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THE INTERNATIONAL HUMAN RIGHTS & ETHICAL ASPECTS OF THE *FORUM* *NON CONVENIENS* DOCTRINE

BY FRANCISCO FORREST MARTIN¹

This article addresses the *forum non conveniens* [FNC] doctrine within the context of international human rights and ethics. First, this article will examine the availability and adequacy of using international tribunals for circumventing the FNC doctrine in national courts for plaintiffs claiming human rights violations, as well as the possible emergence of an international FNC doctrine for regional international tribunals.² Although the main focus is on the Inter-American Commission and Court of Human Rights, this article also discusses the European Court of Human Rights and the UN Human Rights Committee. Second, the article will address the FNC doctrine in relation to the Alien Tort Claims Act³ litigation in U.S. courts addressing human rights violations. Finally, this article will briefly address ethical dimensions of the FNC doctrine.

1. INTERNATIONAL HUMAN RIGHTS TRIBUNALS & THE FNC DOCTRINE

Some background on the availability and adequacy of international tribunals for litigating human rights claims is necessary to fully understand the subject matter of this article. Over fifteen years ago, international human rights law was not taken very seriously. It was considered to be "soft law". However, over the

1. President, Rights International, The Center for International Human Rights Law, Inc.; fmr. Ariel F. Sallows Professor of Human Rights, University of Saskatchewan College of Law.

2. In determining whether a case should be transferred to another forum, the FNC doctrine examines whether an alternative forum is both (i) accessible and (ii) adequate. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-507 (1947). If the alternative forum is accessible and adequate, the court must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing forum and any public interests at stake. See, e.g., *Gilbert*, 330 U.S. at 508-09. The defendant has the burden to establish that an adequate alternative forum exists and then to show that the pertinent factors "tilt[] strongly in favor of trial in the foreign forum." *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991). "The plaintiffs choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508.

3. 28 U.S.C. § 1350 (1948).

years, there have been dozens of cases before the Inter-American Court of Human Rights⁴ and thousands of cases in which the European Court of Human Rights⁵ have found states in violation of their international legal obligations with respect to human rights. Of those many rulings, only a few states have refused or been slow to comply with these Courts' orders.⁶ There is little doubt that now international human rights law is "hard law," i.e., effective law. Therefore, international human rights fora generally are both available and adequate. However, there are some twists and turns in this general conclusion that depend upon the particular tribunal and the kind of remedy sought.

1.1. AVAILABILITY OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS

There are two major international adjudicative systems that deal with human rights: the Inter-American Commission and Court of Human Rights and the European Court of Human Rights.⁷ Both of these courts will be discussed in detail in the upcoming sections.

1.1.1. INTER-AMERICAN COMMISSION & COURT OF HUMAN RIGHTS

In relation to the Inter-American system, individuals can sue any member of the Organization of American States [OAS] before the Inter-American Commission ["the Commission"] for violations of the American Declaration on the Rights and Duties of Man.⁸

4. For a list of cases addressed by the Inter-American Court of Human Rights, see http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited June 24, 2003).

5. Between November 1, 2002 and February 28, 2003 alone, the European Court of Human Rights dealt with 7031 cases. Council of Europe, *European Court of Human Rights*, Human Rights Information Bulletin No. 58, Nov. 2002 – Feb. 2003 at 2.

6. For state-party compliance with the European Convention on Human Rights, see Christian Tomuschat, *Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights – and a Few Dark Stains*, 13 HUM. RTS. L. J. 401 (1992). For state-party compliance with the American Convention on Human Rights, see ANNUAL REPORTS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, available at http://corteidh.or.cr/publicaciones_ing/index.html (last visited June 24, 2003).

7. The Inter-American Commission is located in Washington, D.C., and the Inter-American Court is located in San Jose, Costa Rica. The European Court of Human Rights is located in Strasbourg, France.

8. OAS Res. XX, 2 May 1948, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.82 doc. 6 rev. 1 at 17 (1992) [hereinafter *American Declaration*].

The United States is an OAS member. However, individuals cannot sue those OAS member states before the Inter-American Court of Human Rights if they are not states-parties to the American Convention on Human Rights [ACHR].⁹ Furthermore, only those states that recognize the jurisdiction of the Inter-American Court can be sued.¹⁰ Although states such as Honduras, Venezuela, Colombia, Mexico, Peru, Haiti, Chile, and Argentina are parties to the ACHR, other states, such as the U.S. and Cuba, are not states-parties.¹¹ Therefore, non-states-parties cannot be sued under the ACHR before the Inter-American Court.

It is important to recognize that private individuals or corporations cannot be sued under this system.¹² However, it may be possible for a state to be sued in place of such private persons or corporations if the state failed to exercise due diligence in preventing certain gross human rights violations, such as murder or torture, or participated in such violations.¹³ Furthermore, while corporations can sue under this system, individual shareholders within the corporation cannot.¹⁴ Unlike the Commission, which can only provide declaratory relief,¹⁵ the Inter-American Court provides monetary damages, injunctive relief, legal fees, and costs awards.¹⁶ However, the Inter-American Court has not provided relief in the form of punitive damages.

