch).

111. 542 U.S. 692, 732 n.21 (2004).

112. 221 F. Supp. 2d 1116, 1193, 1207 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

113. 369 U.S. 186, 217 (1962). In *Baker*, the Court stated that, to find a political question, a case must have one of the following six factors present: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due to coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.*

114. *Sarei*, 221 F. Supp. 2d at 1121–25.

115. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1083 n.13 (9th Cir. 2006), *withdrawn and superseded on reh'g in part,* 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

The political question doctrine places no obligation on courts to dismiss cases even if the executive branch expresses an interest in having them dismissed. As the Ninth Circuit noted in *Sarei*, "[I]t is [the court's] responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."[116]

Despite this assertion of independence by the Ninth Circuit Court of Appeals, federal courts still accept the U.S. government's Statements of Interest in cases the government wants dismissed.[117] These Statements of Interest raise the possibility of inconsistent adherence to the political branches' arguments. Even if the Statements of Interest do not consistently sway courts towards dismissal, or are rejected in favor of the court's own assessment of the presence of a political question, courts continue to accept and discuss the Executive Branch's expressed desires in the ATS context. As in *Sarei*, courts at times have decided not to be swayed by the federal government's interests, but the courts also have not relied on the clear statutory language of the ATS and its explicit provision for a U.S. judicial forum as a reason for such decisions.

2. Doctrine of International Comity

International comity is the deference that U.S. courts give to a foreign sovereign's application of law.[118] The idea of deference to the interests of foreign nations and their tribunals and legal channels is a sturdy tenet of U.S. law, and while not considered an obligation of the court, it is a matter of courtesy and respect to foreign courts and governments.[119] Advocates of dismissing ATS claims from federal courts cite international comity as one ground that courts ought to use to do away with these claims at an early stage in litigation.[120]

In application, international comity is an analysis of the extent of the conflict of laws in a case.[121] The Supreme Court has stated that a case should only be dismissed on international comity grounds when there is an actual conflict between foreign and domestic law, and even then factors in favor of hearing the

---

116. *Id.* at 1081.

117. *See, e.g.*, State Dept. Letter, *supra* note 105, at 2.

118. *See* O'Donnell, *supra* note 106, at 233.

119. For early applications of international comity, see, e.g., Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); Emory v. Grenough, 3 U.S. 369, 370 (1797).

120. Press Release, Wash. Legal Found., Court Urged to Limit Use of ATS to Bring International Law Claims (Presbyterian Church of Sudan v. Talisman Energy Co.) (May 9, 2007), *available at* http://www.wlf.org/upload/050907RS.pdf.

121. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 749 F.2d 1378, 1384–95 (9th Cir. 1984). In addition to an analysis of the conflict of laws, the *Timberlane* analysis also requires an assessment of the significance of the effects of the case on the United States and the importance of conduct within the United States compared to conduct abroad that is part of the violation. However, some circuits require a "true conflict" as a threshold matter. Richard T. Marooney & George S. Branch, *Corporate Liability Under the Alien Tort Claims Act: United States Jurisdiction Over Torts*, 12 CURRENTS: INT'L TRADE L.J. 3, 10 (2003).

case in the United States may outweigh the desire to avoid that conflict.[122] The doctrine is difficult to apply in cases of torture and murder, acts universally recognized as illegal. Those clear violations of international law are, therefore, not subject to deference under international comity. But cases that challenge a foreign court's decision to conduct primarily economic activities that harm human rights, such as opening lands for gas and oil exploration that may harm community health and the local environment, may be more easily dismissed on international comity grounds.[123] Instead of alleging direct violations of clear international norms, those cases challenge a foreign government's policy decisions.[124]

For example, in *Sarei*, the plaintiffs alleged that the defendant, an international mining company that was operating gold and copper mines in Papua New Guinea, collaborated with the government of Papua New Guinea to perpetrate human rights violations.[125] The court dismissed the plaintiffs' claims of environmental tort and racial discrimination under both international comity and the act-of-state doctrine.[126] Those dismissals, however, did not preclude the plaintiffs' claims of war crimes and crimes against humanity from going forward.[127] Again, the claims not dismissed relied on universally condemned practices. They also presented less of a conflict with economic foreign policy decisions than those that involved the use of natural resources or development.

