

Right to Remedies and the Inconvenience of *Forum Non Conveniens*: Opening U.S. Courts to Victims of Corporate Human Rights Abuses

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As globalization has increased over the past several decades, so have allegations of human rights abuses by transnational corporations. Victims of such abuses have few opportunities to seek redress, and while U.S. courts are one potential avenue to justice, their doors are often closed by the likelihood of forum non conveniens dismissals. Without access to remedies, victims are unable to hold corporations accountable for their actions, and violations continue. This Note proposes a series of changes to the common law forum non conveniens doctrine in order to improve access to courts for victims of international human rights violations at the hands of U.S. corporations. Despite the effects of globalization, the growing international human rights movement, and massive changes in technology, the doctrine has changed very little in the sixty years since it was established. United States courts can and should adapt their application of this doctrine to increase the accountability of U.S. corporations for human rights violations committed abroad.

I. INTRODUCTION

Over the past twenty years, plaintiffs have filed several cases against United States corporations in United States courts, alleg-

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ing that those corporations committed human rights abuses in their operations abroad. Many of these cases, however, failed even to reach the merits phase of trial. They were dismissed on the grounds of *forum non conveniens*.¹ As a result, many victims² of human rights abuses at the hands of U.S. corporations have been unable to obtain any remedy for the violations committed against them. Meanwhile, abusive corporations continue to operate with relative impunity for their actions.

Growing concern for human rights and growing recognition of the ability of corporations to affect human rights have led to much study of the interaction between the two. In 2005, the United Nations appointed Special Representative John Ruggie to study the issue, and his April 2008 report has become a central focal point for this ongoing debate.³ In his words, there is currently

a . . . fundamental institutional misalignment . . . between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blame-worthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.⁴

1. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987).

2. At the stage of a *forum non conveniens* dismissal, there has not yet been a determination on the merits. Therefore, because the plaintiffs have not yet proved that they were harmed at the hands of a corporation, they are still technically “alleged victims,” not “victims.” This Note, however, will use the word “victims” throughout, emphasizing the importance of providing a forum in which the alleged harms committed against the plaintiffs may be evaluated.

3. Special Representative of the U.N. Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*, delivered to the Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter Ruggie Report 2008].

4. Special Representative of the U.N. Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 3, deli-

Recognizing the need to hold corporations accountable for their actions and to provide remedies to victims of corporate human rights abuses, this Note proposes a series of modifications in the application of the current U.S. *forum non conveniens* doctrine. In particular, courts should take account of the effects of globalization, the growing international human rights movement, and massive changes in technology in any modern application of *forum non conveniens*. The doctrine has changed very little in the sixty years since it was first laid down in *Gulf Oil Corp. v. Gilbert*.⁵ Meanwhile, the world and the legal climate surrounding the doctrine have changed significantly.

Part II of this Note provides background on globalization and discusses ways in which corporations affect fundamental human rights. It closes with a summary of the work of Special Representative John Ruggie that frames the discussion of legal issues later in the Note. Part III describes the main problem that the Note is meant to address: victims of corporate human rights abuses have few avenues for justice. It outlines the main elements of *forum non conveniens* and describes how the doctrine, in its current form, disserves victims. Finally, Part IV offers a potential solution — to modify the application of *forum non conveniens* to take account of modern human rights, globalization, and technological concerns. It details why the doctrine should be changed and offers additional justifications for why it is important to hold transnational corporations accountable for their actions.

If the application of *forum non conveniens* remains stagnant, corporations will continue to lack incentive to refrain from committing human rights abuses abroad. U.S. courts have the ability and the responsibility to improve respect for international human rights across the world and to contribute to sustainable development by holding U.S. corporations responsible for human rights violations committed abroad.

vered to the Human Rights Council, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) (by John Ruggie) [hereinafter Ruggie Report 2007].

5. 330 U.S. 501 (1947).

II. THE BUSINESS AND HUMAN RIGHTS LANDSCAPE

This Part provides background on two areas of the current business and human rights debate: first, it details the phenomenon of globalization and the impact it has had on the operations of transnational corporations (“TNCs”) and global respect for universal human rights. Next, it discusses the work of John Ruggie, the Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Ruggie’s work has divided the business and human rights debate into three primary components: the state duty to protect against human rights abuses, the corporate duty to respect human rights, and the need for access to adequate remedies.⁶ This three-part framework provides a structure to address business and human rights issues throughout this Note.

A. GLOBALIZATION AND CORPORATE IMPACTS ON HUMAN RIGHTS

TNCs are playing an increasing role in the global economy.⁷ The scope of corporate conduct has increased dramatically, through both foreign direct investment and the outsourcing of production and services to corporations abroad.⁸ As corporations continue to gain more power, the relative power of states is declining.⁹ A “dramatic increase in corporations’ wealth, power, influence and responsibility over the last twenty years” has led to calls for more attention to the human rights impacts of those cor-

6. Ruggie Report 2008, *supra* note 3, ¶ 9.

7. All businesses can affect the enjoyment of human rights. This Note, however, focuses on transnational corporations (“TNCs”). The fundamental problem addressed in this Note is the inability to hold these corporations responsible for their actions. This problem is much more difficult and complex for corporations operating in multiple countries and multiple legal settings, and therefore the analysis in this Note focuses on the operations of U.S. TNCs operating abroad.

8. John McKenzie, Note, *The Limits of Offshoring — Why the United States Should Keep Enforcement of Human Rights Standards “In-House,”* 83 IND. L.J. 1121, 1132 (2008).

9. See John Spanier, *Who Are the Non-State Actors?*, in THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS 43, 50 (William C. Olson ed., 8th ed. 1991) (noting that rise of non-state actors, including large corporations, “has led some to conclude that states are of declining importance and that nonstate actors are gaining in status and influence”); *id.* at 47 (describing TNCs as “new sovereigns” and expressing fear that they “will become more powerful than the governments of many countries”).

porations' actions.¹⁰ For example, in discussing the effects of globalization, Mary Robinson¹¹ has called for more accountability for corporations, noting that "more than half of the top economies in the world are corporations not states."¹²

Corporations can and do affect human rights in all stages of their operations. While previous efforts to address corporate human rights abuses focused only on certain rights or certain constituencies,¹³ Ruggie and others now recognize that corporations can affect all human rights and a broad range of stakeholders.¹⁴

10. Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 860 (2008).

11. Mary Robinson served as the U.N. High Commissioner for Human Rights from 1997 through 2002. *Mary Robinson*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ABOUTUS/Pages/Robinson.aspx> (last visited Nov. 26, 2010).

12. Mary Robinson, Op-Ed, *Globalisation Has to Take Human Rights into Account*, IRISH TIMES (Dublin), Jan. 22, 2002, at 14. See also E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 L. & BUS. REV. AM. 11, 27 (2007) (noting tremendous wealth and influence of TNCs); Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 544 (1985) (noting that annual sales of General Motors were greater than entire economic activity of Belgium or Switzerland); Scott Fornek, *Big, Big Business: Firms' Values Dwarf Economies of Many Countries*, CHI. SUN-TIMES, Aug. 18, 2002, at 10 (discussing U.N. conference that ranked world's 100 largest economic entities and noting that 29 of top 100 entities were transnational corporations); *Transnational Corporations*, GLOBAL POLICY FORUM, <http://globalpolicy.org/empire/economic-expansion/transnational-corporations-8-23.html> (last visited Nov. 24, 2010) ("[S]ome of the largest TNCs now have annual profits exceeding the GDPs of many low and medium income countries.").

13. See, e.g., Sub-Comm'n on the Promotion & Prot. of Human Rights, U.N. Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Norms] (attempting to categorize a limited list of human rights with which business should be primarily concerned).

14. See, e.g., Ruggie Report 2008, *supra* note 3, ¶¶ 6, 24, 51–52 (criticizing U.N. Norms for "generat[ing] intense discussions about whether its list of rights was too long or too short, and why some rights were included and others not" and emphasizing instead importance of "defining the specific responsibilities of companies with regard to all rights," *id.* ¶ 51); John Ruggie, Special Representative of the U.N. Secretary-General, Remarks before Yale Law School: Reframing the Business and Human Rights Agenda (Oct. 30, 2008) (transcript available at <http://www.reports-and-materials.org/Ruggie-remarks-Yale-Law-School-30-Oct-2008.pdf>) [hereinafter, Ruggie, Reframing] ("Business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance."); Interview by Devin Stewart with John Ruggie, Special Representative of the U.N. Secretary-General, in New York, N.Y. (Oct. 28, 2008), available at <http://www.policyinnovations.org/ideas/briefings/data/000089> [hereinafter

Meanwhile, although corporations are growing and operating all over the world, there are few mechanisms to hold corporations directly accountable for their actions. Regional human rights courts and U.N. treaty bodies can only hear complaints against states, not private actors.¹⁵ The obligation therefore falls to states to hold corporations accountable for their actions.¹⁶

As the role of TNCs in the global economy increases, so does their ability to influence the governments of states in which they wish to invest.¹⁷ This power creates a major barrier to holding states responsible for regulating corporations' human rights abuses. Corporations now have tremendous influence over the governments of developing countries, and they can use that power to ensure that governments do not provide strong protections for human rights.¹⁸ Because it is less expensive to operate in

Ruggie, Achievements and Prospects] (describing study of 400 public charges against companies and finding "that companies are capable of violating any human right, even the right to jury trial").

15. For example, the Rome Statute creating the International Criminal Court (ICC) gave the ICC the authority to try individuals but not corporations; although the drafters considered creating jurisdiction over corporations, they ultimately rejected that option. Ruggie Report 2007, *supra* note 4, ¶ 21; Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

16. Ruggie Report 2008, *supra* note 3, ¶ 50.

17. See Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 234–41 (1999) (discussing how TNCs use foreign direct investment to influence host states); Lena Ayoub, Note, *Nike Just Does It — And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 401 (1999) (describing influence TNCs have over host states regarding labor rights "as a means of assuring their prosperity in the host country, free from union or governmental intervention").

18. Triponel, *supra* note 10, at 860; Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 L. & POL'Y INT'L BUS. 111, 149 (1998) ("[P]rivate initiatives may create disincentives for developing nations to enact stronger labor laws or improve enforcement of current standards. . . . [G]overnments of developing nations may attempt to compete with other nations for U.S. investment by offering undeserved subsidies to U.S. MNCs or by reducing enforcement of environmental and other standards."). See also Ruggie Report 2008, *supra* note 3, ¶¶ 14–16 (discussing institutional barriers to enforcing laws and regulations against TNCs); Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445, 449 (1995) (noting that interventions to prevent race to the bottom may result in unintended negative consequences and explaining that "[e]mployers or governments in poorer countries may respond to specific labor mandates (e.g., wages and hours) by lowering other specific standards (e.g., worker safety and health) in order to avoid overall increases in unit labor costs").

countries that do not have strict regulations in place,¹⁹ TNCs have an incentive to advocate for looser laws. At the same time, developing countries are often competing for international investment.²⁰ The result of these two forces is a “race to the bottom” where countries with the least regulation are likely to attract the most investment.²¹

Therefore, in the absence of overarching international regulations, companies operating in developing countries often enjoy virtual impunity for their actions. They have little accountability for even gross human rights violations and therefore little incentive to change the way they operate.²² Despite the many changes in the way the global economy functions, the legal framework regulating TNCs operates in much the same way as it did before globalization. The law has not kept pace with the challenges and demands of globalization.²³

The case of Texaco’s investment in Ecuador provides a good example of the challenges facing the world of business and human rights. In 1964, Texaco signed a contract with the govern-

19. See Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 674–75 (1992) (“MNCs search for the countries which offer them the lowest costs and highest returns. This search may include a search for a lower standard of regulation, as this carries with it a lower possibility of liability.”).

20. *Id.* at 674 (“The governments of lesser developed countries compete with one another for the business of MNCs to aid economic development.”).

21. See Daschbach, *supra* note 12, at 24 (describing the “global race to the bottom”); Paula Downey, *Businesses Must Contribute to the Common Good to Survive Scrutiny*, IRISH TIMES (Dublin), Nov. 9, 2001, at 55 (“Critical decisions affecting our lives, social structures and environment are subtly transferred from elected governments to the unelected boards of transnational corporations, and citizens everywhere on the planet increasingly find that social and environmental needs play second fiddle to the priorities of business and money.”).

