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## Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection

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# Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection

Emeka Duruigbo

## Abstract

This Article looks at the scope and application of the local remedies rule in international law and the implications of its introduction in ATS litigation. As has been the case in the rule's introduction to human rights proceedings in other settings, its application in ATS litigation could mean additional work for the courts in fashioning the right way to interpret and apply the rule. For victims of human rights abuse who are seeking justice in the United States, it may not herald a lot of changes, although it could still make their quest a little more difficult. However, it could be a harbinger of broad public policy changes if properly utilized. These changes could redound to the benefit of the countries where human rights abuses constantly take place and may also lead to a more progressive development of the international law of human rights. Part I discusses the local remedies rule under general international law, while Part II undertakes a similar assignment with regard to international human rights law. In these two parts, the rationale and advantages of the rule are highlighted including the prevention of occasions for potential international irritation or interstate tension, promotion of peaceful co-existence of States, avoidance of counter-productivity, and facilitation of a higher or voluntary adherence to the relevant international instruments by States Parties. Part III focuses on the application of the local remedies rule in litigation under the TVPA. This part will also provide an applied speculation of the possible implications of an ATS exhaustion requirement for plaintiffs. Part IV examines the public policy implications of the introduction of the local remedies rule in ATS litigation. Generally speaking, attending to the dictates of the doctrine could provide a channel for vibrant political practices and judicial structures in human rights-abusing countries. It could also be fashioned into an avenue for strengthening international institutions and mechanisms for the promotion and protection of human rights. Part V is the conclusion.

## ARTICLE

# EXHAUSTION OF LOCAL REMEDIES IN ALIEN TORT LITIGATION: IMPLICATIONS FOR INTERNATIONAL HUMAN RIGHTS PROTECTION

*Emeka Duruigbo\**

### INTRODUCTION

In *Sosa v. Alvarez-Machain*,<sup>1</sup> the U.S. Supreme Court, in a very important footnote,<sup>2</sup> noted that in litigation under the Alien Tort Statute (“ATS”) of 1789,<sup>3</sup> consideration would certainly be given to the rule of exhaustion of local remedies “in an appropriate case.”<sup>4</sup> While it remains unclear what matters truly fall into the category of “appropriate cases,” the *Sosa* opinion settled a brewing controversy by bringing an element of clarity to

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

2. *See id.* at 733 n.21. The relevant part of the footnote for our purposes stemmed from a submission of the European Commission in the *Sosa* case. In the pertinent part of its Brief, The European Commission stated:

The TVPA [Torture Victim Protection Act] exhaustion requirement derives from a rule of general international law requiring that, before a claim may be asserted in an international forum, the claimant must have exhausted remedies in the domestic legal system. This doctrine gives a State an opportunity to prevent, correct, or remedy conduct that would otherwise constitute a violation of international law. At the same time, to protect against a denial of justice and prevent wasteful resort to ineffective remedies, the doctrine excuses an attempt to exhaust when local redress is unavailable or obviously futile. In similar fashion, an exercise of universal civil jurisdiction [through the Alien Tort Statute] should be predicated on a showing that there was no reasonable prospect of redress in either a State exercising jurisdiction on a traditional basis or through an international mechanism.

Brief for European Commission as Amici Curiae Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (No. 03-339), 2004 WL 177036, at \*24 (footnotes omitted).

3. Alien Tort Statute (“ATS”), 28 U.S.C.S. § 1350 (2005).

4. *See Sosa*, 542 U.S. at 733 n.21.

the issue of exhaustion of local remedies in alien tort litigation. Before *Sosa*, there was a divergence of opinions on the place of the doctrine in ATS cases, with one school of thought arguing that under the ATS, plaintiffs need to exhaust local remedies<sup>5</sup> and another school positing that in the absence of a clear specification in the statute, the exhaustion requirement could not be read into the ATS.<sup>6</sup> Other scholars essentially skirted the controversy and called for the doctrine's incorporation into ATS litiga-

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5. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 245 (2d ed. 2001) ("Although not explicit in the ATCA, the [exhaustion] requirement also applies to suits under that statute"); see also Eric Engle, *The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge*, 67 *ALB. L. REV.* 501, 504 (2003) ("Like the ATCA, the TVPA requires exhaustion of local remedies.") (citation omitted); Gregory G. A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 *COLUM. HUM. RTS. L. REV.* 359, 396 (1999) ("There are two procedural obstacles that many Alien Tort defendants can raise against plaintiffs' claims: forum non conveniens and exhaustion of remedies.").