While a dismissal under international comity is not explicitly a procedural dismissal, the way such dismissals are applied seems to indicate that the doctrine is used in the same manner as those procedural dismissals that avoid addressing the substance of difficult legal issues—like aiding and abetting liability. Deferrals to a foreign government's acts and policies certainly make courts *appear* to be at the whim of foreign regimes, casting these dismissals in a political light. An illustrative example is *Sequihua v. Texaco, Inc.*, a case brought by Ecuadorian citizens against Texaco for environmental and human rights abuses in that country.[128] In that case, a federal court in Texas dismissed the plaintiffs' claims on grounds of both forum non conveniens and international comity,[129] specifically citing the Ecuadorian government's desire for the case not to proceed in U.S. courts.[130] In a similar case against the same oil company for actions in Ecuador years later, however, the Second Circuit vacated a dismissal on the same grounds when the Ecuadorian government asserted no objections to the case going

---

122. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

123. Marooney & Branch, *supra* note 121, at 10.

124. *Id.*

125. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d. 1116, 1193, 1207 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part,* 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh'g in part,* 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted,* 499 F.3d 923 (9th Cir. 2007).

126. *Id.*

127. *Id.* at 1140, 1151.

128. 847 F. Supp. 61, 62–63 (S.D. Tex. 1994).

129. *Id.* at 63.

130. *Id.*

forward.[131] Regardless of whether the court of appeals in the latter case was swayed by the Ecuadorian government's interests, it appeared deferential to them.

In short, international comity is a much-cited and acknowledged doctrine of law, and its presence in ATS jurisprudence is significant. But examples like the Texaco cases reveal that courts' reliance on it to dismiss cases looks suspiciously political, and not like the application of a legal standard. It is also almost always coupled with the political question doctrine discussed earlier, or the act-of-state doctrine, discussed below.

3. Act-of-State Doctrine

The act-of-state doctrine—a foreign relations equivalent of the political question doctrine[132]—encourages deference to acts committed by other sovereign states or as a result of state decisions.[133] The act-of-state doctrine "prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory."[134] It is invoked only when "a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign," and the court's decision would invalidate that official action.[135]

The doctrine's main purpose, like international comity, is to afford deference to foreign governments and to preserve the political branches' ability to conduct diplomatic relations with foreign governments.[136] It does this by respecting foreign policy decisions in other countries.[137] Given this expressly political purpose, the act-of-state doctrine is primed for tension between the judiciary and executive branches of government, and decisions of when to afford deference under the doctrine are rife with separation-of-powers implications.[138]

Modern jurisprudence under the doctrine began with *Banco Nacional de Cuba v. Sabbatino*, in which the Supreme Court listed the considerations for courts deciding whether to adjudicate claims that implicate the act-of-state doctrine.[139] The Court found that: (1) the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it; (2) the less important the implications of an issue are for foreign relations, the weaker the justification for exclusivity in the

131. Jota v. Texaco, Inc., 157 F.3d 153, 156, 163 (2d Cir. 1998), *aff'd as modified,* 303 F.3d 478, 480 (2d Cir. 2002).

132. O'Donnell, *supra* note 108, at 229 (citing Trajano v. Marcos, Nos. 86-2448, 86-15039, 1989 WL 76894, at *2 (9th Cir. July 10, 1989)).

133. O'Donnell, *supra* note 108, at 230–31.

134. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1084 (9th Cir. 2006), *withdrawn and superseded on reh'g in part,* 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted,* 499 F.3d 923 (9th Cir. 2007) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964)); *see also* 44B AM. JUR. 2d. *International Law* § 83 (2010).

135. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404, 406 (1990).

136. O'Donnell, *supra* note 106, at 230–31.

137. *Id.*

138. *See id.* at 230.

139. 376 U.S. at 428.

political branches; and (3) the balance of relevant considerations may be shifted if the government which perpetrated the challenged act of state is no longer in existence.[140]

Because there is a clear overlap between the policy decisions of foreign governments and the difficult, ancillary ATS issues of complicity and aiding and abetting, defendants regularly raise the doctrine in ATS cases.[141] For example, defendants may claim that a foreign government's decision to engage in actions that result in human rights violations—such as a government's lax enforcement of some environmental laws that damage human health—should be viewed the same as economic policy decisions that are afforded deference under the act-of-state doctrine.