22. See Fazal Khan, *The Human Factor: Globalizing Ethical Standards in Drug Trials Through Market Exclusion*, 57 DEPAUL L. REV. 877, 878 (2008) (arguing that companies operating under lax regulations are not “inherently unethical institutions — these corporations are composed of persons who are simply being human and responding to structural incentives”); Ruggie, *Achievements and Prospects*, *supra* note 14 (“[M]ultinational corporations . . . are not intrinsically bad. . . . The problem is that there is a vast misalignment between their scope and their ability to operate globally . . . and the ability of countries or societies to adapt to this and to manage the adverse consequences.”).

23. See Ruggie Report 2008, *supra* note 3, ¶¶ 13, 104 (“[A]s has happened throughout history, rapid market expansion has . . . created governance gaps . . .” *Id.* ¶ 13.); Ruggie, *Achievements and Prospects*, *supra* note 14 (“[W]e live in a world where there are huge gaps between the scope of economic forces and actors on the one hand, and the ability of societies to manage the adverse consequences of global economic integration.”).

ment of Ecuador to explore and drill for oil in the Amazon.²⁴ At the time the parties signed the contract, Ecuador did not have a democratic representative government but rather a military regime that did not even recognize indigenous people as full citizens.²⁵ Furthermore, the government had little or no regulation to protect the environment or the indigenous people living near the drilling sites from the potential adverse effects of the drilling:

Ecuador had practically no environmental regulations, no technical knowledge of oil operations, no scientific or public-health expertise, no governmental oversight capabilities — and no clue that it even needed such things. It needed money, pure and simple.²⁶

Therefore, while the company now claims to have always respected relevant Ecuadorian law,²⁷ the law offered little or no actual protections for the environment or the indigenous peoples living near the drilling sites. As a consequence, Texaco's drilling operations in Ecuador resulted in several suits against it in the United States.²⁸ The suits alleged both environmental and personal injuries arising out of pollution of the rain forests and rivers surrounding Texaco's operations.²⁹

B. FRAMING THE DEBATE: UNITED NATIONS SPECIAL REPRESENTATIVE JOHN RUGGIE

Against this backdrop, the human rights bodies within the United Nations have recognized the major impact that corporations have on human rights as well as the need to take a leadership role in this area.³⁰ In 2005, the Human Rights Commission

24. William Langewiesche, *Jungle Law*, VANITY FAIR, May 2007, available at <http://www.vanityfair.com/politics/features/2007/05/texaco200705>.

25. *Id.*

26. *Id.*

27. *Id.*

28. One of the cases is *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). For a more detailed discussion of this case, see *infra* notes 106–111 and accompanying text.

29. *Aguinda*, 303 F.3d at 473.

30. See generally U.N. High Comm'r on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) (considering “the scope and legal status of existing initia-

adopted a resolution targeting the problem, requesting the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.³¹ Kofi Annan, then Secretary-General, appointed John Ruggie, a professor at Harvard's Kennedy School of Government, to the post.³²

In April 2008, Ruggie produced a report that provided a three-part framework to “anchor the business and human rights debate.”³³ Ruggie based his framework on three pillars: (1) the State duty to protect against human rights abuses by third parties, including business;³⁴ (2) the corporate responsibility to respect human rights;³⁵ and (3) the need for more effective access to remedies.³⁶

In June 2008, the Human Rights Council (successor to the Human Rights Commission) adopted a second resolution, welcoming the framework defined by the special representative and extending his mandate for an additional three years so that he could “operationalize” the framework.³⁷ In the resolution, the

tives and standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights as well as outstanding issues that require further consideration by the [Human Rights] Commission”; see also Ruggie Report 2008, *supra* note 3, ¶ 107 (noting that the U.N. “can and must lead . . . by setting expectations and aspirations” in the area of business and human rights).

31. Commission on Human Rights Res. 2005/69, 61st Sess., U.N. Doc. E/CN.4/2005/L.87 (Apr. 20, 2005).

32. Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), available at <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>. Ruggie's past work for the United Nations included overseeing the U.N. Global Compact. *John Ruggie: Biography*, HARVARD KENNEDY SCHOOL, <http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html> (last visited Nov. 6, 2010). The U.N. Global Compact is a voluntary initiative under which businesses commit to uphold ten principles covering human rights, the environment, labor, and anti-corruption. See *About Us*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Nov. 22, 2010). For additional background on John Ruggie's appointment and the context for the creation of the position, see Ruggie, *Achievements and Prospects*, *supra* note 14.

33. Ruggie Report 2008, *supra* note 3, at 1.

34. *Id.* ¶ 18.

35. *Id.* ¶ 23.

36. *Id.* ¶ 26.

37. Human Rights Council Res. 8/7, Rep. of the Human Rights Council, 8th Sess., June 2–18, 2008, U.N. Doc. A/HRC/8/52, ¶ 2 (June 18, 2008) (“Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies . . . and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary . . .” *Id.* at pmb.).

Human Rights Council reaffirmed the impact that businesses have on human rights and urged the special representative to develop concrete and practical steps to guide both states and corporations.³⁸

The work of the special representative in this area is important for several reasons: first, in addition to reflecting current thinking in this area, the three-part framework has also served to anchor the business and human rights debate, as was the report's express intent.³⁹ Second, the special representative's work reflects a broad diversity of viewpoints, and thus his recommendations are both well-informed as well as realistic in response to the many challenges posed: he met with stakeholders in all groups, including businesses, non-governmental organizations, and government representatives.⁴⁰

Before the appointment of the special representative, much work in the area of business and human rights had been focused on creating legally binding obligations on businesses.⁴¹ Ruggie, on the other hand, elected to use a different focus. Rather than advocating for a treaty that creates obligations directly enforceable on businesses, Ruggie took the view that while companies do have a "responsibility to respect human rights,"⁴² the primary enforcement duties should remain with states.⁴³ This view is consistent with traditional international law, which is binding on states but not on individual persons — or legal persons, in the case of corporations.

Accordingly, the first pillar of the framework is the state's duty to protect against human rights abuses, including those committed by businesses.⁴⁴ This means that states have a duty to

38. *Id.* ¶ 4.

39. *See, e.g.*, Ruggie, Achievements and Prospects, *supra* note 14 (discussing positive reception of three-part framework from U.N. Human Rights Council, governments, NGOs, and business); Ruggie, Reframing, *supra* note 14, at 2 (same).

40. *See* Ruggie, Reframing, *supra* note 14, at 6 (describing engagement with "business and civil society organizations, the UN and regional human rights bodies, the OECD, IFC, UNCITRAL, and International Organization for Standardization").

41. *See, e.g.*, U.N. Norms, *supra* note 13, ¶ 1 ("Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law" (emphasis added)).

42. Ruggie Report 2008, *supra* note 3, ¶ 23. For an elaboration on the corporate responsibility to respect, see *id.* ¶¶ 51–81.

43. *Id.* ¶ 50 ("The human rights regime rests upon the bedrock role of States.").

44. *Id.* ¶ 18.

prevent and remedy abuses, including by taking action to increase corporate accountability and to improve victims' access to remedies.⁴⁵ The legal system and the courts remain the primary means to hold wrongdoers responsible and to provide remedies to victims. Ruggie argues that states should both "strengthen judicial capability to hear complaints and enforce remedies against all corporations operating or based in their territory," and also "address obstacles to access to justice, including for foreign plaintiffs."⁴⁶

The second pillar is the corporate responsibility to respect human rights.⁴⁷ Essentially, corporations have the responsibility to "do no harm," meaning they should not leave populations in a worse position than they would have been in had the corporation's investment not occurred.⁴⁸ The corporate responsibility to respect human rights requires "due diligence," meaning that companies must not only respect national laws but must also manage and avoid human rights-related risks.⁴⁹ Sometimes, however, corporations do cause harm; in those cases, victims need a mechanism to hold the corporation responsible. This leads to the framework's third pillar: the need for victims to have access to remedies,⁵⁰ which is addressed in more detail in Part III.

Ruggie's framework offers a window into the problem addressed by this Note. The current debate in business and human rights recognizes both the corporate responsibility to respect human rights as well as the need for greater access to remedies. At the same time, it places enforcement duties in the hands of states. In a scheme of state enforcement, the U.S. *forum non conveniens* doctrine is one obstacle that keeps victims of corporate human rights abuses from obtaining remedies and from holding perpetrators accountable.

45. *Id.* ¶¶ 82–83.

46. *Id.* ¶ 91.

47. *Id.* ¶ 23.

48. *Id.* ¶ 24.

49. *Id.* ¶¶ 25, 56–59. Ruggie's report applies the concept of "due diligence" to the corporate responsibility to respect human rights. *Id.* ¶¶ 56–64. For a discussion of due diligence as applied to state duties, see *infra* Part IV.B.1.

50. Ruggie Report 2008, *supra* note 3, ¶ 26.

III. THE PROBLEM OF INADEQUATE REMEDIES

This Part provides additional background on the problem this Note aims to address: victims of corporate human rights abuses do not have access to adequate remedies. Part III.A reviews recourse mechanisms currently available to victims and notes gaps inherent in the primary mechanisms. Part III.B discusses domestic enforcement mechanisms available to victims in U.S. courts. Part III.C defines the U.S. *forum non conveniens* doctrine and describes the history of its development. Part III.D discusses why *forum non conveniens* serves as a significant obstacle to victims of corporate human rights abuses.

A. DESCRIPTION OF THE PROBLEM — INSUFFICIENT ACCESS TO REMEDIES

Victims of human rights abuses have few avenues to justice. In the case of human rights abuses committed by governments, victims can file claims against the government at one or more of three different levels: the national level, the regional level, and the international level.⁵¹ For victims of corporate human rights abuses, however, only the domestic level is available as a means of holding the corporation directly responsible: regional and international tribunals only permit cases against states, not against private actors such as corporations.⁵²

At the domestic level, victims may seek justice either in the courts of their own state (“the host state”) or of the state where

51. See generally DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2005).

52. See *supra* note 15 and accompanying text. See generally John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008) (explaining that while governments have duties to protect human rights, their role with regard to private actors is unclear and there is no international enforcement); Ruggie, *Achievements and Prospects*, *supra* note 14 (discussing Knox article and describing key points as related to business and human rights). Commentators have criticized the lack of accountability for private actors in the international system. See, e.g., Julia Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205, 1214 (2004) (questioning “whether a human rights system premised on state responsibility to respect human rights can be effective in a globalized world” (quoting Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 274 (2002))).

the corporation is based (“the home state”).⁵³ The host state may be reluctant to hold TNCs responsible for human rights violations out of fear that such action will reduce investment in their country or because the state may have been involved in the human rights abuse either directly or indirectly.⁵⁴ On the other side, the home states of corporations may be reluctant to hold their own corporations responsible for fear of putting their corporations at a disadvantage as compared with corporations from other countries,⁵⁵ or for fear of damaging bilateral relations with other

53. Victims may also be able to file suit in some other country, such as where the corporation does a significant amount of business. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2000) (allowing claims against English and Dutch companies for harms committed in Nigeria to be brought in New York). Nevertheless, due to the focus of this Note and for the sake of simplicity, the analysis here addresses home states (where the corporation is based) and host states (where the investment and the harm occurred).