In order to have a case admitted to the Inter-American system, the petition must first be submitted to the Inter-American

9. American Convention on Human Rights, November 22, 1969, 1144 U.N.T.S. 123 (entered into force July 17, 1978) [hereinafter *ACHR*].

10. *ACHR*, *supra* note 9, art. 62.

11. FRANCISCO FORREST MARTIN, ET AL., *INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE: CASES, TREATIES AND MATERIALS (DOCUMENTARY SUPPLEMENT)*, xii-xvii (1997) (library edition).

12. *ACHR*, *supra* note 9, art. 44.

13. See, e.g., *Velásquez Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 135 (state liable for failing to fulfill affirmative duty to prevent right to life, humane treatment, and liberty violations committed by private or state actor).

14. *Banco de Lima Shareholders v. Peru*, Report No. 10/91, Case No. 10.169, INTER-AM. C.H.R. 1990-1991, OEA/Ser.L/V/II.79, doc. 12 rev. 1 at 425-426 (1991); MARTIN, *supra* note 11, at 1094.

15. See Advisory Opinion, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10 at §§ 40-47 (Inter-American Commission charged with duty to promote observance and defense of OAS members' obligations in *American Declaration*).

16. *ACHR*, *supra* note 9, art. 63 (injunctive and compensatory relief); *Suárez Rosero v. Ecuador*, Inter-Am. Ct. H.R. (Ser. C) No. 44 (1999) (legal fees and costs award granted).

Commission.¹⁷ For the Commission to find the case admissible, the case may not be pending in another international proceeding, the petitioners must have exhausted any and all domestic remedies, and the case generally must be filed within six months of exhausting these remedies. If the Commission finds the case admissible, the Commission then examines the merits of the case. If the Commission finds a violation of the American Declaration, the Commission eventually issues a report on its findings. If the OAS member is also a party to the American Convention and the Commission finds the member in violation of the Convention, the Commission may – or may not – refer the case to the Inter-American Court.¹⁸

1.1.2. EUROPEAN COURT OF HUMAN RIGHTS

In the European Court of Human Rights, individuals can sue states-parties to the European Convention on Human Rights and Fundamental Freedoms [ECHR].¹⁹ Just about every western and eastern European State (including Russia) is a state-party to the European Convention. As in the Inter-American system, private individuals and corporations cannot be sued. States, however, can be sued for failure to prevent foreseeable gross human rights violations committed by private persons.²⁰ Furthermore, corporations can – and often do – sue states-parties.²¹ Only in dicta has the European Court recognized that shareholders can sue in exceptional circumstances.²² The European Court provides monetary damages, legal fees and costs awards,²³ however, it does not provide injunctive relief and has not provided punitive damages.

As with the Inter-American system, petitioners (called “applicants”) in the European Court of Human Rights are not permitted to have the case pending in another international proceeding,

17. *ACHR*, *supra* note 9, arts. 46-47.

18. A case flow chart for the Inter-American system can be found in MARTIN, *supra* note 11, at 1059 (DOCUMENTARY SUPP.).

19. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 34, 213 U.N.T.S. 221, (entered into force Sept. 3, 1953) [hereinafter *ECHR*].

20. *Osman v. United Kingdom*, 29 Eur. H.R. Rep. 245 (2000) (affirmative state duty to prevent foreseeable right to life violations committed by private actor); *A. v. United Kingdom*, 27 Eur. H.R. Rep. 611 (1999) (affirmative state duty to prevent foreseeable right to humane treatment violations committed by private actor).

21. See, e.g., *Gasus Dosier-und Fördertechnik GmbH v. The Netherlands*, 306-B Eur. Ct. H.R. (1995).

22. *Agrotexim and Others v. Greece*, 330-A Eur. Ct. H.R. (1995).

23. *ECHR*, *supra* note 19, art. 50.

must exhaust all domestic remedies, and generally must file within six months of exhausting these remedies.²⁴

As this brief outline of the procedural law and institutional aspects of the Inter-American and European systems illustrates, the doctrine of *forum non conveniens* is somewhat moot. After all, these tribunals sit in only one location, forcing both the petitioners and the states to litigate the case in same place.

1.2. ADEQUACY OF INTERNATIONAL TRIBUNALS

The next phase of analysis involves the adequacy of these international tribunal systems. As previously mentioned, the Inter-American Commission does not award damages; nor does it provide for legal fees and costs. Compared to the Inter-American and European Courts, where damages, legal fees, and costs are awarded, the Inter-American Commission is somewhat inadequate. The primary difference between the Inter-American Court and the European Court in terms of adequacy of remedies is that, unlike the Inter-American Court, the European Court does not provide injunctive relief. Otherwise, both are nearly the same. The Inter-American Court, however, closely analyzes the quanta of moral and material damages more often than the European Court,²⁵ and often addresses the awards of damages and legal costs at a separate hearing, whereas the European Court generally addresses such awards at the same time that it addresses the merits of the case.