6. See *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1137, 1139 (C.D. Cal. 2002) (rejecting the contention that the exhaustion of remedies doctrine is required under the ATS); see also *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003) ("In sum, because plaintiffs have not alleged a TVPA claim, the TVPA's exhaustion requirement does not apply."); Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 *CAUSES OF ACTION* 2D 327, §5 (2005) (stating that a plaintiff that chooses to state claims under the ATS instead of the TVPA "may avoid the requirement of exhaustion of local remedies" in so doing); Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 *PAGE INT'L L. REV.* 197, 214 (1994) (noting that the requirement to exhaust local remedies which is incorporated into the Torture Victim Protection Act ("TVPA") is absent under the provisions of the ATS); Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 *AM. J. COMP. L.* 1, 48 (2003) (discussing the holding in *Sarei* that "plaintiffs were not required to exhaust local remedies before being eligible to sue under the ATCA, even if the international law norm on which the action is based requires exhaustion of local remedies"); Michelle M. Meloni, *The Alien Tort Claims Act: A Mechanism for Alien Plaintiffs to Hold Their Foreign Nations Liable for Tortious Conduct*, 5 *J. INT'L L. & PRAC.* 349, 360 (1996) (stating that the ATS did not have an exhaustion of local remedies requirement); Kathryn L. Pryor, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 *VA. J. INT'L L.* 969, 1017 (1989) ("Finally, the TVPA, unlike the ATCA, incorporates an exhaustion of local remedies requirement."); Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?* 14 *TRANSNAT'L L.* 207, 232 (2001) ("A final distinction between the two statutes is that the Torture Victim Protection Act, unlike the Alien Tort Statute, incorporates a requirement that the claimant exhaust local remedies."); Nancy Morisseau, Note, *Seen But Not Heard: Child Soldiers Suing Gun Manufacturers Under the Alien Tort Claims Act*, 89 *CORNELL L. REV.* 1263, 1291 n.220 (2004) ("Moreover, unlike the ATCA, the TVPA has exhaustion of remedies and statute of limitations requirements.").

tion.<sup>7</sup>

The exhaustion of local remedies rule is a well-known principle of customary international law.<sup>8</sup> In the *Interhandel Case*,<sup>9</sup> the International Court of Justice ("ICJ"), in giving clear recognition and fresh vent to the rule, clearly stated:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.<sup>10</sup>

The rule has maintained a presence in the international legal system for centuries.<sup>11</sup> "Even for a rule of customary interna-

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7. See Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153 (2003) ("Regardless of the merits of the claims, the principle of exhaustion, well-established in international law, should govern the application of the Alien Tort Statute to corporate conduct by U.S. courts."); see also GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); Stephen W. Yale-Loehr, *The Exhaustion of Local Remedies Rule and Forum Non Conveniens in International Litigation in U.S. Courts*, 13 CORNELL INT'L L.J. 351, 357-59 (1980) (providing justification for such an introduction including avoiding "vexatious litigation in which the United States has little or no interest" and obviating strained relations with other States through providing them an opportunity, *vide* the rule to "correct the problem with a minimum of international interference"); Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending The Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 935 n.374 (1999).

8. For general discussions of the rule, see Edwin M. Borchard, *The Local Remedy Rule*, 28 AM. J. INT'L L. 729 (1934); see also H.W. Briggs, *The Local Remedies Rule*, 50 AM. J. INT'L L. 921 (1956); Richard B. Lillich, *The Effectiveness of the Local Remedies Rule Today*, 58 AM. SOC. INT'L L. PROC. 101 (1964).

9. *Interhandel Case* (Switz. v. U.S.) 1959 I.C.J. 6, 27 (Mar. 21) (Preliminary Objections). For useful discussions of the case, see Herbert W. Briggs, *Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States*, 53 AM. J. INT'L L. 547 (1959); see also Albert H. Garretson, *International Law*, 35 N.Y.U. L. REV. 1, 12-24 (1960).

10. *Interhandel Case*, 1959 I.C.J. at 27.