54. See *Wiwa*, 226 F.3d at 106 (noting that cases of torture may be especially difficult to adjudicate in state where the harm occurred because torture, by definition, requires a state action element, and foreign states will be inhospitable to such claims); Ruggie Report 2008, *supra* note 3, ¶¶ 14–16 (“States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment.” *Id.* ¶ 14.); Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT’L L. 41, 62 (1998) (“[O]ften the country where the alleged abuses took place will not be an adequate forum due to a corrupt legal system or the presence of forces of violence which may pose a threat to the plaintiff.”); Liubicic, *supra* note 18, at 149 (“[G]overnments of developing nations may attempt to compete with other nations for U.S. investment . . . by reducing enforcement of environmental or other standards.”); Ayoub, *supra* note 17, at 422–23, 439 (“MNCs will locate in countries willing to host them with minimal interference . . .” *Id.* at 422.); Christen Broecker, Note, “*Better the Devil You Know*”: *Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT’L L. & POL. 159, 184–85 (2008) (reviewing multiple reasons why host states may be unwilling or unable to effectively regulate TNCs on their territory); INT’L COMM’N OF JURISTS, SUBMISSION TO THE UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON BUSINESS AND HUMAN RIGHTS 6 (2004), available at http://mvoplatforn.nl/publications-en/Publication_2154 (“States on whose territory violations are committed (host governments) are often unable or unwilling to enforce their legislation and there is no foreign or international mechanism to counter this deficit.”); *Case Profile: Texaco/Chevron Lawsuits (re Ecuador)*, BUS. & HUMAN RIGHTS RES. CTR., <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador> (last visited Nov. 24, 2010) (“In early 2008, an independent expert recommended to the [Ecuadorian] court that Chevron should pay \$7–16 billion in compensation for the pollution. . . . In 2008, Chevron reportedly lobbied the US Government to end trade preferences with Ecuador over the lawsuit.”).

55. Ruggie Report 2008, *supra* note 3, ¶¶ 14, 89 (“Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because . . . of concern that those firms might lose investment opportunities or relocate their headquarters.” *Id.* ¶ 14.); Daschbach, *supra* note 12, at 20 (describing the view that allowing suits in U.S. courts against U.S. companies will put U.S. companies at a competitive disadvantage);

states by trying cases of vital interest to other countries.⁵⁶ The result is that victims have few, if any, effective avenues to justice. Further, as John Ruggie has stated, “access to formal judicial systems is often most difficult where the need is greatest.”⁵⁷ As a result, corporations have the dual advantage of profiting from their investments in areas where local citizens are likely to be effectively excluded from the host country’s legal and political systems, while also remaining insulated from actions in home country courts.⁵⁸

As discussed above, Ruggie’s framework also continues to place primary corporate human rights enforcement duties with states.⁵⁹ Placing enforcement duties with states is most consistent with current international law and is probably the most realistic near-term solution for increasing corporate accountability for human rights violations. However, states currently have few incentives to hold corporations accountable for their human rights abuses.

B. HOW DO VICTIMS SEEK JUSTICE IN U.S. COURTS?

Victims filing suit in the United States for fundamental human rights violations committed abroad by American TNCs have primarily relied on the Alien Tort Claims Act (“ATCA”) or the

Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (same).

56. See, e.g., *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 278 (S.D.N.Y. 2009) (quoting statement by South African Minister of Justice Penuell Mpapa Maduna that U.S. apartheid “litigation appears to suggest that the [South African] government . . . has done little or nothing about redressing the ravages of the apartheid system”).

57. Ruggie Report 2008, *supra* note 3, ¶ 26. See also *id.* ¶ 16 (“[T]he worst cases of corporate-related human rights harm . . . occurred . . . disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high.”).

58. Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT’L L.J. 299, 301 (2001). See also OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 359 (2008), available at <http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf> [hereinafter OPBP] (“Almost as great a concern as the frequency with which human rights are violated by TNCs operating in developing countries is the notable absence of effective systems for imposing legal accountability for such violations.”).

59. *Supra* note 43 and accompanying text.

Torture Victim Protection Act (“TVPA”).⁶⁰ Victims can also bring claims under state tort law.⁶¹ Cases are subject to standard U.S. procedural rules, such as jurisdiction requirements and the doctrine of *forum non conveniens*.⁶²

The ATCA provides that “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.”⁶³ Based on the Alien Tort Statute of 1789, the ATCA was plucked from obscurity by the Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*.⁶⁴ In order to establish an actionable claim under the ATCA, the plaintiff must do two things: state a claim for a tortious violation of contemporary international law and establish personal jurisdiction over the defendant.⁶⁵ The Supreme Court’s decision in *Sosa v. Alvarez-Machain* limited the applicability of the statute to norms “of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the courts] have recognized.”⁶⁶ This allows victims who can state a claim of sufficiently defined violations of international law —

60. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (seeking damages under ATCA for imprisonment, torture, and extrajudicial killing). For a summary of available claims against TNCs in the United States, see OPBP, *supra* note 58, at 305–21, describing in detail various claims that may be brought against TNCs in the United States, including ATCA, TVPA, administrative law claims, and others.

61. See *infra* note 75 and accompanying text.

62. See BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 247–51 (2d ed. 2008) (describing personal jurisdiction requirements in human rights cases); *id.* at 385, 391–401 (describing applicability of *forum non conveniens* to human rights cases).

63. 28 U.S.C. § 1350 (2006).

64. 630 F.2d 876 (2d Cir. 1980). In this case, citizens of Paraguay brought suit against another citizen of Paraguay for wrongfully causing the death of their son, allegedly through torture. *Id.* at 878–89. The court held that the torture at issue in the case was a violation of universally accepted norms of international law. *Id.* at 882–85. On remand to the district court, the two plaintiffs were awarded a total judgment of over \$10 million, including significant punitive damages. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984). For more detail on the history of ATCA litigation, see *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 303–04 (S.D.N.Y. 2003), *overruled by* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); STEPHENS ET AL., *supra* note 62, at 7–12 (describing history of ATCA litigation and summarizing the *Filartiga* case).

65. Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1562–63 (1998) (book review).

66. 542 U.S. 692, 725 (2004).

such as torture, genocide, war crimes, or extrajudicial killing⁶⁷ — to find a forum in the United States. Victims in such cases have received large damages awards, sometimes including punitive damages.⁶⁸ The TVPA expands the coverage of ATCA but is focused on torture and summary execution committed abroad under color of foreign law.⁶⁹

The applicability of ATCA to corporations has recently been called into question. In September 2010, the Second Circuit held that corporations cannot be held liable for violations of customary international law under ATCA.⁷⁰ The decision came as a surprise to advocates, particularly because neither party to the case had raised or briefed that particular issue.⁷¹ The decision was also surprising in that no appellate court had previously rejected corporate liability under international law.⁷² The plaintiffs have petitioned for rehearing en banc,⁷³ and human rights groups, unions, international law groups, legal historians, and law professors have filed several amicus briefs opposing the decision and supporting the plaintiffs' petition for rehearing.⁷⁴ A definitive resolution of this issue may take years, and this Note assumes the continuing availability of ATCA suits against corporations. Even in the absence of ATCA, however, state tort law claims remain available to victims of harms committed abroad.

67. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, extrajudicial killing); *Filartiga*, 630 F.2d 876 (torture).

68. See, e.g., STEPHENS ET AL., *supra* note 62, at 526–28 (describing availability of punitive damages under ATCA and TVPA); *supra* note 64 (noting punitive damages awarded in *Filartiga*).

69. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

70. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

71. Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797>; Marco Simons, *Kiobel's First Victim: Flomo v. Firestone*, EARTHRIGHTS INT'L (Oct. 5, 2010), <http://www.earthrights.org/blog/kiobels-first-victim-flomo-v-firestone>.

72. Marco Simons, *U.S. Court Finds Corporations Immune from Liability for Human Rights Abuses*, EARTHRIGHTS INT'L (Sept. 17, 2010), <http://www.earthrights.org/blog/us-court-finds-corporations-immune-liability-human-rights-abuses>.

73. See *Amicus Briefs in Kiobel v. Royal Dutch Petroleum/Shell*, EARTHRIGHTS INT'L, <http://www.earthrights.org/publication/amicus-briefs-kiobel-v-royal-dutch-petroleumshell> (last visited Nov. 8, 2010).

74. *ERI Files Brief for Human Rights and Labor Groups Challenging Corporate Immunity for Abuses*, EARTHRIGHTS INT'L (Oct. 18, 2010), <http://www.earthrights.org/legal/eri-files-brief-human-rights-and-labor-groups-challenging-corporate-immunity-abuses>.

State tort law claims operate like any civil claim in U.S. courts, with victims filing suit for such torts as battery, personal injury, or wrongful death.⁷⁵ Though no state tort law claims for violations of human rights abroad have yet been decided, some cases have settled with recoveries for the plaintiffs.⁷⁶ Tort recoveries could potentially be quite large if juries find that the corporations acted negligently in their operations abroad.⁷⁷ Companies could also potentially face punitive damages if their actions were particularly egregious.⁷⁸

Before any of these cases can reach the merits, however, defendants are likely to file motions to dismiss on the grounds of *forum non conveniens*.

C. WHAT IS *FORUM NON CONVENIENS*?

The doctrine of *forum non conveniens* was first articulated in *Gulf Oil Corp. v. Gilbert* over sixty years ago.⁷⁹ This court-made doctrine gives a court discretion to dismiss a case over which jurisdiction would otherwise be proper where a foreign court is “the more appropriate and convenient forum for adjudicating the con-

75. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002) (seeking damages for negligence, public and private nuisance, strict liability, medical monitoring, trespass, and civil conspiracy arising out of pollution of rivers and rain forests during oil drilling operations); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–94 (2d Cir. 2000) (seeking damages under “various state law torts”); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987) (raising personal injury and wrongful death claims relating to a gas leak from a chemical plant in Bhopal, India); STEPHENS ET AL., *supra* note 62, at 120–27 (discussing availability of state law claims for victims of human rights abuses).

76. For example, a case against Unocal for human rights violations in Burma went through two phases of trial on the state law claims before settling out of court. See *Doe v. Unocal Case History*, EARTHRIGHTS INT’L, <http://www.earthrights.org/legal/doe-v-unocal-case-history> (last visited Nov. 8, 2010); *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, EARTHRIGHTS INT’L (Apr. 2, 2005), <http://www.earthrights.org/legal/historic-advance-universal-human-rights-unocal-compensate-burmese-villagers>. See also STEPHENS ET AL., *supra* note 62, at 124 (describing *Unocal* case); Fran Quigley, Editorial, *Nigerians Get Their Day in Court to Fight Oil Companies*, INDIANAPOLIS STAR, Dec. 15, 2008, at A9 (discussing settlement in *Unocal* case).

77. See STEPHENS ET AL., *supra* note 62, at 508–09 (discussing availability of tort remedies for human rights victims).

78. *Id.* at 509–10.

79. 330 U.S. 501 (1947).

troversty.”⁸⁰ The doctrine has been criticized since its very inception,⁸¹ and the world has changed tremendously in the intervening years.⁸² Despite these facts, the application of the doctrine remains virtually unchanged.⁸³

Forum non conveniens requires a two-step inquiry. First, the court will decide whether an adequate alternative forum exists.⁸⁴

80. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007); see also *Gilbert*, 330 U.S. 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.”).

81. *Gulf Oil Corp. v. Gilbert* was the case that effectively introduced *forum non conveniens* into U.S. law. 330 U.S. 501 (1947). The case was decided by a 5-4 majority, with Justices Reed, Burton, Black, and Rutledge dissenting. *Id.* Given the strong dissent in the case, it seems strange that the doctrine has endured, virtually unchanged, for over 60 years. Justice Black’s dissent in *Gilbert* raised several objections to the Court’s articulation of the doctrine. First, he expressed concern that *forum non conveniens* inquiries would “clutter the very threshold of federal courts with a preliminary trial of fact concerning the relative convenience of forums.” *Id.* at 516 (Black, J., dissenting). Second, Justice Black criticized the doctrine’s unpredictability: “The broad and indefinite discretion left to the federal courts to decide the question of convenience . . . will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.” *Id.* Third, he expressed concern at the impact that *forum non conveniens* dismissals would have on plaintiffs. *Id.* (expressing concern that plaintiffs may “suffer serious financial loss through the delay and expense of litigation” (internal quotation marks omitted)). Finally, he warned that defendants would be able to use the doctrine to manipulate the place of trial — a form of reverse forum shopping. *Id.* at 515–16. A more recent discussion of concerns raised by the doctrine came from the Texas Supreme Court. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680–91 (Tex. 1990) (Doggett, J., concurring) (“[T]he [*forum non conveniens*] doctrine they advocate has nothing to do with fairness and convenience . . .” *Id.* at 680–81.), *superseceded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009).