Another aspect of the adequacy of these international tribunal systems concerns the time it takes for the case to reach its conclusion. Assuming that the case is found admissible and the tribunal reaches the merits and damages award stage, the proceedings can last anywhere from two to ten years, depending on the case's complexity and the tribunal's interest in a particular case. The Inter-American system will generally take longer because of its lack of financial and staff resources and each case's two-stage process of going through both the Commission and Court. On the other hand, in addition to having more money and a larger staff, cases before the European Court do not have to go through a commission. The Inter-American system however, does have friendly dispute resolution mechanisms built into it that expedite the resolution of cases. Unfortunately, the European sys-

24. *ECHR*, *supra* note 19, art. 35; *MARTIN*, *supra* note 18, at 1058.

25. *Compare*, *Aloeboetoe et al. v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994), and *Güleç v. Turkey*, 28 Eur. H.R. Rep. 121 (1998).

tem no longer appears to have such a strong, friendly dispute resolution mechanism in place, as the old European Commission of Human Rights was dismantled a few years ago.²⁶

1.3 IS THERE AN EMERGING FNC DOCTRINE IN REGIONAL INTERNATIONAL COURTS?

Although, as previously noted, the FNC doctrine may be moot for international tribunals, there may be an emerging *forum non conveniens* doctrine for these regional tribunals. This issue is important because different regional and global adjudicative systems may have jurisdiction over the same case. Recently, the European Court of Human Rights in *Bankovic* held that the European Convention's rights guarantees did not extend extraterritorially to areas not under the "effective overall control" of a state party.²⁷ *Bankovic* addressed the NATO bombing of the Serbian radio and television station in Belgrade during the Kosovo Conflict. *Bankovic* is relevant to the FNC doctrine because if the European Court determines that it does not have jurisdiction over certain extraterritorial state acts, then any overlapping jurisdiction with another regional or global tribunal would defeat an application of the FNC doctrine. The European Court, as an alternative forum, would not be available, and neither would any advantages associated with using the European Court. However, this article submits that this "effective overall control" test articulated by the European Court in *Bankovic* is manifestly incorrect for several reasons and that, therefore, there may emerge an international FNC doctrine.

First, the European Court contradicted itself in its decision in *Bankovic*. The Court held that ECHR jurisdiction is primarily territorial, basing its decision on a general principle of international law as articulated by international law experts.²⁸ Although the Court recognized that there are extraterritorial exceptions, such as flag, nationality, diplomatic and consular relations, it held that these exceptions did not include jurisdiction over armed attacks against extraterritorial targets because the jurisdictional language in the Geneva Conventions governing such attacks is differ-

26. The European Commission was dismantled one year after Protocol No. 11 to the European Convention on Human Rights and Fundamental Freedoms, Europ. T.S. No. 155 (entered into force Nov. 1, 1998), came into force.

27. *Bankovic and Others v. Belgium*, App. No. 52207/99, Eur. Ct. H.R., 41 I.L.M. 517, at ¶ 70 (2001), available at www.echr.coe.int/eng.

28. *Id.* at ¶ 59.

ent from the jurisdictional language in the ECHR. Article 1 of the ECHR, governing jurisdiction, states that: "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the ECHR]." ²⁹ Common Article 1 of the Geneva Conventions states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." ³⁰

The European Court, however, contradicts itself. The language in treaties establishing extraterritorial jurisdiction for those exceptions that the Court already recognized is often different from the jurisdictional language of the ECHR. First, the provisions in the U.N. Convention on the Law of the Sea [UNCLOS] ³¹, which governs jurisdiction over ships on the high seas, has different jurisdictional language from that of the ECHR, but the Court recognized that the ECHR applied to ships on the high seas flying the flag of a state-party to the ECHR. ³²

Second, the European Court incorrectly rejected the *lex specialis* governing jurisdiction established by the customary international law reflected in Protocol I to the Geneva Conventions [Protocol I], which governs extraterritorial attacks. Instead of relying on the language in Protocol I, the Court relied upon an incomplete *lex generalis* having nothing to do with extraterritorial attacks. Article 49 (2) of Protocol I states: "The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party." ³³ The jurisdictional language of the ECHR says nothing about

29. *ECHR*, *supra* note 19, art. 1.

30. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 1, 75 U.N.T.S. 31, 32 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 1, 75 U.N.T.S. 85, at 86 (entered into force Oct. 21, 1950); Geneva Convention relative to the Treatment of Prisoners of War, art. 1, 6 U.S.T. 3316, at 3318, 75 U.N.T.S. 135, at 136 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, 6 U.S.T. 3516, at 3518, 75 U.N.T.S. 287 at 288 (entered into force Oct. 21, 1950) [hereinafter *Fourth Geneva Convention*].

31. U.N. Convention on the Law of the Sea, 1833 U.N.T.S. 397, U.N. Doc. A/CONF.62/122 (entered into force Nov. 16, 1994)(1982) [hereinafter *UNCLOS*].