However, defendants have had trouble winning motions to dismiss ATS claims on the basis of this doctrine, and courts have generally allowed cases to proceed, despite protests by defendants, if there is not a clear showing that adjudication would harm U.S. foreign policy interests.[142] As with international comity, it is difficult for defendants to make an argument for dismissal under the act-of-state doctrine in cases of genocide, torture, or murder. These universally-condemned acts are often not recognized as legitimate acts of state, given that they are clear violations of international law.[143] However, the economic focus of many of the issues behind ATS claims that allege vicarious liability or aiding and abetting liability is often an uncomfortable arena for courts. These deferential and prudential tools provide them a way to bow out without stepping on any toes.

IV. JUSTIFICATIONS FOR PROCEDURAL DISMISSALS IN ATS CASES

Throughout its descriptions of procedural dismissals used in ATS cases, this Note has alluded to the problems with employing procedural tools to avoid addressing substantive law.[144] This next section addresses arguments by defendants and some legal scholars who seek to justify procedural dismissals.[145] While many of these arguments are easily discredited, an analysis of the phenomenon reveals an admittedly more nuanced decisionmaking process than mere avoidance by courts of difficult topics.

By its very nature, law requires a conservative process, and actors within the judicial system try to avoid reaching decisions on merits too soon or in areas of law that are not yet "ready" for substantive decisions. Some argue that procedural

---

140. *Id.*

141. *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440, 451 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 100 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Brief for Defendant–Appellant at 41, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-57197, 00-56628, 00-57195), 2001 WL 34093599, at *41.

142. *See, e.g.*, *Wiwa*, 226 F.3d at 100 (allowing claims against Nigerian government despite act-of-state defense); Kadic v. Karadžić, 70 F.3d 232, 250 (2d Cir. 1995) (allowing suit to go forward over act-of-state defense); Trajano v. Marcos, Nos. 86-2448, 86-15039, 1989 WL 76894, at *2 (9th Cir. July 10, 1989) (allowing claims of torture to go forward despite act-of-state defense).

143. Marooney, *supra* note 121, at 11.

144. *See supra* Parts II–III.

145. *See, e.g.*, Martinez, *supra* note 2, at 1017.

dismissals in situations in which a decision on the merits of a claim could potentially damage the legal system are appropriate simply because this is how law works: methodically and conservatively.[146]

This argument may be persuasive in justifying procedural dismissals in cases of terrorism and war. When judges are put in the position of questioning the federal government's use of the executive power to take actions to protect the safety of citizens, deference on these sensitive issues may be appropriate.[147] A similar argument was put forth by the government in *Korematsu v. United States*,[148] in which the executive branch successfully persuaded the Court to defer to its decision to intern Japanese–Americans immediately following the attack on Pearl Harbor.[149] *Korematsu* was not a procedural dismissal, but it does demonstrate the caution with which federal courts proceed toward sensitive issues of substantive law in situations where national security or safety is at stake.[150]

In areas of law that do not affect national security, defendants may also make a number of arguments that procedural dismissals are valuable. First, procedural dismissals may, in some contexts, actually be reflective of substantive legal determinations, and therefore should not always be looked at as avoidance of substantive law. Second, not reaching a substantive decision might not be a tragedy for the plaintiff if winning the case was not necessarily the purpose of bringing the lawsuit. Merely having a voice in the legal system against actors previously thought to be legally unreachable by certain plaintiffs may be valuable in and of itself. The publicity that can be generated during the procedural phases of the case may also help the plaintiffs achieve some goals, such as generating bad press about the defendant that could deter future bad acts. Third, there may simply be legitimate and compelling reasons for courts to proceed cautiously in cases that draw on international law due to the effect of constantly shifting global politics on international norms. These perspectives are examined below, followed by an analysis of the effect of their application.

A. Substantive Value of Process?

Some have argued that the goal of all procedural law is to reach perfect substantive law.[151] Because perfection is impossible, however, the substantive issues in a case will always influence the procedure adopted, and decisions on procedure may therefore reflect substantive determinations by courts.[152] Supporters

---

146. *Id.* at 1071; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 51.