82. See *supra* Part II.A (describing the increasing impact of globalization and corporate activities on human rights). One large change with major relevance to this Note has been the advent of universal human rights. The Universal Declaration of Human Rights was developed in 1948, just one year after the *Gilbert* decision. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Although the Declaration itself did not originally create legally binding duties on states, the rights defined in the Declaration were articulated in the two international covenants that do create such duties. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Social, Economic, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The United States is a party to the ICCPR but not the ICESCR. The United Nations Treaty Collection provides the ratification status by country for each treaty, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

83. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (“In 1947, the Supreme Court handed down a pair of decisions laying out the framework for *forum non conveniens* analysis that the federal courts follow to this day.”); Leah Nico, Comment, *From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalization*, 11 SW. J. L. & TRADE AM. 345, 345 (2005) (“The world has changed, but the doctrine of *forum non conveniens* remains static.”).

84. *Wiwa*, 226 F.3d at 100.

Next, it will weigh the public and private interest factors in the case to determine if the balance favors dismissing the case to the other forum.⁸⁵ *Piper Aircraft Co. v. Reyno*, perhaps the most frequently studied case to illustrate the doctrine, was decided in 1981 and applied the exact same public and private interest factors laid out in *Gilbert*.⁸⁶ The private interest factors include:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.⁸⁷

Public interest factors include the “local interest in having localized controversies decided at home” as well as concerns about court congestion, imposing jury duty on communities with little relation to the litigation, and the inefficiency of a court needing to “untangle” conflict of law issues or unfamiliar laws.⁸⁸

In a motion for *forum non conveniens* dismissal, the defendant has the burden of proving that both steps of the test are satisfied.⁸⁹ If the motion is successful, the case is dismissed — it is not formally transferred to an alternative forum. This means that the victims must re-file in the new forum and often must find new counsel to represent them.⁹⁰

Appellate courts review *forum non conveniens* appeals with substantial deference to the trial court. Originally, *forum non conveniens* was created to dismiss cases that had been brought in an inconvenient forum merely to harass the defendant.⁹¹ The *Gilbert* Court, articulating the standard of review for these cases, reasoned that trial courts are best suited to assess plaintiffs’ attempts to abuse the court system to harass defendants.⁹² Under this deferential standard of review, the appellate court will only

85. *Id.*

86. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

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

88. *Id.* at 508–09.

89. *Wiwa*, 226 F.3d at 100.

90. *See infra* note 104 and accompanying text.

91. *Gilbert*, 330 U.S. at 507.

92. *Id.* at 508.

overturn a trial court's dismissal if it finds that there was an abuse of discretion.⁹³ Although *forum non conveniens* dismissals today are more likely to result from a finding that the alternative forum is more convenient than from a finding that the plaintiff's forum was intended to harass the defendant,⁹⁴ the same standard of review continues to apply.

Ordinarily, a plaintiff's choice of forum receives substantial deference.⁹⁵ In cases where the plaintiff is foreign, however, the courts have shown less deference to their choice of forum.⁹⁶ This is because courts find it more reasonable to assume that a plaintiff's choice of their home forum is convenient.⁹⁷ It will be less inconvenient for a plaintiff to have the suit transferred if they have already chosen to sue away from home.⁹⁸

In the first prong of the test, a defendant seeking dismissal will propose an alternative forum, while the plaintiff will try to show that the alternative forum would be inadequate.⁹⁹ Plaintiffs must meet a high threshold on this point, given courts' reluctance

93. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." (citing *Gilbert*, 330 U.S. at 511–12; *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 531 (1947))); *Gilbert*, 330 U.S. at 508 ("The doctrine leaves much to the discretion of the court to which plaintiff resorts.").

94. See John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 661 (2004) ("The meaning of 'inconvenience' in the *forum non conveniens* inquiry has thus shifted away from the maliciousness implied by harassment to the comparatively benign problem of inappropriate forum choice.").

95. See *Gilbert*, 330 U.S. at 508 ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

96. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000) ("The *Gilbert* test requires a balancing of factors, and a plaintiff's lawful U.S. residence can be a meaningful factor supporting the plaintiff's choice of a U.S. forum."); *Piper*, 454 U.S. at 242 ("[T]he courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." (quoting *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 731 (1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *cert. granted*, 450 U.S. 909, *rev'd*, 454 U.S. 235 (1981))).

97. See *Piper*, 454 U.S. at 255–56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable.").

98. See *infra* Part IV.A.2.

99. *Galustian v. Peter*, 570 F. Supp. 2d 836, 838 (E.D. Va. 2008), *rev'd on other grounds*, 591 F.3d 724 (4th Cir. 2010).

to declare another forum inadequate. The Supreme Court has explicitly held that “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”¹⁰⁰ The court, however, may decide that dismissal is not appropriate if “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . [or] the plaintiff shows that the foreign law is inadequate, or that conditions in the foreign forum . . . plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.”¹⁰¹

D. *FORUM NON CONVENIENS* AFFECTS THE ABILITY OF VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE TO ACHIEVE JUSTICE

Despite the challenges associated with suing corporations in their home states,¹⁰² victims can and often do file suit for human rights violations. In the United States, these claims are very likely to face motions for *forum non conveniens* dismissal. As described above, there are serious reasons to doubt that host states will adequately provide justice in such cases,¹⁰³ and studies indicate that a *forum non conveniens* dismissal is typically outcome-determinative — if the victims are unable to sue in U.S. courts, they are unable to recover for the violations of their rights.¹⁰⁴

100. *Piper*, 454 U.S. at 247.

101. *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (internal citations and quotation marks omitted), *aff'd*, 767 F.2d 908 (2d Cir. 1985); *see also* *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

102. *See* Ruggie Report 2008, *supra* note 3, ¶ 89 (noting that obstacles such as *forum non conveniens* may deter victims from seeking remedies); *supra* note 55 and accompanying text (describing these challenges).

103. *Supra* note 54 and accompanying text.

104. *See, e.g.*, *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 682 (Tex. 1990) (Doggott, J., concurring) (“[T]he doctrine is favored by multinational defendants because a *forum non conveniens* dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery.”), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009); David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. REV. 398, 418–19 (1987) (discussing survey of 180 transnational cases dismissed on *forum non conveniens* grounds and noting that none proceeded to a victory in the foreign court); Duval-Major, *supra* note 19, at 671–72 (discussing reasons why plaintiff may be unable to file suit in alternative forum and noting that “the *forum non conveniens* dismissal . . . really represents the end of the line for many foreign plaintiffs,” *id.* at 672.); Dante Figueroa, *Are There Ways out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, BUS. L. BRIEF, Spring 2005, at 42, 45.

Therefore, the doctrine represents a real barrier for victims of human rights abuses at the hands of U.S. corporations.¹⁰⁵ A series of cases helps to illustrate this effect.

In *Aguinda v. Texaco, Inc.*, a large class of plaintiffs filed suit against Texaco in the Southern District of New York, alleging that Texaco's oil operations had polluted rivers and rain forests in Ecuador and Peru.¹⁰⁶ In particular, the plaintiffs alleged that, because of Texaco's negligence they had "been exposed to toxic substances . . . and have or will suffer property damage, personal injuries, and increased risks of disease including cancer."¹⁰⁷ Their claims included, among others, theories of negligence, strict liability, ATCA, and nuisance.¹⁰⁸ The plaintiffs' claims were dismissed on the grounds of *forum non conveniens*.¹⁰⁹ The plaintiffs re-filed their suit in Ecuador in 2003, and a decision was originally expected in early 2005.¹¹⁰ As of the time of publication, however, the litigation is still ongoing.¹¹¹

The case of *In re Union Carbide Corp. Gas Plant Disaster at Bhopal* was also dismissed on the grounds of *forum non conveniens*.¹¹² In this case, thousands of Indian citizens filed claims after "the most devastating industrial disaster in history."¹¹³ The

105. This Note focuses primarily on suits against U.S. corporations in U.S. courts, although corporations from other home states have also been sued in U.S. courts. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (suing Dutch and U.K. companies, Royal Dutch and Shell). This Note proposes modifications to the application of the *forum non conveniens* doctrine, and those modifications should be applicable regardless of where the defendant is based. In applying the doctrine, however, courts are likely to find that the argument for holding U.S. corporations accountable in U.S. courts will typically be stronger and will more often point toward maintaining the suit in the United States. Therefore, while many of the arguments for increasing TNC accountability will be applicable to all corporations, this Note's focus is primarily on U.S.-based TNCs.

106. *See* 303 F.3d 470, 473 (2d Cir. 2002).

107. Class Action Complaint at para. 13, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (No. 94 Civ. 9266), 1994 WL 16495105.

108. *Aguinda*, 303 F.3d at 473-74.

109. *Id.* at 473.

110. Nico, *supra* note 83, at 354.

111. *History of Texaco and Chevron in Ecuador: Legal Proceedings — History*, TEXACO.COM, <http://www.texaco.com/sitelets/ecuador/en/legalarchives/default.aspx> (last visited Nov. 7, 2010). A decision from the Ecuador court was expected in October 2009, Sheila McNulty, *Chevron Expected to Come Under Fire over Lawsuit in Ecuador*, FIN. TIMES (London), May 27, 2009, available at http://www.ft.com/cms/s/0/9f8111bc-4a55-11de-8e7e-00144feabdc0.html?ncklick_check=1, but none has yet been given.

112. 809 F.2d 195 (2d Cir. 1987).

113. *Id.* at 197.

accident occurred in December 1984,¹¹⁴ when up to 15,000 people were killed and over 200,000 were injured following a gas leak from a chemical plant operated by Union Carbide, an American company, in Bhopal, India.¹¹⁵ Before the case in the United States began, the Chief Justice of the Supreme Court of India opined, “[T]hese cases must be pursued in the United States. . . . It is the only hope these unfortunate people have.”¹¹⁶ The Indian courts at the time had a backlog of a million cases, likely to drag on for many years, and the idea that the system would be able to handle the Bhopal cases was “ludicrous” in the eyes of Indian legal observers.¹¹⁷

The procedural outcome of the case was somewhat peculiar because the Union of India substituted itself for the plaintiffs in the U.S. litigation, acting in the capacity of *parens patriae*,¹¹⁸ and it did not oppose the *forum non conveniens* motion to dismiss.¹¹⁹ After the case was dismissed from U.S. courts, the Indian government brokered a deal in 1989 that provided for a “full and final settlement” of \$470 million, including all future claims.¹²⁰ The settlement, resulting in recoveries between \$2,500 and \$7,500 per person for deaths and between \$1,250 and \$5,000 for permanent disabilities, was widely criticized as failing to meet the victims’ needs.¹²¹

The case of *Wiwa v. Dutch Petroleum Co.* offers a contrast to *Aguinda* and *Union Carbide* in that it survived a *forum non conveniens* motion to dismiss, despite the fact that Royal Dutch was a Dutch company and Shell was a U.K. company. Royal Dutch and Shell were sued in U.S. courts for incidents arising out of their oil operations in Nigeria.¹²² The trial court had dismissed

114. *Id.*

115. OPBP, *supra* note 58, at 1.

116. James B. Stewart, *Legal Liability: Why Suits for Damages Such as Bhopal Claims Are Very Rare in India*, WALL ST. J., Jan. 23, 1985 (quoting Y.V. Chandrachud, Chief Justice of the Supreme Court of India).

117. *Id.*

118. *Union Carbide*, 809 F.2d at 197–98.

119. *Id.* at 201.

120. Andrew Buncombe, *The Cursed Children of Bhopal*, INDEP. (London), Nov. 19, 2008, at 30, available at <http://www.independent.co.uk/news/world/asia/the-cursed-children-of-bhopal-1024600.html>; OPBP, *supra* note 58, at 174.