32. Compare *UNCLOS*, *supra* note 31, arts. 86, 92(1), 94(1), and *ECHR*, *supra* note 19, art. 1.

33. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 49 (2), 16 I.L.M. 1391, (entered into force Dec. 7, 1978) [hereinafter *Geneva Convention-Protocol I*].

extraterritoriality or armed attacks. Because specific law applies over general law, the Court's failure to follow the language of Protocol I made its argument invalid. The jurisdictional language of Protocol I is the *lex specialis* that should have been used to construe the jurisdictional language of the ECHR.

Third, the *Bankovic* decision contradicts the substantial case law of both the Inter-American Commission on Human Rights and the UN Human Rights Committee that recognizes jurisdiction over such extraterritorial attacks. For example, the Inter-American Commission in *Alejandro et al. v. Cuba* and *Salas and Others v. United States*, as well as the UN Human Rights Committee in *Saldías de López v. Uruguay* and *Celiberti de Casariego v. Uruguay* recognized the extraterritorial application of international human rights law.³⁴ It is well-established in international law that "an international instrument must be interpreted and applied within the overall framework of the [international] juridical system in force at the time of the interpretation."³⁵ The European Court failed to do this and, instead, invented its own law. The result will be the emergence of conflicting international legal norms across both regional and global adjudicative systems, as well as state confusion over what international legal obligations will be imposed.

34. See, e.g., *Alejandro et al. v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999) (recognizing jurisdiction over Cuban extraterritorial use of disproportionate force and violation of right to life); *Salas and Others v. United States*, Case 10.573, Report No. 31/93, OEA/Ser.L/V/II.85 Doc. 9 rev. at 312 (1994) (recognizing jurisdiction over U.S. extraterritorial attacks in Panama); Case 9.239, *United States*, 986-87 Annual Report of the IACHR, OEA Ser. L/V/II.71, doc. 9 rev. 1, Sept. 22, 1987, p. 184 (recognizing jurisdiction over U.S. extraterritorial attacks in Grenada); *Saldías de López v. Uruguay*, Comm. No. 52/1979, U.N. Doc. CCPR/C/OP/1 (1985) (views adopted July 29, 1981) (recognizing extraterritorial jurisdiction over detention and torture in Argentina); *Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92 (1984).

35. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Reports 16, 31 (1971); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. Ser. A, No. 10, at ¶ 37 (1989); *Coard v. United States*, Inter-Am. Cm.H.R., No. 109/99 at ¶ 40 (1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm> (last visited Feb. 15, 2003); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 31 (3) (c), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (hereinafter *Vienna Convention*) (treaty must be interpreted in light of "any rules of international law applicable in the relations between the parties"); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (meaning of treaty language "to be taken in their ordinary meaning, as understood in the public law of nations").

Fourth, by refusing to recognize extraterritorial jurisdiction over areas in which a state does not exercise "effective overall control," it violates other provisions in the ECHR that explicitly recognize such jurisdiction, such as the right to receive information "regardless of frontiers."³⁶ A treaty cannot be interpreted to produce a result that conflicts with its other provisions. This would violate the object and purpose of the treaty, which is a violation of international law.³⁷

Finally, the *Bankovic* standard of "effective overall control" is ambiguous. The Court did not explain how much control was necessary, nor did it explain over how much territory the standard applied. Such a standard is indeterminate.

In conclusion, the *Bankovic* decision is problematic. However, it is fair to say that regional systems may be inclined against extending their jurisdictional competence over matters not within their regional borders for financial and political purposes. It is hard to see how this could be a principled conclusion given the fact that even the European system has recognized jurisdiction over cases from European territories in the Pacific.³⁸ Nevertheless, lawyers should be aware of this potential issue.

The *Bankovic* case is important to FNC doctrinal issues. Consider, for example, a case in which a military operation under joint British and U.S. command kills a civilian in Iraq. The victim's family might want to sue the U.S. (rather than the U.K., which is not an OAS member) before the Inter-American Commission because, unlike the European system, the Inter-American system *does* recognize jurisdiction over such extraterritorial attacks. However, it is unclear whether the Inter-American Commission would recognize jurisdiction over a killing that took place in Iraq given the political and financial concerns involved. At present, this question is unresolved. Furthermore, the Inter-American Commission cannot award damages against the U.S.

On the other hand, given the aforementioned difficulties with the *Bankovic* decision, it may be quite possible that future applicants before the European Court may be able to reverse the Court's decision in *Bankovic*. In the above hypothetical, the vic-

36. *ECHR*, *supra* note 19, art. 10 (1).

37. *Vienna Convention*, *supra* note 35, art. 31 (1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

38. *See, e.g.*, *Piermont v. France*, 314 Eur. Ct. H.R. (1994) (finding French violation of German national's freedom of expression in French Polynesia); *see also ECHR*, *supra* note 19, art. 63 (extending *ECHR* jurisdiction to colonies).

tim's family would sue the U.K. rather than the U.S., which is not a party to the *ECHR*, before the European Court. Indeed, this might be the preferable route for the applicants. Recall that some states (like the U.S.) do not recognize the jurisdiction of the Inter-American Court and, hence, petitioners cannot obtain damages or legal costs, whereas the European Court does award damages and legal costs.