147. *See* Sunstein, *supra* note 146, at 51.

148. 323 U.S. 214 (1944).

149. *Id.*

150 While it may demonstrate that hesitancy, however, the deference afforded the executive branch in *Korematsu* looks arguably different decades later; it was the first and only time that the Court upheld, under the Equal Protection clause, racial classifications burdening minorities as justified for national security reasons. *Id.*

151. *See, e.g.*, Jeremy Bentham, *supra* note 28, at 5; *see also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 593 (7th ed. 2007) (discussing the theory's application in law and economics approach to procedure).

152. Martinez, *supra* note 2, at 1080.

of this idea cite *Mathews v. Eldridge*, in which the Court introduced a balancing test for due process that weighed the benefits of procedure for an individual deprived of government benefits against the state's interests.[153] Even in situations like *Eldridge*, where the question of what process was due to the appellant was explicitly procedural, the substantive issue regarding the value of the benefits that George Eldridge was seeking, and whether he was owed those benefits, weighed on the Court's determination of what process he should be afforded.[154]

In the context of ATS claims, advocates of this perspective might argue that many procedural dismissals do, in fact, reflect some substantive determinations. In turn, corporate defendants do get some guidance on what actions are acceptable from these procedural dismissals. For example, decisions that dismiss ATS claims under the procedural doctrine of forum non conveniens must undertake a balancing test that demands the court look at both the public and private interests at stake in hearing the case in the foreign country.[155] Assessing whether the foreign court can provide an adequate forum includes both whether that country requires that defendants participate in the legal process, as well as the availability of enforcement procedures in that country.[156] Allegations against a corporate defendant often concern a lack of enforcement of laws in the foreign country; because the defendant did not comply with those laws, human rights abuses were suffered by certain plaintiffs. Therefore, dismissals that are decided as forum non conveniens dismissals may contain substantive judgments about the availability of the rule of law for plaintiffs. They also certainly provide guidance for the defendant on what they can be held responsible for in a foreign country.

The problem with the argument that substantive law may emerge from procedural dismissals, however, is that such dismissals leave a myriad of troublesome questions unanswered, and do little or nothing to advance the plaintiffs' goals in ATS cases. If procedure is to be employed to achieve perfect substantive law, which substantive law is the "correct" one to be advanced through procedural decisions?[157] What should be done about procedural law that appears contradictory to the substantive purpose of the law?[158] Further, even if procedural decisions in ATS claims reflect some level of substantive law, it is unlikely to be a thorough exploration of the substantive issue, and is also unlikely to be the central holding of the case. Substantive determinations that underlie procedural decisions may provide some idea about how specific courts interpret ATS actions. If expressed as dicta, however, their precedential power is limited, and parties to ATS suits may be left even more confused.

---

153. 424 U.S. 319, 334–35 (1974).

154. *Id.*

155. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); *see also* Carijano v. Occidental Petroleum Corp., 548 F. Supp. 2d 823, 828 (C.D. Cal. 2008).

156. *Gulf Oil Corp.*, 330 U.S. at 508.

157. Martinez, *supra* note 2, at 1083 (discussing, in the criminal context, how procedural rules may enforce or advance individual, substantive rights that are not necessarily related to the correct outcome of a criminal proceeding).

158. *Id.*

B. Value in "Just Bringing the Suit"

A second argument disavowing any harm from procedural dismissals in ATS suits is that, for some plaintiffs, having a voice in the legal process may be as important as any substantive decision issued by courts.[159] Plaintiffs in ATS suits may otherwise be voiceless in U.S. courts, as they are often disenfranchised individuals or communities in developing countries with little global social capital with which to make their case. The opportunity to state a claim in a U.S. court at all could be a worthy goal that gives value to the Act without requiring courts to provide clarification on its substance.