11. See A.A. Cancado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 BELGIAN REV. INT'L L. 499 (1976). The rule was discussed in the works of classical international legal scholars such as Hugo Grotius and Emmerich de Vattel. See also Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RTS. L. REV. 223, 227 n.7 (1987).

tional law, the local remedies rule has particularly deep roots.”<sup>12</sup> Evidence of its existence can be found in the various sources of international law<sup>13</sup> listed in Article 38(1) of the Statute of the ICJ.<sup>14</sup>

The local remedies rule states that before a claim can be espoused at an international judicial forum, the claimant or the representative government must have exhausted all domestic remedies in the country where the claim arose.<sup>15</sup> Articulating

12. Matthew S. Duchesne, *The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes*, 36 GEO. WASH. INT'L L. REV. 783, 788 n.24 (2004).

13. The Statute of the International Court of Justice (“ICJ”) embodies the modern codification of the sources of international law. See Statute of the International Court of Justice (“ICJ”), June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, T.S. No. 993. A century before the conclusion of the Statute of the ICJ, the U.S. Supreme Court articulated the sources in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). See Peter Schuyler Black, *Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281, 281 n.10 (1996).

14. Statute of the ICJ, June 26, 1945, art. 38(1), 59 Stat. at 1060; see *Report of the International Law Commission on the Work of its Twenty-Ninth Sess.*, [1977] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 2) (discussing the acceptance or application of the local remedies rule in treaties, custom, judicial, and arbitral decisions and writings of the most qualified publicists) [Hereinafter *International Law Commission*].

15. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 713, cmt. f (1987) (“Under international law, ordinarily a State is not required to consider a claim by another State for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”); E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 817-18 (1915) (“Almost daily the Department of State of the United States of America has occasion to reiterate the rule that a claimant against a foreign Government is not usually regarded as entitled to the diplomatic interposition of his own government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes a claim.”); M. WHITEMAN, *DAMAGES IN INT'L L.* 1558 (1943) (“If an adequate remedy exists in the respondent state, the non-recourse to such remedy is defense to the assertion of a claim; it is only when a denial of justice has been suffered in resorting to the remedy afforded that an international claim arises.”); see also Matthew H. Adler, *The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in ELSI*, 39 INT'L & COMP. L.Q. 641, 641 (1990) (“One of the time-honored principles of customary international law has been that before a State can pursue, or ‘espouse’, the claim of one its nationals, the injured party must be shown to have exhausted its local remedies in the host State.”) (citation omitted); Algot Bagge, *Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. Y.B. INT'L L. 162, 165 (1958) (“No claim may be put forward on the international plane by way of intervention as long as the remedies of redress provided by the delinquent State have not been exhausted.”) (citation omitted); A.A. Cancado Trindade, *Exhaustion of Local Remedies in Relation to Legislative Measures and Administrative Practices— The European Experience*, 18 MALAYA L. REV. 257, 257

the rule in the *Ambatielos* case,<sup>16</sup> the Commission of Arbitration stated:

[The rule] means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies . . . .<sup>17</sup>

In *Banco Nacional de Cuba v. Sabbatino*,<sup>18</sup> the U.S. Supreme Court held that before resort can be made to international law, claimants are required to first seek local remedies or show that such remedies are unavailable.<sup>19</sup> The remedies required to be exhausted may be judicial, administrative, or legislative.<sup>20</sup>

Traditionally, the local remedies rule developed in the context of diplomatic protection.<sup>21</sup> In contemporary times, however, the rule has often been invoked in modern arbitration or international investor protection disputes<sup>22</sup> and human rights

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(1976) [hereinafter Trindade, *Legislative Measures*] (stating that where there are claims of individual rights being “disregarded in violation of international law, the State where the violation occurred should have the opportunity to redress the wrong by its own means and within the framework of its own domestic legal system before resort may be had to an international organ”); Dionyssios M. Poulantzas, *The Rule of Exhaustion of Local Remedies and Liability for Space Vehicle Accidents*, 31 J. AIR L. & COM. 261, 261 (1965) (“It is well known in international law that before a State may espouse the claim of one of its nationals against another country, the individual should have exhausted the means, judicial and administrative, available to him in the State against which the diplomatic protection is exercised.”); Stephen M. Schwebel & J. Gillis Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 AM. J. INT’L L. 484, 500 (1966) (referring to the ICJ’s conclusion that the requirement to exhaust local remedies before instituting international proceedings is a “well-established rule of customary international law”).

16. *Ambatielos Case* (Greece v. U.K.), 1952 I.C.J. 28 (July 1).

17. *Ambatielos Claim* (Greece v. U.K.), 12 R.I.A.A. 91, 118-19 (1956).

18. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

19. *Id.* at 422-23.

20. See *infra* notes 73-76 and accompanying text.

21. It is pertinent to note that the “[t]he term ‘diplomatic protection’ was never confined to diplomacy or recourse to diplomatic channels to negotiate a settlement of international claims. Rather, the adjective ‘diplomatic’ referred to the ‘governmental’ level of protection, which could encompass any means adopted by the injured State.” Sompong Sucharitkul, *State Responsibility and International Liability under International Law*, 18 LOY. L.A. INT’L & COMP. L.J. 821, 823-24 (1996).

22. See, e.g., Sean D. Murphy, *NAFTA Decision on Continuous Nationality and Local Remedies*, 97 AM. J. INT’L L. 700 (2003); Clyde C. Pearce & Jack Coe, Jr., *Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT’L & COMP. L. REV. 311, 323

protection.<sup>23</sup> The doctrine has been applied in human rights litigation in the United States under the Torture Victim Protection Act (“TVPA”).<sup>24</sup> Opening the doors to its application in ATS litigation, as the Supreme Court did in *Sosa*, may further assure its widespread use. The implications of its introduction in alien tort litigation could turn out to be one of the most discussed issues relating to that piece of legislation.

Some scholars view the *Sosa* decision as making it more difficult to bring ATS suits generally.<sup>25</sup> Even if one disagrees with that general observation, as some scholars undoubtedly do,<sup>26</sup> there is hardly any question that the introduction of an exhaustion requirement certainly constitutes an additional hurdle that many victims of human rights abuses may be constrained to cross in the course of seeking justice in U.S. courts.<sup>27</sup> Plaintiffs in alien tort litigation already have to grapple with a coterie of procedural difficulties including standing, sovereign immunity, act of state doctrine, *forum non conveniens*, and the political question

(2000). *But see* Stephen M. Schwebel, *Arbitration and the Exhaustion of Local Remedies Revisited*, 23 INT’L L. 951, 954 (1989).

23. *See generally* Int’l Law Ass’n, 2000 REPORT OF SIXTY NINTH CONFERENCE 2000 [hereinafter LONDON CONFERENCE REPORT].

24. Torture Victim Protection Act (“TVPA”), 28 U.S.C.S. § 1350 (Lexis 2005).

25. *See* Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 115 (2004) (arguing that the Supreme Court in *Sosa* essentially shut the door to new causes altogether because there is nothing behind the door that *Sosa* apparently left “ajar subject to vigilant doorkeeping”).

26. *See generally* Arthur Traldi, *Some, But Which? Filling in the Theoretical Gaps in Sosa v. Alvarez-Machain*, (ExpressO Preprint Series, Working Paper No. 602, 2005), available at <http://law.bepress.com/expresso/eps/602>; Ralph G. Steinhardt, *Laying One Bankrupt Critique To Rest: Sosa V. Alvarez-Machain And The Future Of International Human Rights Litigation In U.S. Courts*, 57 VAND. L. REV. 2241 (2004). *But see*, Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151 (2006) (surveying post-*Sosa* ATS decisions and observing that the outcome has not been consistent although the trend appears to be in the direction of a greater restriction of access to plaintiffs in application of the *Sosa* decision).

27. Generally, the exhaustion requirement is a burden in whatever setting it is introduced. *See* Keturah A. Dunne, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms in Germany*, 30 CAL. W. INT’L L.J. 117, 150 (1999); *see also* Schochet, *supra* note 11, at 223 (“The exhaustion of local remedies has traditionally been considered an obstacle to overcome before a claim for international protection can be pursued.”); Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT’L L. 559, 591 (1993) (noting that “the exhaustion requirement can be burdensome”).



doctrine.<sup>28</sup> There should be no pretense to unanimity, however, as there is also a tendency not to acknowledge the exhaustion doctrine as imposing an arduous task on plaintiffs.<sup>29</sup> The present work stakes the position that the *Sosa* decision essentially halts the expansion of ATS litigation not only through the Supreme Court's express restrictions but also through the implications of the application of the exhaustion doctrine.<sup>30</sup> Cases from States with functioning judicial systems will be abandoned and ATS litigation may be limited to cases against a handful of public officials widely known for egregious human rights abuses or confined to lawsuits against multinational corporations doing business with brutal regimes.