In conclusion, the paucity of law on this issue creates uncertainty as to the potential impact of an FNC doctrine on litigation before international human rights tribunals.

2. THE ALIEN TORT CLAIMS ACT & THE FNC DOCTRINE IN HUMAN RIGHTS LITIGATION

This section will focus on the FNC doctrine in the context of human rights claims pressed under the Alien Tort Claims Act [ATCA]. This portion of the article will only address issues peculiar to human rights cases in the context of the FNC doctrine as exemplified in *Wiwa v. Royal Dutch Petroleum*.³⁹

The ATCA states that: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴⁰ The ATCA was amended by the Torture Victim Protection Act [TVPA] in 1992 to include plaintiffs who are U.S. nationals, but only if they have been subjected to torture or extrajudicial killings by foreign authorities.⁴¹

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

40. 28 U.S.C. § 1350 (1948).

41. *Id.*:

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) **LIABILITY.**— An individual who, under actual or apparent authority, or color of law, of any foreign nation —

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) **EXHAUSTION OF REMEDIES.**— A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) **STATUTE OF LIMITATIONS.**— No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

In *Wiwa*,⁴² the U.S. Court of Appeals for the Second Circuit reversed the lower district court's dismissal of the plaintiffs' ATCA claims on FNC grounds. The plaintiffs in *Wiwa* were suing Royal Dutch Petroleum and Shell Transport and Trading under the ATCA for murder, torture, and other violations of the law of nations that allegedly took place in Nigeria with the participation of Nigerian authorities. The lead plaintiff, Ken Saro Wiwa, was a Nobel Peace Prize winner who was subsequently hanged by the Nigerian government. The remaining plaintiffs were U.S. residents. The defendants had sought that the case be tried in an English court.

The issue of the plaintiffs' residence is often raised in FNC challenges to ATCA suits for several reasons. First, ATCA creates a private cause of action for aliens only, whose own countries have

(a) **EXTRAJUDICIAL KILLING.**— For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) **TORTURE.**— For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

42. *Wiwa*, 226 F.3d 88.

potentially available and adequate fora.⁴³ Second, the alleged international legal wrong usually takes place in another country that has potentially available and adequate fora.⁴⁴

In *Wiwa*, the Court of Appeals noted that, although the proper forum should not be considered solely upon the issue of residence, residence is an important factor for consideration.⁴⁵ In human rights cases, such as *Wiwa*, plaintiffs often have fled the country where the human rights violations occurred. The ATCA is an especially appropriate remedy in such a case, particularly if the defendants are government authorities, because plaintiffs may very well be subject to retaliation if they return to the country in which the violation occurred to press their claims. Furthermore, the judicial system of that country may very well be hostile to the plaintiffs because allegations of human rights violations could embarrass the government. Hence, under the adequacy of the alternative forum test in the FNC doctrine, such potential for governmental retaliation and court hostility would weigh in favor of the plaintiffs. As the Court of Appeals in *Wiwa* put it:

One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought.⁴⁶

Another issue material to human rights cases is that the plaintiffs often are less wealthy and relatively less powerful than the defendants that they are suing. Such was the situation in the

43. See, e.g., *Flores v. Southern Peru Copper Corp.*, 253 F.Supp. 2d 510, 541 (S.D. N.Y. 2002) (Peruvian courts available and adequate fora for Peruvian plaintiffs alleging international law violations committed in Peru.).

44. *Id.*

45. *Id.* (citing *Alcoa v. Nordic*, 654 F.2d 147, 155 (2d Cir. 1980) (forum non conveniens should not be conditioned solely upon residence, but "residence is, of course, an important factor to be considered")). "[P]laintiff's choice of forum is entitled to substantial deference and should only be disturbed if the factors favoring the alternative forum are compelling. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("[A] plaintiff's choice of forum should rarely be disturbed").

46. See *Wiwa*, 226 F.3d at 106.

Wiwa case. Dismissal on FNC grounds requires poor plaintiffs to start over in the courts of another nation, which will generally, at a minimum, require the plaintiff to obtain new counsel, perhaps even a new residence. Furthermore, class actions may not be available in foreign fora. This too requires greater expenditures for plaintiffs. Such requirements often impose insurmountable financial burdens on poor plaintiffs. As the Court of Appeals in *Wiwa* stated:

[The] Magistrate Judge, whose findings were adopted by the district court, gave no consideration to 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.⁴⁷

However, the Court of Appeal's decision in *Wiwa* has been criticized because the Court used the TVPA for interpreting ATCA, even though the plaintiffs did not raise a TVPA claim. The Court of Appeals held that TVPA expressed a U.S. policy favoring federal court exercise of the jurisdiction conferred by ATCA in cases of torture or extrajudicial killings.⁴⁸ However, one commentator, Aric Short, has argued that this was inappropriate because the text and legislative intent of ATCA does not disclose such a U.S. policy.⁴⁹ Mr. Short, however, repeatedly makes the common mistake of asserting that the law of nations – violations of which are actionable under ATCA – did not include such human rights violations at the time of ATCA's enactment in 1789. He makes the mistake of equating the law of nations with "international law." The law of nations in 1789 not only addressed inter-state relations but also addressed a state's relations with its own nationals,⁵⁰

47. *Id.* at 106-107.