121. See OPBP, *supra* note 58, at 174 (describing criticism of settlement).

122. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000).

the case, finding a British forum preferable.¹²³ The Second Circuit overturned that decision in 2000, applying a more flexible view of the *forum non conveniens* doctrine.¹²⁴ Specifically, the Second Circuit found that the trial court had abused its discretion because it failed to take into account “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” and because the factors favoring the alternative forum “were not particularly compelling.”¹²⁵ In June 2009, on the eve of trial, the case was settled out of court with Shell agreeing to pay \$15.5 million.¹²⁶

In *Dow Chemical Co. v. Castro Alvaro*, the Texas Supreme Court held that the state legislature had statutorily abolished the doctrine of *forum non conveniens* in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code, which permitted wrongful death and personal injury actions arising out of an incident in a foreign state or country.¹²⁷ After the court rejected the motion to dismiss, the case settled, with a substantial recovery for the plaintiffs.¹²⁸ Three years after the case was decided, the Texas state legislature responded by passing a statute to permit *forum non conveniens* dismissals.¹²⁹

The *Wiwa* and *Castro Alvaro* cases demonstrate that surviving a motion to dismiss for *forum non conveniens* permitted the plaintiffs to recover significant amounts for their injuries. Notably, it did so without even requiring a trial in a U.S. forum. The defendants were willing to settle in both cases once they faced the real

123. *Id.* at 93–94.

124. *See id.*

125. *Id.* at 101. In addition to emphasizing relevant U.S. policy interests in human rights cases, *id.* at 105, the court also weighed the relevant burdens that dismissal would impose on the plaintiffs as compared with the defendants. *Id.* at 107.

126. Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, June 9, 2009, at B1; Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), available at <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

127. 786 S.W.2d 674 (Tex. 1990), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009).

128. *Costa Rica: The Price of Bananas*, ECONOMIST, Mar. 12, 1994, at 48 (reporting that suit resulted in settlement of \$20 million, with distributions to 800 workers involved of between \$1,500 and \$15,000 each).

129. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009); *see also* Wilson, *supra* note 94, at 690 (discussing Texas statute).

threat of trial in the U.S.¹³⁰ One can only guess that those settlements would have been much smaller¹³¹ or would not have happened at all¹³² had the cases been dismissed on *forum non conveniens* grounds. *Aguinda* and *Union Carbide*, on the other hand, demonstrate the opposite: the *Aguinda* plaintiffs are still mired in an ongoing legal battle in Ecuador, while the *Union Carbide* plaintiffs recovered only small amounts for their very serious injuries.

* * *

As this Part demonstrates, the current doctrine of *forum non conveniens* stands as a significant obstacle to victims of human rights abuses perpetrated by U.S. corporations. The original intent of *forum non conveniens* was to prevent the use of lawsuits in an inconvenient forum to harass defendants,¹³³ a valid and useful purpose. The doctrine, however, now serves to deny remedies to deserving plaintiffs by protecting TNCs from suit in the U.S.¹³⁴ One judge even referred to *forum non conveniens* as a “legal fic-

130. According to recent data, ninety-eight percent of civil cases in federal courts settle before trial. Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 40 (2006). In this context, providing a U.S. forum may turn out to be a hypothetical exercise. Merely signaling to defendants that they are more likely to face trial in U.S. courts may encourage them to settle before ever setting foot in a courtroom. Cf. *Historic Advance for Universal Human Rights*, *supra* note 76 (providing an example of corporate defendants settling human rights claims after losing preliminary trial motions). Conversely, as long as defendants believe they have a good chance of succeeding in having cases thrown out of U.S. court, they are likely to continue arguing for *forum non conveniens* dismissal. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting) (arguing doctrine would “clutter . . . courts with a preliminary trial of fact concerning the relative convenience of forums”).

131. See, e.g., *Union Carbide* settlement at *supra* notes 112–113 and accompanying text.

132. See, e.g., *supra* note 104.

133. See *supra* note 92 and accompanying text.

134. See Daschbach, *supra* note 12, at 25 (discussing how *forum non conveniens* shields TNCs); Rosemary H. Do, Note, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua’s DBCP Litigation*, 14 SW. J. L. & TRADE AM. 409, 418 (2008) (“[F]orum non conveniens has become a formidable shield for U.S.-based multinational corporations against foreign plaintiffs seeking compensation within the U.S. legal system.”); Duval-Major, *supra* note 19, at 650 (“United States-based multinational corporations (MNCs) constitute the main group of defendants who currently benefit from the doctrine.”).

tion with a fancy name to shield alleged wrongdoers”¹³⁵ and noted that the doctrine does not serve convenience or fairness goals but rather serves to insulate TNCs from responsibility for their actions abroad.¹³⁶ Other commentators have expressed concern that courts granting dismissal for *forum non conveniens* do so for the wrong reasons.¹³⁷

While globalization has expanded opportunities for TNCs to operate across boundaries, there has been no similar expansion in victims’ ability to hold TNCs accountable when these cross-boundary operations impact basic human rights. We are left with a significant problem — a “fundamental institutional misalignment . . . [that] must be fixed.”¹³⁸

IV. A PROPOSAL TO MODIFY *FORUM NON CONVENIENS*

This Part proposes a solution to the problem defined in Part III. The current application of *forum non conveniens* doctrine must be modified to account for changes wrought by globalization, technology, and the growing field of human rights. Part IV.A defines how the doctrine should be modified. Part IV.B provides additional support for the solution, describing important reasons why corporations must be held responsible for human rights violations committed abroad and why U.S. courts must play a role in this effort.

135. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 680 (Tex., 1990) (Doggett, J., concurring), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009).

136. *Id.* at 680–81 (“[*Forum non conveniens*] ‘doctrine’ . . . has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad . . .”).

137. See, e.g., ONATI INT’L INST. FOR THE SOCIOLOGY OF LAW, FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN LEGAL CULTURES 111–12 (Volkmar Gessner ed., 1996) (noting that personality and discretion of judge are most important factors in *forum non conveniens* dismissals); Boyd, *supra* note 54, at 71 (“The doctrine appears to be not a convenience doctrine at all, but rather an outcome determination which could mask more nefarious motives such as xenophobia, a desire to protect multinational corporations for injuries in foreign countries, or fears of dealing with difficult issues of foreign law.”); *id.* at 74 (“The district judge’s decision is necessarily intuitive and subjective, many times motivated by bureaucratic pressures and political attitudes . . .”).

138. Ruggie Report 2007, *supra* note 4, ¶ 3. See text accompanying *supra* note 4.

A. APPLICATION OF THE DOCTRINE SHOULD BE MODIFIED TO
TAKE ACCOUNT OF HUMAN RIGHTS, GLOBALIZATION,
AND NEW TECHNOLOGIES

Although the doctrine of *forum non conveniens* was originally developed to prevent harassment of defendants, it has become a tool for U.S. multinationals seeking to avoid liability for human rights abuses committed abroad.¹³⁹ The doctrine's application should be modified to take into account globalization, the increasing role of TNCs, technological improvements available to trial courts, and the international interest in promoting fundamental human rights.¹⁴⁰ Some commentators have proposed abolishing the doctrine altogether¹⁴¹ or selectively abolishing it with respect to human rights cases.¹⁴² Still others have proposed adding a single new factor to the analysis to account for globalization and human rights concerns.¹⁴³ For several reasons, this Note proposes a different approach.

It is unlikely that courts will choose to abolish the doctrine altogether. In 2007, the Supreme Court decided *Sinochem International Co. v. Malaysia International Shipping Corp.*,¹⁴⁴ reaffirming the vitality of the doctrine in cases where the alternative forum is abroad.¹⁴⁵ Further, many U.S. states have also reaffirmed the doctrine.¹⁴⁶ It is unrealistic to expect such a widely and recently supported doctrine to be struck down.

139. See *supra* note 134.

140. See Nico, *supra* note 83, at 347 (noting that *forum non conveniens* balancing test fails to consider "social and moral responsibility that accompany the expanding global economy"); Wilson, *supra* note 94, at 690–91 ("In its current formulation, *forum non conveniens* frustrates the judicial resolution of disputes that cross national boundaries.").

141. See *supra* note 81.

142. See Boyd, *supra* note 54 (advocating abolition of *forum non conveniens* in U.S. human rights litigation); P.J. Kee, *Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens*, 83 TUL. L. REV. 495 (2008) (arguing *forum non conveniens* should not apply in ATCA cases).

143. See Nico, *supra* note 83, at 360–61 ("American courts must add a factor to the *forum non conveniens* test. Under the public interest factors, American courts should weigh the role of globalization in causing the plaintiff's injury.").

144. 549 U.S. 422 (2007). See *infra* note 202 and accompanying text.

145. See *supra* note 80 and accompanying text.

146. See Wilson, *supra* note 94, at 690 ("Almost every state recognizes the doctrine [of *forum non conveniens*] by common law, statutory mandate, or both."). In 1993, the Texas state legislature struck down its state supreme court's finding that the doctrine had been abolished. See *supra* note 129 and accompanying text.

To abolish the doctrine selectively with respect to human rights cases would simply invite mini-trials to determine whether a case raised a human rights issue. Furthermore, other issues affected by globalization, such as activities of TNCs affecting the environment, may also deserve the attention of U.S. courts.¹⁴⁷ More importantly, the doctrine can and does serve a valid purpose in some instances. For example, the doctrine's original purpose of protecting against harassment¹⁴⁸ may still be valid in some cases. Abolishing the doctrine outright in certain types of cases would prevent it from serving its purpose.¹⁴⁹ Finally, adding a single new factor to the analysis is insufficient to solve the current concerns with the *forum non conveniens* doctrine. There are multiple reasons that should lead us to reassess the doctrine's application, and each of these reasons should be accounted for in an integrated, modern application of the doctrine. Courts should be permitted to retain discretion, but they must ensure that they are applying the test in a manner that takes account of all relevant interests.

The question therefore becomes how the doctrine should be modified. It was originally designed as a flexible balancing test: the *Gilbert* Court's articulation of private and public interest factors relevant to a *forum non conveniens* analysis was quite broad and provided ample room for conducting a fair assessment of relevant interests.¹⁵⁰ The key is in the way courts apply the test. This Note identifies several considerations that courts should integrate into existing assessments of the *Gilbert* factors.

First, courts should expand the current "adequate alternative forum" test¹⁵¹ to better account for comity concerns inherent in determining the adequacy of another country's court system.

147. See, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir.) (raising environmental and human rights claims against mining company for activities in Papua New Guinea), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (raising environmental and human rights claims against Texaco for drilling operations in Ecuador); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999) (raising environmental claims for use of herbicides and fungicides in Ecuador).

148. See *supra* notes 91–93 and accompanying text.

149. For a further defense of *forum non conveniens* in human rights cases, see Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2001).

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

151. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000).

Second, this Note proposes a broader consideration of some of the public and private interest factors courts already examine. Third, courts should do away with the rule that a foreign plaintiff's choice of forum should automatically receive less deference. Rather, this should be just one other factor for courts to consider in applying the *Gilbert* balancing test to assess the relative convenience of the forums. Finally, this Note proposes revisiting the current standard of review to provide for increased appellate scrutiny of *forum non conveniens* decisions.

Because these modifications work within the framework of the existing *forum non conveniens* doctrine, trial courts and appellate courts could begin to take account of these changes immediately. While a Supreme Court decision supporting these particular considerations in *forum non conveniens* cases would help to ensure that all courts explicitly recognize these considerations, such a decision is by no means necessary.

1. *Existence of an Adequate Alternative Forum*

The first step in a *forum non conveniens* analysis is for the court to determine whether an adequate alternative forum exists to hear the case.¹⁵² This inquiry seems like a reasonable question to help determine whether a case should be dismissed. To the contrary, it is unlikely that courts will truly engage in a searching examination of the adequacy of the alternative forum or that they will dismiss a case on a finding that the alternative forum is inadequate because this step requires the courts to consider, among other things, the possible corruption of foreign courts,¹⁵³ an inquiry that can be very sensitive. A judgment that another court system is corrupt could present an insult to the alternative forum and could raise serious comity concerns.¹⁵⁴ Furthermore, reflecting a concern for comity, courts do not currently require a truly fair forum — rather, they assess only whether the alterna-

152. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000).

153. *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (explicitly considering and rejecting plaintiffs' contention that "Ecuadorian courts are subject to corrupt influences and are incapable of acting impartially").