A closer look at the plaintiffs of ATS claims provides some support for this idea. Generally, plaintiffs are from poor communities that were harmed by development or by repressive and undemocratic governments.[160] Those individuals often have no voice in their own countries' political systems and no control over the larger economic forces that impact their human rights. For example, in *Doe v. Unocal Corp.*, plaintiffs were Burmese peasants who lived along a proposed pipeline route.[161] The peasants were allegedly harassed, made to participate in forced labor, murdered, raped, and forcibly relocated from their lands by the Burmese government.[162] Despite the fact that the court never reached a decision on the merits, the publicity surrounding it was credited with getting the attention of those in the corporate boardroom and giving a voice to a population historically ignored by both corporate executives and a particularly repressive government.[163]

The problem with this argument, however, is that it oversimplifies the ideas of participation in the legal process and access to justice. Procedural decisions made in the place of substantive decisions are not valuable merely because they provide the plaintiffs with *some* voice in the legal arena. If procedure is used merely to manipulate or avoid the application of substantive law, then the goal of procedure providing justice fails. If publicity is the goal, even if press is generated, it is still a separate victory from anything achieved in the courtroom.

---

159. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004). The term procedural justice was first used by John Rawls in his descriptions of procedure and its role in achieving substantive outcomes. JOHN RAWLS, A THEORY OF JUSTICE 74–75 (rev. ed. 1999). Since then, the idea of procedural justice has expanded to recognize participation in the legal process as inherently valuable, and not just valuable because of its likelihood to increase a favorable substantive outcome. *See* Martinez, *supra* note 2, at 1084 (citing Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 70, 75 (Joseph Sanders & V. Lee Hamilton eds., 2001)).

160. *See, e.g.*, Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in US*, WALL ST. J., July 20, 2009, at B3 ("[P]laintiffs in this case, residents of Ecuador's oil-producing Amazonian rainforest"); Chris Kahn, *Settlement Reached in Human Rights Case Against Royal Dutch/Shell*, COMMON DREAMS, June 8, 2009 (recounting that "plaintiffs also say Shell helped the government capture and hang [activist Ken Saro-] Wiwa," who was executed by Nigeria's former military regime).

161. Barbara Gaerlan, *Blind Eye in Burma*, UCLA INT'L INST., Mar. 12, 2008, *available at* http://www.international.ucla.edu/article.asp?parentid=88840.

162. *Id.*

163. Daphne Eviatar, *A Big Win for Human Rights*, NATION, Apr. 25, 2005, http://www.thenation.com/doc/20050509/eviatar.

Instead, real justice for plaintiffs requires that consistent procedural application result in the enfranchisement of individuals who previously had no voice. Just having your day in court, while it may spur publicity, is not justice.

C. Legitimate Avoidance of Difficult Substantive Issues

Given the lack of merit in these two arguments, it is at least plausible that procedural dismissals in the context of ATS are a form of avoidance by federal courts. Arguably, avoidance in the context of such a volatile area of law might be justified. As they often are in cases concerning war and terrorism, federal courts have been hesitant to deal with issues of globalization and have attempted to clarify the courts' role in a rapidly expanding global economy.[164] How, or if, international law should influence or dictate the federal government's decisions in this arena has been a particularly difficult issue for the courts to tackle.[165]

A similar hesitancy to decide cases that affect international policy in the context of terrorism and war is relatively sympathetic, although still troublesome. When safety and security are at stake, deference to executive power and a minimal role for the courts in policy-making may be prudent. The powerful economic forces behind some of these corporations arguably have a similar ability to compromise safety and security and, thus, defendants could argue that judicial prudence is appropriate. Further, the uncertainty in international law may be a legitimate reason for federal courts to be circumspect in defining the substantive scope of the Act. There is no doubt that there is "uncertainty with how to deal with the transnational dimension of many of the legal problems" associated with globalization, and a "dearth of truly decisive authority (either in the form of judicial precedents, founding era materials, or constitutional text) that compels the courts to resolve . . . debates [about globalization] one way or the other."[166] For example, the language on this issue in *Filartiga* is anything but clear. There, the court stated that the international law to draw on to determine whether there are violations is "[t]he law of nations [that] 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"[167] But what is the source for determining "general usage and practice of nations," and which judicial decisions are to be consulted?

Not deciding these cases because of the potential for mistake, however, is a weak excuse. When used in situations where strong economic interests or national economic policies are at play, it looks like a political decision as opposed to the application of a legal rule. Further, ATS cases that are primarily concerned with the positioning of global economic actors in relation to the jurisdiction of

---

164. Martinez, *supra* note 2, at 1075.

165. Bradley, *supra* note 48 (describing controversy over domestic status of customary international law); *see also* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 2–3 (2006) (describing controversy over use of foreign and international sources in constitutional interpretation).