48. *Id.* at 106.

49. 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 (2002).

50. One of the Founding Fathers, James Wilson, recognized that the law of nations governed not only relations between nations but also relations between the state and its citizens.

Some seem to have thought, that [the law of nations] respects and regulates the conduct of nations only in their intercourse with each other. A very important branch of this law – that containing the duties which a nation owes itself – seems to have escaped their attention. "The general principle . . . of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals."

See JAMES WILSON, LECTURES ON LAW, *Of the Law of Nations*, ¶ 1 (1791).

including the protection of their human rights. For example, rights to life, personal security, and property as exemplified in the prohibition against piracy were recognized by the law of nations in 1789.⁵¹ International law (*jus inter gentes*) is only a subset of the law of nations (*jus gentium*).⁵² Most importantly, jurists in the eighteenth century recognized that the law of nations was evolving.⁵³ After all, that is why the law of nations later became called "customary international law." Customs often change. For example, even if the law of nations recognized the legality of slavery in the eighteenth century, the subsequent law of nations outlawing slavery is the correct law to apply, because it would be nonsensical to apply the outdated law of nations protecting slavery. Indeed, if Mr. Short were correct, an alien *today* seeking compensation for the loss of his slaves freed in another country would have a colorable claim covered by ATCA because the law of nations protected slavery in 1789.⁵⁴ Indeed, one of the first

51. For example, on establishing prize courts, Congress also recognized the possibility that private Americans may have claims against U.S. authorities and privateers who seized their cargo in violation of the law of nations. 19 JOURNALS OF THE CONTINENTAL CONGRESS 315 (prize courts governed by law of nations) and 364 (privateers violating laws of nations subject to forfeiture of commission and "liable to an action for breach of the condition of [privateer's] bond, [and] responsible to the party grieved for damages sustained by such malversation") (1912). Piracy – which includes murder and robbery on the high seas – was prohibited by the law of nations in 1789. One of the first ATCA cases was for the reparations of property seized unlawfully on the high seas. See *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1607) (suit for restitution for loss of slaves under ATCA).

52. The phrase "international law" was first coined by Jeremy Bentham in 1780, and it referred only to *jus inter gentes* – "law between nations." JEREMY BENTHAM, PRINCIPLES AND MORALS OF LEGISLATION, Preface at Part the Seventh (1789). ("Principles of legislation in matters between nation and nation, or, to use a new though not inexpressive appellation, in matters of international law.")

53. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (distinguishing between ancient and modern law of nations). The law of nations is mutable and evolving. Only what Vattel calls the "necessary law of nations" is immutable because of its identification with natural law. EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGN, *Preliminaries*, at § 8 (1758) ("Since therefore the necessary law of nations consists in the application of the law of nature to states, — which law is immutable, as being founded on the nature of things, and particularly on the nature of man, — it follows that the *Necessary* law of nations is *immutable*." (emphases in original)) [hereinafter, VATTEL, LAW OF NATIONS]; see also J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW, vol. I, pt. II, ch. VI, § IX (1748) (one kind of law of nations is "universal, necessary, and self-obligatory . . . [and] differs in nothing from the law of nature, and is consequently immutable").

54. See *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (law of nations protects slavery); VATTEL, LAW OF NATIONS, bk. III, ch. viii, § 152 (law of nations allows enslavement of prisoners of war).

reported cases that addressed ATCA involved this very issue.⁵⁵ Such an interpretive approach would create the strange situation of allowing a U.S. court to do that which would otherwise be unconstitutional if the slavery at issue had existed under U.S. jurisdiction.⁵⁶

Furthermore, Mr. Short fails to recognize that federal statutes must be construed in conformity with the United States' international legal obligations under the Supreme Court's *Charming Betsy* Rule.⁵⁷ Such obligations include the affirmative state duty to provide an effective and sufficient domestic judicial remedy for human rights violations. International law generally requires that states provide full reparations, including monetary damages and, if necessary, injunctive relief when an illegal act has been committed.⁵⁸ International human rights law guarantees that individuals have a remedy enforceable in domestic courts. For example, the *International Covenant on Civil and Political Rights* states:

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall

55. See *Bolchos v. Darrel*, 3 F.Cas. 810 (D.C.S.C.1795) (No. 1607) (suit for restitution for loss of slaves available under ATCA).