154. *See Boyd, supra* note 54, at 63–64 ("Adhering to principles of comity and sovereignty, courts hesitate to judge the integrity of a foreign forum's judicial system.").

tive forum has “that *modicum* of independence and impartiality necessary to an adequate alternative forum.”¹⁵⁵

Beyond comity concerns, there are certain aspects of the U.S. court system that favor plaintiffs, such as the availability of contingency fee lawyers, broader discovery rules, jury trials, and the absence of rules that require the losing party to pay the costs of litigation.¹⁵⁶ The reality is that in the absence of some of these features, plaintiffs may be unable even to file in the alternative forum.¹⁵⁷ The risk of litigation may be too high if plaintiffs are forced to pay large attorneys’ fees and face the threat that they will be required to pay all of the litigation expenses in the event of a loss. For example, in overturning the *forum non conveniens* dismissal in *Wiwa*, the Second Circuit noted that the plaintiffs had “obtained excellent pro bono counsel” in the United States and that there was “no guarantee that they [would] be able to obtain equivalent representation in England without incurring substantial expenses.”¹⁵⁸ Courts in other countries have also looked to similar considerations in applying *forum non conveniens* doctrine.¹⁵⁹ Such considerations are highly relevant to whether the case will actually proceed in the alternative forum, but most U.S. courts have neglected to consider them.

The existence of an “adequate” forum, as currently defined in *forum non conveniens* doctrine,¹⁶⁰ is certainly necessary, but it is not sufficient. Rather, courts should determine whether dismissing the case would seriously impede the victims’ access to adequate remedies as a practical matter. This analysis should include all of the current factors that courts already consider, including potential issues of corruption in the court system and whether the foreign forum’s law provides some minimally ade-

155. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544–46 (S.D.N.Y. 2001) (considering human rights concerns in Ecuador and concluding that “the Court is satisfied on the basis of the record before it that the courts of Ecuador can exercise with respect to the parties and claims here presented that *modicum* of independence and impartiality necessary to an adequate alternative forum” (emphasis added)), *aff’d as modified*, 303 F.3d 470.

156. John Fellas, *Parallel Proceedings*, in INTERNATIONAL COMMERCIAL LITIGATION 1999, at 133, 139 (PLI Commercial Law & Practice, Course Handbook Ser. No. A0-0030, 1999).

157. Recall that studies show that *forum non conveniens* dismissals tend to be outcome determinative. See *supra* note 104 and accompanying text.

158. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 n.13 (2d Cir. 2000).

159. See *infra* note 237 and accompanying text.

160. See *supra* note 155.

quate protection for the rights at issue in the case.¹⁶¹ It should also consider practical concerns plaintiffs will face in the alternative forum. Courts should focus on whether the plaintiffs will be able to fully realize their right to seek adequate remedies. Indeed, one court has phrased the question as whether the “plaintiffs are highly unlikely to obtain basic justice [in the alternative forum].”¹⁶²

2. *The Gilbert Balancing Factors*

The second step in a *forum non conveniens* analysis requires a weighing of private and public interest factors.¹⁶³ In *Wiwa*, the Second Circuit seemed to expand the considerations that may be relevant under a weighing of private interests, such as the relative financial resources of the defendants and plaintiffs, and the potentially substantial cost of transferring the suit to a new forum.¹⁶⁴ The *Wiwa* court noted that the defendants’ resources, as compared with those of the plaintiffs, should be considered: “[D]efendants have not demonstrated that these costs are excessively burdensome, especially in view of the defendants’ vast resources . . . [and] the plaintiffs’ minimal resources in comparison”¹⁶⁵ The same court had also recognized financial concerns in a 1980 case considering a *forum non conveniens* dismissal. There, a concurring judge found that “[i]t will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit.”¹⁶⁶

When weighing the private interests of the litigants, courts should consider the relative financial burdens of dismissing the suit, including the relative resources of the plaintiffs and defen-

161. See *supra* note 101 and accompanying text.

162. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (quoting *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff’d*, 767 F.2d 908 (2d Cir. 1985)).

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

164. See *Wiwa*, 226 F.3d at 106–07 (overturning lower court’s grant of *forum non conveniens* dismissal and finding fault with failure to consider “the very substantial expense and inconvenience (perhaps fatal to the suit) that would be imposed on the impecunious plaintiffs by dismissal in favor of a British forum, and the inconvenience to the defendants that ultimately justified the dismissal seems to us to have been minimal”).

165. *Id.* at 107.

166. *Calavo Growers of Cal. v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring).

dants. The considerations should include the time, convenience, and financial burdens as well as whether the net effect of those burdens would result in the plaintiffs not being able to recover for their injuries at all.¹⁶⁷ Dismissal under *forum non conveniens* is a huge setback for plaintiffs who have already spent considerable time and effort litigating in U.S. courts.¹⁶⁸ They must re-file in the new forum and possibly find new representation in the other country. Under the *Gilbert* test, such considerations should be relevant under an assessment of the “practical problems that make trial of a case easy, expeditious and inexpensive.”¹⁶⁹

Courts and commentators have attacked *forum non conveniens* for its express requirement, derived from *Piper Aircraft*,¹⁷⁰ to give less deference to foreign plaintiffs’ forum choice. In *Myers v. Boeing Co.*, the Washington Supreme Court declined to apply lesser deference to a foreign plaintiff.¹⁷¹ Instead, the court criticized the rule, stating, “The [U.S. Supreme] Court purports to be giving lesser deference to the foreign plaintiffs’ choice of forum when, in reality, it is giving lesser deference to *foreign plaintiffs*, based solely on their status as foreigners.”¹⁷² The *Myers* court elaborated that giving lesser deference to foreign plaintiffs “raises concerns about xenophobia.”¹⁷³

The Second Circuit rejected the *Myers* argument in *Wiwa*, claiming that foreign plaintiffs receive less deference “not because of chauvinism or bias in favor of U.S. residents” but “because the greater the plaintiff’s ties to the plaintiff’s chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction.”¹⁷⁴ Although this is accurate, the defendant’s residence

167. See *supra* note 104 and accompanying text.

168. For a discussion of why *forum non conveniens* dismissals tend to be outcome determinative, see *supra* notes 103–104 and accompanying text.

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

170. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1981) (“[T]he courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States.” (quoting *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev’d*, 630 F.2d 149 (3d Cir. 1980), *cert. granted*, 450 U.S. 909, *rev’d*, 454 U.S. 235 (1981))); see also *supra* note 96 and accompanying text (noting that courts give lesser deference to foreign plaintiffs’ choice of forum).

171. *Myers v. Boeing Co.*, 794 P.2d 1272 (Wash. 1990) (en banc).

172. *Id.* at 1281 (emphasis in original).

173. *Id.*

174. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000).

should also be given substantial weight; U.S. defendants seeking dismissal on the grounds of *forum non conveniens* should be required to show that the U.S. forum is truly inconvenient for them. This is especially important given the doctrine's original objective of preventing harassment of defendants. While it may be true that it is less inconvenient for plaintiffs to have a suit transferred if they live near the alternative forum,¹⁷⁵ it is also less *inconvenient* for a defendant to defend a suit in its own home state. For example, Dow Chemical sought a *forum non conveniens* dismissal in the *Castro Alfaro* case to avoid defending a case three blocks from its corporate headquarters.¹⁷⁶

Rather than automatically giving less deference to a foreign plaintiff's choice of forum, the courts should incorporate this consideration into a more flexible balancing approach that takes into account both the plaintiff's and the defendant's residences in assessing the relative convenience of forums. The residence of the plaintiff and defendant are both relevant to the convenience of the lawsuit, and neither party's situation should be ignored. Considering both parties' residences would permit a more balanced consideration of the convenience issues at stake and would fit nicely within the existing balancing test prescribed by *Gilbert*.

Another private interest factor that courts have analyzed in *forum non conveniens* dismissals is the comparative availability of sources of proof in the U.S. forum versus the alternative forum.¹⁷⁷ This consideration remains relevant today; however, as globalization has increased, so have technologies that could ease the burden of litigation in an otherwise inconvenient forum. Nearly thirty years ago, judges began to recognize that technological changes, such as capabilities for electronic discovery, have changed the dynamic in assessing the relative convenience of fo-

175. *Id.*

176. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring) (balking at the suggestion that "it is *inconvenient* and *unfair* for farmworkers allegedly suffering permanent physical and mental injuries, including irreversible sterility, to seek redress by suing a multinational corporation in a court three blocks away from its world headquarters" (emphasis in original)), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2009).

177. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257–58 (1981) (comparing availability of sources of proof in the United States and in the alternative forum).

rum. ¹⁷⁸ Other courts and commentators have followed suit, noting that improvements in travel and communication technologies have altered the equation. ¹⁷⁹ As a result, courts today should not overestimate the importance of the fact that some evidence may be located abroad. Rather, they should consider the availability of communications, information, and travel technologies that may enable electronic discovery, permit witnesses to testify remotely, ¹⁸⁰ or otherwise ease burdens that may have affected the availability of evidence in the past.

With regard to the public interest aspects of the *Gilbert* balancing test, courts are asked to consider whether the local forum has a strong interest in the case. ¹⁸¹ For international human rights cases in particular, there are several U.S. policy interests at stake and U.S. courts have a strong interest in adjudicating these cases. Congress has explicitly recognized U.S. concerns in this area. In *Wiwa*, the Second Circuit noted that Congress's passage of the TVPA ¹⁸² indicated a strong U.S. interest in providing a forum for international human rights cases. ¹⁸³ The *Wiwa* court went on to state, "[T]his policy interest should have a role in the balancing of the *Gilbert* factors." ¹⁸⁴ It also pointed to the plaintiffs' argument in another case ¹⁸⁵ that "to dismiss . . . [a claim pursuant to the ATCA under *forum non conveniens*] would

178. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) (calling for re-examination of *forum non conveniens* doctrine in light of technological advances since doctrine was first created).

179. See, e.g., *Clayton v. Heartland Resources*, No. 3:08-cv-0513, 2008 WL 2697430, at *6 (M.D. Tenn. June 30, 2008) (noting that "import of [location of documents] is mitigated in light of technological advances, including the availability of electronic discovery"); *Castro Alfaro*, 786 S.W.2d at 684 (Doggett, J., concurring) (arguing that private interest factors of *Gilbert* test no longer serve goals of convenience and fairness given changes in travel and communication technologies); Boyd, *supra* note 54, at 70 ("Courts have acknowledged that modern modes of transportation, multilateral treaties providing for service abroad and other procedural mechanisms for international litigation render *Gilbert's* private interest analysis, virtually obsolete.").

180. Remote testimony is permitted in civil trials under the Federal Rules of Civil Procedure. FED. R. CIV. P. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.").

181. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

182. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)).

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

184. *Id.* at 103.

185. *Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations."¹⁸⁶ The district court presented a similar perspective in *Cabiri v. Assasie-Gyimah*,¹⁸⁷ "accept[ing] the argument that U.S. interests as evidenced by both the ATCA and the TVPA overcome convenience considerations."¹⁸⁸ Other commentators have expressed similar views with respect to the importance of ATCA and TVPA cases.¹⁸⁹

Trial in a corporation's home state also has advantages, and such considerations are relevant to U.S. interests in determining whether to hear cases against U.S. companies. First, trials in the U.S. are more visible to U.S. consumers and policymakers. The resulting "court of public opinion" could act as a strong deterrent and could encourage companies to act responsibly when investing abroad.¹⁹⁰ Furthermore, some have argued that consumers have a right to know more about the practices of the companies from which they purchase.¹⁹¹ Second, the United States has a strong policy interest in adjudicating cases against its own corporations

186. *Wiwa*, 226 F.3d at 105 (internal quotation marks omitted).

187. 921 F. Supp. 1189 (S.D.N.Y. 1996).

188. Boyd, *supra* note 54, at 73. See *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

189. See, e.g., Paul B. Stephan, *A Becoming Modesty — U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 635 (2002) ("Certain issues, especially those involving international wrongdoing, are too important to be left to foreign courts."); Cleveland, *supra* note 65, at 1579 ("The ATCA thus can fill an important niche in underscoring the United States's abhorrence for violations of those basic principles on which the global community can agree."). But see Short, *supra* note 149 (defending *forum non conveniens* and its applicability to ATCA cases).