166. Martinez, *supra* note 2, at 1074–75.

167. Filartiga v. Peña-Irala, 630 F.2d 880 (2d Cir. 1980) (citing U.S. v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

U.S. courts are arguably the exact kind of "soft international law" that could be a good place for the Supreme Court to clarify the substantive reach and ancillary legal issues raised under the ATS.[168] This is not meant to minimize the seriousness of the violations alleged in ATS claims, which often involve violence and egregious violations of human rights. Rather, ATS claims provide courts with an opportunity to rule on questions about the scope of international law and the reach of the jurisdiction of federal courts in a context that is less likely to appear to be an admonition of executive branch decisions about the safety and security of the American people. While global terrorism cases raise many similar jurisdictional issues, decisions on the merits of ATS cases would not necessarily put courts in the unsavory position of dictating national security policy to the executive branch.

D. Effect of the Piecemeal Approach to Law Covered Under the ATS

Considering what is lost when federal courts fail to address the substance of ATS claims makes these already weak arguments look even worse. Dismissing these claims on procedural grounds leaves defendants with a lack of clarity in an under-developed area of law. Most troublingly, it leaves plaintiffs with no recourse or access to justice under a statute that explicitly provides a venue to address violations of international law.

The Supreme Court and lower federal courts are slowly compiling a list of things that *are not* covered under the ATS. In *Sosa*, the Court found that a two-day detention and interrogation by U.S. government officials is not covered.[169] In *Flores v. Southern Peru Copper Corp.*, a lower federal court found that environmental pollution from a company's mining operations that allegedly violated residents' rights to life and health was not a violation of customary international law.[170] Courts have also held that countries and authorities which would not do business with apartheid South Africa did not create international norms or law that would make those who did do business with the apartheid government liable under the ATS.[171] Granted, law generally follows this tedious approach, which will give courts more time to ease their way into the international arena, to gradually make decisions about how to incorporate international law, and to make sense of their role in global economics.

However, both defendants and plaintiffs suffer while courts take decades to work through these procedural issues. Multinational corporations will spend millions of dollars moving these cases through motions and procedures and

---

168. *Cf.* Martinez, *supra* note 2, at 1075 (explaining how courts might be deferring the hard legal questions of global terrorism and testing the waters with "soft" international-law-influenced resolutions of questions posed by transnational fact patterns).

169. Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).

170. 414 F.3d 233, 254–55 (2003). Plaintiffs had alleged that these actions violated the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Rio Declaration on Environment and Development, all of which recognize an individual's right to health. *Id.* The court found that these declarations were "boundless and indeterminate." *Id.* at 255.

171. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part, vacated in part and remanded*, 504 F.3d 254 (2d Cir. 2007), *motion to stay mandate denied*, 509 F.3d 148 (2d Cir. 2007), *aff'd* 128 S.Ct. 2424 (2008).

changing forums, and plaintiffs will suffer through grave human rights harms while courts work through where the correct venue for a case might be. Instead, courts should look to the plain language of the ATS to determine that the doctrines of forum non conveniens, heightened pleading standards, and political deference should be afforded less weight in this area. Then, instead of gradually compiling lists of what is not a violation of international law, courts could provide more guidance and arguably give themselves more room for interpretation by providing parameters for the substantive reach of the ATS.

Currently, in-house counsel for corporate defendants can offer little advice on what kind of relationship with a foreign government is appropriate in light of the ATS. And despite some input from courts in determining what is *not* a violation, scholars continue to debate which source of law should be used, including whether federal common law exists and whether reliance on it in the context of the ATS is justified.[172]