56. See U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

57. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

58. See *Chorzow Factory Case*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (recognizing *restitutio in integrum* principle).

enforce such remedies when granted.⁵⁹

Generally speaking, international law often allows states to exercise a certain amount of discretion in fashioning how they provide a domestic remedy for international legal violations. However, international human rights jurisprudence has strictly limited this deference and has required a judicial remedy because other remedies, such as those provided by the political branches, are most often ineffective and/or inadequate, and a judicial remedy is the only remedy that can provide complete restitution.⁶⁰ For example, in cases where individuals have committed gross human rights violations, international human rights law creates an affirmative state duty to punish such persons.⁶¹ Only a *judicial*

59. *International Covenant on Civil and Political Rights*, Dec. 19, 1996, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) art. 2 (2)-(3) [hereinafter *ICCPR*]. The U.S. is a party to the *ICCPR*. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS OF DEC. 31, 1992, at 132, U.N. Doc. ST/LEG/SER.E/11 (1993) [hereinafter *MULTILATERAL TREATIES*].

The American Convention on Human Rights also guarantees an individual a right to a judicial remedy:

Article 25. RIGHT TO JUDICIAL PROTECTION.

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. To develop the possibilities of judicial remedy; and
 - c. To ensure that the competent authorities shall enforce such remedies when granted.

ACHR, *supra* note 9, art. 25; see FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 77-78 (2001) [hereinafter *MARTIN*, HUMAN RIGHTS VIOLATIONS] (discussing individual's right to remedy entails judicial remedy). The U.S. has signed the *ACHR*, thereby indicating the U.S.' acceptance of any regional customary international legal norms reflected therein. See *MARTIN*, *supra* note 11.

60. See, e.g., *Anguelova v. Bulgaria*, Application No. 38361/97, Eur. Ct. H.R. at § 161 (2002) (states allowed "some discretion" as to how they provide remedy to individuals for international law violations); M.J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 67 (1987); *Darmburg v. Suriname*, Case No. 10.117, Res. No. 19/89, Inter-Am. Cm. H.R. 128, OEA/ser.L/V.II.76, doc. 10 (1988-89); *Tumilovich v. Russia*, Application No. 47033, Eur. Ct. H.R. (1999) (domestic remedy depending on discretionary powers do not constitute effective domestic remedy).

61. See, e.g., *Velásquez Rodríguez v. Honduras*, Case No. 4, Inter-Am. C.H.R. at 172 (1988) (state affirmative duty to punish rights to life and humane treatment);

remedy could provide the required punishment of individuals committing such human rights violations.

The federal court's discretion to dismiss a human rights case pursuant to the FNC doctrine is invalidated by the United States' affirmative duty to provide a forum which will afford a full remedy for human rights violations. Under international human rights⁶² and humanitarian law,⁶³ this affirmative state duty even includes providing a remedy for certain gross human rights violations perpetrated abroad by foreign actors. Because ATCA suits most often raise claims of such gross human rights violations, the ATCA in such cases must be construed to eliminate federal court discretion. Although, generally speaking, international law allows states to exercise a certain amount of discretion in tailoring their domestic remedies for complying with their international legal obligations, international courts have strictly limited this deference in cases concerning gross human rights violations in order to ensure a domestic judicial remedy. The rationale behind this reasoning is that other remedies, such as those provided by the political branches, are most often ineffective and inadequate.

Finally, because human rights violations often are egregious, U.S. courts have awarded punitive damages in ATCA suits. However, at least one federal court has held that the unavailability of punitive damages in an alternative foreign forum does not necessarily bar dismissal of an ATCA suit on FNC grounds. Such rulings are problematic. On the one hand, international human rights tribunals have not awarded punitive damages against states *per se*. On the other hand, international human rights law does not appear to prohibit the awarding of punitive damages against either states or individuals. For example, the Statute of the International Criminal Court provides for a trust fund for the

Celis Laureano v. Peru, U.N. Doc. CCPR/C/56/D/540/1993 (1996) (views adopted March 25, 1996) (state affirmative duty to punish violations of rights to life, humane treatment, and liberty and personal security committed by state and non-state actors).

62. See, e.g., *Saldías de López v. Uruguay*, Comm. No. 52/1979, U.N. Doc. CCPR/C/OP/1 (1985) (views adopted July 29, 1981) (recognizing extraterritorial jurisdiction over detention and torture committed in Argentina by Uruguayan security and intelligence forces with assistance of Argentinean paramilitary forces).

63. See, e.g., *Fourth Geneva Convention*, *supra* note 30, arts. 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all Circumstances") and 146 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention . . .").

benefit of victims, where all the fines collected by the court are deposited.⁶⁴ Indeed, the international legal doctrine of full restitution – the principle of *restitutio in integrum* – suggests that punitive damages may be appropriate in cases where the human rights violations implicate international crimes. Furthermore, U.S. courts repeatedly have awarded punitive damages against both state agents and instrumentalities, as well as private persons under, respectively, the ATCA and the Foreign Sovereign Immunities Act (FSIA).⁶⁵ Therefore, in determining the adequacy of a foreign domestic tribunal under the FNC doctrine, the unavailability of punitive damages in a foreign domestic court should weigh in favor of the plaintiffs because the ATCA and the FSIA can provide punitive damages, whereas many foreign courts cannot.