190. See JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 198 (2006) (citing Nike and Shell as examples of companies bowing to public pressure regarding human rights abuses). On the other hand, the "court of public opinion" is certainly not an adequate substitute for courts in terms of finding facts or assessing fault, and there is a danger that plaintiffs or attorneys may use the media to pressure defendants unfairly. See generally JONATHAN DRIMMER, U.S. CHAMBER INST. FOR LEGAL REFORM, THINK GLOBALLY SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES (2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf> (raising and discussing ethical concerns with plaintiffs' use of media and other out-of-court tactics in transnational cases). For a response to Drimmer's report, see EARTHRIGHTS INT'L, MISSING THE POINT: A RESPONSE TO THE U.S. CHAMBER OF COMMERCE REPORT "THINK GLOBALLY, SUE LOCALLY" (2010), available at <http://www.earthrights.org/sites/default/files/documents/Missing-the-point.pdf>.

191. See, e.g., Editorial, *An International Right to Know*, N.Y. TIMES, Jan. 25, 2003, at A18 ("Companies should have to make public information about overseas activities that would be prohibited or subject to disclosure laws at home.").

and ensuring that American corporations do not earn a reputation for exporting human rights abuses.¹⁹²

Under the public interest factors, courts should weigh the importance of U.S. policy interests, including the U.S. interest in providing a forum for human rights cases,¹⁹³ the importance of fulfilling due diligence requirements under international law,¹⁹⁴ and the concern with ensuring that U.S. corporations do not earn a reputation as gross human rights abusers. These considerations are relevant under *Gilbert's* concern for avoiding trial in "a community which has no relation to the litigation."¹⁹⁵ Taking a broader conception of community interests and U.S. interests, courts should recognize that human rights abuses perpetrated abroad do affect interests at home.

3. *Standard of Review*

Finally, given the changes advocated above and the changing role of the doctrine of *forum non conveniens*, the standard of appellate review should also be revisited. The doctrine is currently reviewed under an abuse of discretion standard.¹⁹⁶ Such a deferential standard, however, should apply only where trial courts

192. See Upendra Baxi, *Geographies of Injustice: Human Rights at the Altar of Convenience*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 197, 210 (Craig Scott ed., 2001) (discussing the "boomerang impact of risk production," or the idea that creating "double standards for American corporations doing business at home and abroad is not conducive to American well-being"); Daschbach, *supra* note 12, at 48–53 (discussing U.S. interests that would be served by increasing accountability for U.S. corporate human rights abuses); Duval-Major, *supra* note 19, at 675 (noting that "MNCs' harmful activities in foreign countries may make the United States itself appear involved in potentially harmful conduct" because U.S. corporations earn a large portion of their profits abroad and those profits flow back to the U.S.); *id.* at 673 ("By authorizing *forum non conveniens* dismissals in a broad spectrum of cases, United States courts are tacitly condoning the potentially hazardous activities of MNCs by allowing injured plaintiffs' claims to go unanswered.").

193. See Baxi, *supra* note 192, at 207 ("Whatever the surface text of judicial decisions in this area, *forum non conveniens* doctrine is configured in terms of that peculiar combination of balancing 'public' and 'private' interest aggregations, a mode of analysis that facilitates denial of jurisdiction in part by totally avoiding an assessment of comparative societal responsibility for ensuring transnational justice.").

194. See *infra* Part IV.B.1.

195. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

196. See *supra* notes 91–94 and accompanying text.

have applied the test correctly.¹⁹⁷ Given the number of considerations that can — and should — be taken into account in *Gilbert's* flexible balancing test, appellate courts should engage in a more searching review in determining whether the *forum non conveniens* test has, in fact, been applied in a way that takes all relevant considerations into account. They should review the record for facts and considerations the trial court may have failed to take into account, for the reasons discussed below. Although a *forum non conveniens* inquiry requires factual analysis, which is typically the purview of trial courts, determining whether the correct test has been applied is effectively a question of law, and appellate courts typically review such questions *de novo*.¹⁹⁸

This more searching review of the test's application is further justified by the fact that the goals of the doctrine have changed: it is no longer primarily used to prevent harassment of defendants through inappropriate forum choice.¹⁹⁹ It is also supported by the important interest of providing a U.S. forum for cases where U.S. corporations have committed human rights violations abroad²⁰⁰ and by the definitive impact of granting a *forum non conveniens* motion — i.e., dismissal and the extreme unlikelihood that the victims will be able to recover elsewhere.²⁰¹

Furthermore, the federal courts have limited the doctrine to apply only in circumstances “where the alternative forum is

197. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99 (2d Cir. 2000) (“The deference accorded to a district court’s discretion, however, presupposes that the court used the correct standards prescribed by the governing rule of law.”).

198. Standards of review are meant to strike the appropriate balance between the roles of trial and appellate courts. See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–33 (1991) (“[S]tandard[s] of deference for appellate review of district-court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts.” *Id.* at 233.). Whereas trial courts are “charged with determining the facts of the case at hand and applying the correct law to those facts,” appellate courts are “primarily interested in reviewing the trial court’s decisions and ascertaining whether the law has been correctly applied.” Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 239 (2009).

199. Cases where a plaintiff sues a defendant in the defendant’s own home state are particularly unlikely to be motivated by a desire to harass the defendant through choice of an inconvenient forum. See *supra* notes 133–136 and accompanying text.

200. For a further critique of the doctrine’s standard of review, see Daschbach, *supra* note 12, at 18–19 (citing William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1693 (1992)).

201. See *supra* note 104 and accompanying text.

abroad”²⁰² and in some rare cases “where a state or territorial court serves litigational convenience best.”²⁰³ Cases where the alternative forum is abroad are likely to involve more complex questions than the Supreme Court envisioned when creating the standard of review in *Gilbert*. While it may have been true that the “trial court [was] the best arbiter of any attempt by a plaintiff to abuse the power of the court,”²⁰⁴ the trial court may not be the best arbiter of whether important international concerns should be heard in a U.S. forum. This is particularly true in the human rights context.

Trial court decisions on *forum non conveniens* also represent a potential conflict of interest. The judge deciding the motion is the same judge who will hear the case if it is not dismissed, making it difficult for “a foreign plaintiff . . . to find a court receptive to the idea that another forum has greater administrative burdens.”²⁰⁵ In other words, “[a]lthough the central purpose of *forum non conveniens* is to avoid great inconveniences to one party or one jurisdiction when another forum is more appropriate, courts seem mostly concerned with the inconvenience to their own judicial docket when evaluating public interests.”²⁰⁶ Providing for *de novo* appellate review of the trial court’s application of the *forum non conveniens* test would better account for these important considerations and would help to ensure that the test is being applied correctly.

* * *

In sum, courts should make several changes to application of the existing doctrine. They should revise the existing test for determining whether the alternative forum is adequate to hear the case, focusing primarily on ensuring the plaintiffs’ right to reme-

202. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)).

203. *Id.*

204. Duval-Major, *supra* note 19, at 655.

205. Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT’L L. 703, 718 (2005). See also *supra* note 137 and accompanying text (noting that courts sometimes dismiss cases for the wrong reasons).

206. *Id.*

dies. They should also integrate new considerations into their balancing of the existing public and private interest factors. In addition, the analysis should no longer operate on an assumption that foreign plaintiffs' forum choices automatically receive less deference. Instead, the more expansive balancing of private interests will help to account for the relative convenience concerns that the now outdated "lesser deference" standard attempted to serve. Finally, courts should provide more searching appellate review in order to ensure that the doctrine continues to meet its goals while also serving other relevant policy interests.

B. THE PROPOSED MODIFICATIONS WILL ADDRESS THE
RECOGNIZED NEED TO INCREASE ACCOUNTABILITY OF TNCs FOR
THEIR OPERATIONS ABROAD

Through its specific critiques of the *forum non conveniens* doctrine, this Note seeks to address the more general and pressing problem in the area of business and human rights — the need to increase accountability for the actions of TNCs operating abroad.²⁰⁷ Because the proposed solution is likely to lead to fewer dismissals of cases against U.S. corporations, it will help to address this larger problem. This Section provides additional support for why TNC accountability is such an important goal and why providing a U.S. forum for cases against TNCs is an important step toward achieving that goal.

1. *States' Duties of "Due Diligence" Point Toward a Need for
States to Play a Larger Role in Holding Corporations
Accountable*

Linked to Ruggie's conception of the state duty to protect²⁰⁸ is the concept of due diligence under international law. States have duties of due diligence to prevent and remedy human rights abuses.²⁰⁹ Various regional tribunals and treaty bodies have rec-

207. For a description of the corporate impunity problem, see *supra* Part III.A.

208. See Ruggie Report 2008, *supra* note 3, ¶ 18 (defining state duty to protect).

209. See MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW 185–86 (2007).

ognized and elaborated on such duties,²¹⁰ and states have been forced to pay damages to victims in cases where they failed in their due diligence responsibilities.²¹¹ In other words, “it is essentially the responsibility of the state parties to uphold international human rights through monitoring, regulating, and punishing multinational corporations as private actors.”²¹² By increasing access to U.S. courts, the *forum non conveniens* modifications that this Note proposes will assist the United States in meeting its due diligence duties.

The United States has particular affirmative obligations with respect to treaties it has ratified, including treaties addressing genocide, war crimes, torture, and forced labor.²¹³ For example, under the U.N. Convention Against Torture, to which the United States is a party, state parties agree to take measures to establish jurisdiction over acts of torture in several circumstances, such as where the alleged offender is a national of the state²¹⁴ or where the offender is present in the state’s territory.²¹⁵ The United States has ratified, and is therefore legally bound by, some of the most important international instruments regarding slavery

210. See generally *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988) (defining States’ due diligence obligations in context of forced disappearances); Special Rapporteur, *Violence Against Women, Its Causes and Consequences*, ¶¶ 32–37, U.N. Doc E/CN.4/1996/53 (Feb. 6, 1996) (by Radhika Coomaraswamy) (discussing due diligence obligations in context of domestic violence); Ayoub, *supra* note 17, at 426–27 (describing obligations of states parties to ICCPR to “ensure” or “secure” rights under Covenant).

211. See, e.g., *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 (ordering government of Honduras to compensate family members of victims of disappearance under theory of due diligence).

212. Ayoub, *supra* note 17, at 416.

213. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention]; Convention Concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932), reprinted in INT’L LABOUR ORG., INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1991, at 29 (1982); Convention Concerning the Abolition of Forced Labour (ILO No. 105), June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959, entered into force in the U.S. Sept. 25, 1992), reprinted in INTERNATIONAL LABOUR CONVENTIONS, *supra*, at 39; Cleveland, *supra* note 65, at 1578.

214. Torture Convention, *supra* note 213, at art. 5(1)(b).

215. *Id.* at art. 5(2).

and forced labor.²¹⁶ Enforcement of these standards through litigation would help bring the United States into compliance with its affirmative legal obligations in this area.²¹⁷

Finally, it is necessary to dispense with arguments that states cannot exercise their jurisdiction for actions that occurred abroad.²¹⁸ Supporters of *forum non conveniens* argue that international law does not permit states to exercise jurisdiction over all cases they wish to hear — such jurisdiction may offend traditional notions of state sovereignty.²¹⁹ In the case of U.S. multinationals in U.S. courts, however, this argument is not applicable. Although states may not be legally required to prevent abuses by their own corporations abroad, they are not prohibited from doing so when there is a recognized basis for jurisdiction,²²⁰ such as “where the actor or victim is a national.”²²¹ In cases of U.S. multinationals operating abroad, the actor is a U.S. national, and U.S. courts are therefore permitted to exercise their jurisdiction.

2. *A Trend in the Comments of U.N. Treaty Bodies Indicates Growing Recognition of State Duty to Hold Its Own Corporations Accountable*

United Nations treaty bodies have done a significant amount of work further defining relevant international law. Most of the

216. Cleveland, *supra* note 65, at 1573. For a more detailed account of the slavery and forced labor issues, see Joey Asher, Comment, *How the United States Is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT'L L. REV. 215 (1994).

217. Cleveland, *supra* note 65, at 1578.

218. See Ruggie Report 2008, *supra* note 3, ¶ 19 (noting disagreement “on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory” but concluding that “States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 (1987) (discussing corporate nationality and noting that state “may exercise jurisdiction to prescribe laws for acts of its corporate nationals committed outside of its territory,” *id.* cmt. b); Ayoub, *supra* note 17, at 411–13 (describing circumstances under which states may exercise jurisdiction over their own companies operating abroad).