The failure of courts to deal with these weighty substantive issues is most distressing because of its effect on litigants. Plaintiffs who bring these suits are often suffering great and continuous harm. Many ATS claims involve health complications and even death caused by unsafe labor conditions or environmental damage. In *Carijano v. Occidental Petroleum Co.*, for example, plaintiffs suffered adverse health effects from thirty years of heavy metal, hydrocarbon, and other contamination of the waterways they lived alongside.[173] *Carijano*, though, was dismissed on grounds of forum non conveniens.[174] Justice under the ATS might be these plaintiffs' only recourse, and failure to reach the merits of their claims could leave them with no other options. Harms attributed to the actions of corporate defendants are regularly accompanied by violent enforcement actions by oppressive governments, and these governments may have strong economic incentives to not prosecute multinational companies that are responsible for violations of human rights—and may even assist in or facilitate those violations. For example, in *Wiwa v. Royal Dutch Petroleum*, plaintiffs filed a complaint against a subsidiary of Shell Oil Company after nonviolent protestors of the company's expanding oil production in the Niger Delta were captured, tortured, and killed by the Nigerian government.[175] Saro-Wiwa, the lead plaintiff in the case, was an activist leader of the Ogoni people who protested Shell's practices in the

---

172. Vora, *supra* note 6, at 196. *Compare* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2251 (2004) (arguing that *Erie* left room for the creation of federal common law), *with* Bradley, *supra* note 48, at 924–29 (arguing that federal common law is an appropriate source but that it cannot impose liability under ATS).

173. 548 F. Supp. 2d 823, 823 (C.D. Cal. 2008); *Issue 191: Lawsuit Filed Against U.S. Petroleum Company for Alleged Pollution in Peru*, ENVTL., CHEM. & NANOTECH. UPDATE, May 18, 2007, at 2, *available at* http://www.shb.com/newsletters/ECU/ECU191.pdf.

174. 548 F. Supp. 2d at 835.

175. 226 F.3d 88, 100 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

Niger delta.[176] The activists, concerned about the injurious effects of gas production to the surrounding people and land, including damage caused by gas flaring, organized demonstrations that were violently repressed by the government and resulted in the arrest of nine Ogoni activists who were accused of murder, allegedly denied a fair trial, and hanged.[177] The plaintiffs alleged the company's complicity in these government actions.[178]

The ATS provides a unique legal opportunity for plaintiffs to expose collusive action between governments and multinational corporations that may not be available to them in a foreign country. Failure to reach the substance of these types of claims may leave plaintiffs with no relief and no recourse. Given that these plaintiffs are often already at a social, financial, procedural, and political disadvantage,[179] the courts' hesitancy to step quickly into this area of law, while theoretically understandable, is simply tragic for plaintiffs who are looking to U.S. courts as a last resort.

CONCLUSION

Federal courts' focus on procedural issues in ATS claims against corporate defendants is the result of many factors. Some have claimed that these dismissals are justified because procedural issues may be highly intertwined with substantive issues—that procedural decisions, in fact, contain substantive law—or that the plaintiffs' day in court is what really matters, and substantive decisions that result from the lawsuit are only icing on the cake. It is possible that courts focus on procedural issues in ATS claims because the substantive law in this area is uncertain, contentious, and difficult. Regardless, procedural dismissals of ATS claims are counter to the purpose expressed in the Act's language, and do nothing to guide defendants' actions or provide relief to plaintiffs.

A reliance on procedural issues to deal with difficult areas of law is not a new phenomenon in federal courts. In the context of ATS cases, however, blurring the line between procedure and substance or avoiding substantive decisions through procedural dismissals is troublesome. Any avoidance of a decision on the merits harms both parties involved, leaving defendants in the dark about how they can behave, and leaving plaintiffs who are wronged by corporate defendants with no recourse or relief. Instead, courts should adhere to the plain language of the statute and should be available to hear ATS claims with merit.

---

176. Press Release, Ctr. for Constitutional Rights, Settlement Reached in Human Rights Case (June 8, 2009), *available at* http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell.

177. *Id.*

178. *Wiwa*, 226 F.3d at 91.

179. For example, foreign nationals who bring suits have to navigate tricky venue and forum issues, often with little or no money, from a continent away. Julie Schwartz, Saleh v. Titan Corporation*: The Alien Tort Claims Act: More Bark than Bite? Procedural Limitations and the Future of ATS Litigation Against Corporate Contractors*, 37 RUTGERS L.J. 867, 874 (2006) (citing John Haberstroh, Note, *In re* World War II Era Japanese Forced Labor Litigation *and Obstacles to International Human Rights Claims in the U.S. Courts*, 10 ASIAN L.J. 253, 264–66 (2003)).