3. ETHICAL ISSUES IN FNC DOCTRINE WITHIN THE CONTEXT OF HUMAN RIGHTS LITIGATION

Finally, there are certain ethical considerations that plaintiff and defense counsels should be cognizant of in such human rights cases. Generally speaking, because human rights cases often involve potential retaliation against plaintiffs by states or other powerful defendants, plaintiff counsel should be especially sensitive to any client claims of potential retaliation when drafting their pleadings. Furthermore, defense counsel must communicate to their clients that such retaliation would be illegal, and, if

64. Rome Statute of the International Criminal Court, July 17, 1998, art. 79, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002) [hereinafter *ICC Statute*]. Article 79 states:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

65. See, e.g., *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 865-66 (S.D.N.Y. 1984) (punitive damages awarded against state actor under ATCA); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198, 201 (D. Mass. 1995) (punitive damages awarded against state actor under ATCA); *Kadic v. Karadzic*, 74 F.3d 377 (2nd. Cir. 1996) (punitive damages awarded against private actor under ATCA); 28 U.S.C.A. §1605 (punitive damages available under FSIA); *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 42 F.Supp.2d 1317 (S.D.Fla.1999) (\$137,700,000 in punitive damages awarded against Cuban Air Force under FSIA); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (\$225 million in punitive damages awarded against Iran under FSIA).

defense counsel learns of their client's plans for retaliation, ethics require that such plans be reported to the court and/or relevant law enforcement authorities. For example, Rule 4-1.6 (b) of the Florida Bar Rules of Professional Conduct states: "A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another."⁶⁶ Rule 1.16 (a) of the ABA Model Rules of Professional Conduct states: "Except as stated in paragraph (c)⁶⁷, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law."⁶⁸

Specifically in the context of moving for dismissal on FNC grounds, defense counsel cannot *ethically* make an FNC motion with the knowledge that the plaintiff would face a reasonable risk of criminal law violations in the foreign forum at the hands of the defendant if the plaintiff did return to the foreign forum. Even if the plaintiff was prevented from returning to the foreign forum, this would be an ethical violation, regardless of the inadequacy of plaintiff discovery requests. Rule 4.1 of the ABA Model Rules of Professional Conduct states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁶⁹

Rule 1.6 states in relevant part:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;

...

66. FLA. STAT. ANN. BAR RULE 4-1.6 (1993)

67. Paragraph c states: "(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

68. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2000).

69. *Id.* R. 4.1.

- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (4) to comply with other law or a court order.⁷⁰

Furthermore, the defense may be *criminally* liable for making an FNC motion if the defense had knowledge that the plaintiff would face an actual risk of gross human rights or humanitarian violations by the defendant if the plaintiff returned to the foreign forum. Such a motion would be, for defense counsel, the equivalent of aiding or abetting the commission of certain international crimes. In *Tadic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held the following in regard to violations of humanitarian law:

[T]he accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.⁷¹

Such participation includes words and does not require the defendant's physical presence at the scene of the underlying act.⁷²

Furthermore, in the *Akayesu Case*, the International Criminal Tribunal for Rwanda established a lower liability threshold in cases of genocide:

[A]n accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.⁷³

In conclusion, defense counsel should be very wary of making

70. *Id.* R. 1.6.

71. The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Judgement, Trial Chamber II, ¶ 692 (May 7, 1997).

72. *Id.* at ¶ 679.

73. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement,

FNC motions in order to transfer a human rights case to a forum where the plaintiff may be exposed to criminal, human rights, or humanitarian law violations.

CONCLUSION

In litigation before the international human rights courts, the issue of the applicability of FNC doctrine is a potential obstacle for petitioners receiving sufficient remedies. Because of the novelty of the issue, the law is presently unclear as to whether such a doctrine, or even some form of it, would be applied and if so, what should/would be the outcome. This article has outlined some of the potential contours of the application of such a doctrine and its consequences. Essential to the future state of the law is the viability of the *Bankovic* case and whether the European Court of Human Rights' decision in that case will be overturned in the future by the Court, or else rejected by other international courts. This article has attempted to show the flaws in the Court's decision in *Bankovic* on a number of grounds.

In the area of human rights litigation before U.S. courts, the FNC doctrine has emerged in the context of ATCA litigation. Because of the nature of human rights cases in which an alternative foreign forum may be hostile, plaintiffs may face retaliation, and poor plaintiffs may face insurmountable financial burdens. Therefore, defendants probably will face substantial challenges in successfully arguing for a change of venue on FNC grounds as a matter of law. It is unclear, however, whether the unavailability of punitive damages in an alternative forum is a sufficient reason for denying a change of venue.

Finally, several ethical concerns in FNC motions become acute in human rights cases because of potential retaliation against plaintiffs by defendants and hostile states. Lawyers for both plaintiffs and defendants must be cognizant of such concerns. Most importantly, defense counsel should be very wary of making FNC motions because of their exposure to criminal liability.