219. See Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177, 185 (2008).

220. Ruggie Report 2008, *supra* note 3, ¶ 19.

221. *Id.* ¶ 19 n.12 (citing Special Representative of the U.N. Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum: Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, U.N. Doc A/HRC/4/35/Add.2 (Feb. 15, 2007) (by John Ruggie)).

primary U.N. human rights treaties have specialized bodies to interpret obligations arising under the treaties, such as the Human Rights Committee for the International Covenant on Civil and Political Rights.²²² In recent years, interpretations and general comments of the treaty bodies have increasingly recognized the responsibility of private actors for human rights abuses and encouraged states to take more action to hold their own corporations responsible for treaty violations committed abroad.

For example, in March of 2007, the Committee on the Elimination of Racial Discrimination, the treaty body charged with overseeing the International Convention on the Elimination of All Forms of Racial Discrimination, encouraged Canada “to take appropriate legislative or administrative measures [and to] explore ways to hold transnational corporations registered in Canada accountable” for human rights violations committed abroad.²²³

The Committee on Economic, Social, and Cultural Rights, the treaty body in charge of the International Covenant on Economic, Social, and Cultural Rights, has also recognized that states should take more responsibility for the actions of their corporations abroad, noting in the case of water rights that states should take steps to “prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”²²⁴

The International Law Commission (“ILC”), in its work on preventing and repairing transnational environmental harm, has also recognized the need for home states to play a larger role in

222. See *Human Rights Committee*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Jan. 11, 2011).

223. U.N. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on Elimination of Racial Discrimination*, ¶ 17, U.N. Doc. CERD/C/CAN/CO/18 (March 25, 2007). See also Seck, *supra* note 219, at 201–02.

224. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water*, ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003). See also Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties*, ¶¶ 86–87, delivered to the Human Rights Council, U.N. Doc. A/HRC/4/35/Add.1 (Feb. 13, 2007) (by John Ruggie).

holding their corporations accountable.²²⁵ Specifically, the ILC has said that “a ‘state of origin’ is under an obligation to exercise due diligence to prevent harm in other states by taking necessary legislative, administrative or other action.”²²⁶ With regard to remedies, the ILC also notes a role for home states, taking the view that “access to justice in state of origin courts is to be provided to affected citizens of other states in accordance with the principle of non-discrimination.”²²⁷

3. *Approaches of Other Countries Provide Further Support for the Idea that the United States Should Increase Access to Justice in Corporate Human Rights Cases*

The approaches of other countries with respect to *forum non conveniens* also provide persuasive authority that the United States can and should consider in determining whether and how to modify its own approach. Many other countries, including Canada, Australia, and several European countries, are similarly home to large numbers of TNCs, and their experiences in dealing with cases against their corporations can help shed light on how the United States can address this problem. The experiences of these other countries are also useful in demonstrating the weakness of the primary argument in favor of a stronger *forum non conveniens* doctrine. Defenders of the doctrine claim that *forum non conveniens* helps to prevent a flood of litigation in U.S. courts,²²⁸ but the fact that other countries that are home to large numbers of TNCs have taken a relatively more permissive approach in their application of *forum non conveniens* demonstrates that the floodgates concern seems unlikely to play itself out in practice.

225. Seck, *supra* note 219, at 202–03.

226. *Id.* at 203; see also Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; 53d Sess., GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Report].

227. Seck, *supra* note 219, at 203. See also ILC Report, *supra* note 226, at 375. For a discussion of how current U.S. *forum non conveniens* doctrine is discriminatory against foreigners, see *supra* notes 172–173 and accompanying text.

228. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981) (arguing that weakening *forum non conveniens* would “further congest already crowded courts”); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929) (arguing *forum non conveniens* is useful tool to combat “the flood of litigation by which our courts are being overwhelmed”).

The European Council passed a directive in 2000 standardizing jurisdiction throughout the member states. The directive stated:

The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.²²⁹

This directive was later interpreted by the European Court of Justice in the case of *Owusu v. Jackson*.²³⁰ In that case, the court “confirmed that national courts in an EU member State may not dismiss actions against companies domiciled in that State on *forum non conveniens* grounds.”²³¹ Moreover, even if a corporation is not incorporated in a European Member State, it will still be subject to jurisdiction there if it has its primary place of business in a Member State.²³²

The U.K. doctrine of *forum non conveniens* offers something of a contrast to the U.S. approach, though it also entails a two-step test.²³³ First the courts determine the “natural forum” for the case — also seen as the forum with the greatest connection to the lawsuit.²³⁴ Considerations include convenience, expense, govern-

229. Council Regulation 44/2001, pmb. 11, 2001 O.J. (L 12) 1 (EC).

230. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1283.

231. Ruggie Report 2008, *supra* note 3, ¶ 90 n.51. *See also* OPBP, *supra* note 58, at 110 (“[T]he Brussels Regulation will typically direct the courts of the Member State to hear the matter where the defendant is a company domiciled in the Member State, irrespective of the location of the plaintiff's domicile. This means that a company domiciled in a Member State will be unable to resist a claim of jurisdiction if it is domiciled in that Member State. There is no leeway in which to argue a claim of *forum non conveniens* where the courts of a Member State have been seised by virtue of art 2(2).”). *See generally* Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939 (2009).

232. *See* OPBP, *supra* note 58, at 111 (“[E]ven where [the corporation is not incorporated in Europe], the place wherefrom management control is exercised, which will almost invariably be from within the Member State, will be sufficient to ground the domicile in that Member State. As such, even if the corporation is incorporated outside the European Union, Member States will still have jurisdiction so long as the company's principal place of business or central administration is within the European Union.”).

233. *Id.* at 282–83.

234. *Id.* at 282.

ing law, and residence of the parties.²³⁵ Next the courts consider whether there are “circumstances by reason of which justice requires that a stay should nevertheless not be granted.”²³⁶ For example, in *Connolly v. RTZ*, the court found that Namibia was the natural forum for the case but declined to dismiss on the grounds of *forum non conveniens* because the plaintiffs would not be able to proceed without financial assistance, which was available in England but not in Namibia: “[H]aving regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available.”²³⁷ This analysis shows that U.K. courts, like the Second Circuit in *Wiwa*, are willing to consider practical obstacles to litigation abroad, including relative financial burdens on the plaintiffs.

Australia’s rule also presents a contrast to the U.S. approach. In order to obtain dismissal on grounds of *forum non conveniens*, defendants must prove both that there is a “more appropriate overseas forum” to hear the case²³⁸ and that the Australian forum is “clearly inappropriate.”²³⁹ This analysis “allows the court to consider a wide range of factors . . . , such as the location of the evidence and the parties, the applicable law, the sensitivity of the subject matter to the foreign state, and whether the plaintiff will obtain justice in the courts of the foreign state.”²⁴⁰ While these are essentially the same factors considered by U.S. courts,²⁴¹ the Australian approach shows more deference to the plaintiffs’ choice of forum by requiring that Australia be *clearly inappropriate* rather than simply considering whether an adequate alternative forum exists.

Canada, on the other hand, has had an approach similar to that of the United States. There has only been one case in Canada against a Canadian TNC, and it was dismissed on the grounds

235. *Id.*

236. *Id.* at 283 (internal quotation marks omitted).

237. *Connolly v. R.T.Z. Corp.*, [1998] A.C. 854 (H.L.) 872–74 (appeal taken from Eng.).

238. *See* OPBP, *supra* note 58, at 11.

239. *Voth v Manildra Flour Mills Proprietary Ltd.* (1990) 171 CLR 538 (Austl.).

240. Richard Garnett, *Foreign States in Australian Courts*, 29 MELB. U. L. REV. 704, 706 (2005).

241. *See supra* notes 87–88 and accompanying text.

of *forum non conveniens*.²⁴² The Canadian Parliament, however, has stated its intention to make its law more plaintiff-friendly: the Standing Committee on Foreign Affairs and International Trade expressed the view that “more needs to be done to allow non-nationals to sue in Canada for acts committed by Canadian corporations abroad.”²⁴³ Furthermore, recent case law in the Canadian Supreme Court also suggests a move away from strict application of *forum non conveniens* law.²⁴⁴ In one case interpreting the Civil Code of Quebec, the court “emphasize[d] the exceptional quality of the *forum non conveniens* doctrine,”²⁴⁵ and suggested “that the existence of a better suited forum would not lead an appropriate suited Canadian forum to decline jurisdiction.”²⁴⁶ A new suit was recently filed against a Canadian mining company for alleged human rights abuses in Ecuador, and observers anticipate a *forum non conveniens* challenge.²⁴⁷ The lawyers in that case have already spoken out against the doctrine: “The plaintiffs feel that the *forum non conveniens* rule is . . . out of touch with the present globalized reality, and doesn’t provide real legal accountability We are saying these rules are very cumbersome and not very effective, and that legal reform is seriously needed.”²⁴⁸ The court’s decision on *forum non conveniens* could reportedly take years,²⁴⁹ but it is likely to indicate the future direction of Canadian courts on this important issue.

In conclusion, other jurisdictions that are home to large numbers of TNCs have recognized a need to provide a forum for cases against their own corporations. The U.S. approach, on the other

242. See *Recherches Internationales Québec v. Cambior, Inc.*, 1998 CarswellQue 4511, para. 89 (Can. Que. C.S.) (WL). In the case, plaintiffs sued Cambior, Inc., for environmental damage caused by its gold-mining operations in Guyana. The Canadian court refused to hear the case on the grounds that Guyana was competent to hear the case. OPBP, *supra* note 58, at 337. It found that the plaintiffs had not proven that “the administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana.” *Cambior*, 1998 CarswellQue, at para. 12.

243. OPBP, *supra* note 58, at 337.

244. See, e.g., *Spar Aerospace Ltd. v. Am. Mobile Satellite*, [2002] 4 S.C.R. 205 (Can.).

245. *Id.* at para. 81–82.

246. OPBP, *supra* note 58, at 42.

247. Cristin Schmitz, *Lawyers Take Aim at Mining Companies*, LAWYERS WEEKLY (Toronto), Apr. 3, 2009, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=887>.

248. *Id.*

249. *Id.*

hand, is now “generally more generous to defendants.”²⁵⁰ Given the many factors which point toward the need for more accountability for TNCs operating abroad, the approach of other countries and courts provides even more evidence of the need to change the U.S. doctrine. The revisions proposed by this Note would increase the number of lawsuits that could be heard in U.S. courts and would thus bring the United States more in line with other states that are home to large numbers of TNCs.

V. CONCLUSION

The business and human rights landscape is plagued by the inability to effectively hold corporations accountable for their actions committed abroad. Despite growing recognition of this problem and growing concern about its ramifications, U.S. courts continue to use *forum non conveniens* to dismiss cases against U.S. multinationals for human rights abuses. Commentators, other countries, and even some U.S. courts have argued for changes to the doctrine, particularly as applied to corporate human rights cases. The many calls for action reflect the scope of the problem.

Although *forum non conveniens* is unlikely to disappear completely, there are compelling reasons to apply it in a more modern fashion. Globalization, the human rights movement, and changes in technologies should all be factored in to any modern consideration of the doctrine. Courts can take account of such considerations within the test’s existing public and private interest factors. They should also eliminate the rule that foreign plaintiffs’ forum choices should receive less deference, replacing it instead with a balancing of both the plaintiffs’ and defendants’ residences as part of the overall *Gilbert* balancing test. Finally, appellate courts should engage in a more searching review of trial courts’ application of the doctrine to ensure that trial courts take all relevant considerations into account.

250. OPBP, *supra* note 58, at 11. In contrast to the United States, “Australia’s doctrine of *forum non conveniens* poses less of a barrier to justice to would-be claimants because an Australian court will be less likely to stay proceedings.” *Id.*

Changing U.S. *forum non conveniens* law will not eliminate the problem of corporate human rights abuse,²⁵¹ but it will help to address the problem by providing victims with greater access to U.S. courts and by deterring future human rights abuses by corporations subject to jurisdiction here. Given the vast scope and magnitude of corporate human rights abuses, this is an important first step.

251. See Ruggie Report 2008, *supra* note 3, ¶ 7 (“There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors — States, businesses, and civil society — must learn to do many things differently.”).