Legal scholars, human rights advocates, and corporate defense attorneys are firmly united in the belief and acknowledgment that the import of the exhaustion of local remedies requirement will be one of the central issues in post-*Sosa* ATS litigation.<sup>31</sup> Indeed, the contours of the rule and the extent of its application are shrouded in uncertainty.<sup>32</sup> Judge Jessup's observation five decades ago that: "There is a well established but inadequately defined rule that the alien must exhaust local remedies before a diplomatic claim is made,"<sup>33</sup> still appears to reflect

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28. See generally FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 794-818 (3d ed. 2001). See Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 413 (1985); see also Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996); Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 181 (1999).

29. See, e.g., Virginia A. Melvin, Case Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211, 229 n.91 (1985) (describing the requirement of exhaustion of local remedies as a "less imposing barrier" in contradistinction to *forum non conveniens* and other hurdles faced by ATS plaintiffs).

30. See Steinhardt, *supra* note 26.

31. Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts, Advocacy Efforts, and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 171 (2005), available at <http://www.cja.org/projects/writingsdocs/AccountabilityColiverGreenHoffman.pdf> (noting that the Supreme Court in *Sosa* "did not resolve numerous issues that will take years to work their way through the courts, including . . . exhaustion of remedies . . .").

32. See Adler, *supra* note 15, at 641 ("Yet while the rule is widely accepted and is often a line of first defense for States accused of injury to aliens, its scope of application has remained unclear in a number of fundamental areas.").

33. See P. JESSUP, *A MODERN LAW OF NATIONS* 104 (1958); see also Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y.B. INT'L L. 83, 83

today's legal reality.<sup>34</sup>

This Article looks at the scope and application of the local remedies rule in international law and the implications of its introduction in ATS litigation. As has been the case in the rule's introduction to human rights proceedings in other settings, its application in ATS litigation could mean additional work for the courts in fashioning the right way to interpret and apply the rule.<sup>35</sup> For victims of human rights abuse who are seeking justice in the United States, it may not herald a lot of changes, although it could still make their quest a little more difficult. However, it could be a harbinger of broad public policy changes if properly utilized. These changes could redound to the benefit of the countries where human rights abuses constantly take place and may also lead to a more progressive development of the international law of human rights.

Part I discusses the local remedies rule under general international law, while Part II undertakes a similar assignment with regard to international human rights law. In these two parts, the rationale and advantages of the rule are highlighted including the prevention of occasions for potential international irritation or interstate tension, promotion of peaceful co-existence of States, avoidance of counter-productivity, and facilitation of a higher or voluntary adherence to the relevant international instruments by States Parties. The disadvantages of the doctrine, however, are not glossed over. For instance, some human rights advocates view the local remedies rule as an impediment to a quicker and more effective dispensation of justice.<sup>36</sup> Part III focuses on the application of the local remedies rule in litigation under the TVPA. The TVPA was enacted as a consequence of ATS practice and litigation under the two statutes shares a lot of similarities.<sup>37</sup> Besides, a snapshot into the practice under the

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(1959) ("While the rule itself is well established in international jurisprudence . . . both its basis and the limits of its applicability are rather vague.").

34. See Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1, 3 (2003) (stating that "many aspects of the rule as yet require clarification").

35. See Trindade, *Legislative Measures*, *supra* note 15, at 257 (noting that the incorporation of the rule in the European Convention on Human Rights system was "met with innumerable problems of interpretation in the handling of concrete cases").

36. See Garrity-Rokous & Brescia, *supra* note 27, at 591.

37. See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 513 (1997).

TVPA is likely to provide an insight into the expected scenario under the ATS. Thus, this part provides an applied speculation of the possible implications of an ATS exhaustion requirement for plaintiffs. Part IV examines the public policy implications of the introduction of the local remedies rule in ATS litigation. Generally speaking, attending to the dictates of the doctrine could provide a channel for vibrant political practices and judicial structures in human rights-abusing countries. It could also be fashioned into an avenue for strengthening international institutions and mechanisms for the promotion and protection of human rights. Part V is the conclusion.

### I. THE LOCAL REMEDIES RULE IN GENERAL INTERNATIONAL LAW

The local remedies rule is commonly regarded as a rule of international procedural law,<sup>38</sup> although controversy continues to rage as to whether its exact nature is one of substance, procedure or mixed.<sup>39</sup> This controversy is not merely of theoretical import.<sup>40</sup> "Its significance touches for example time-limits for bringing the claim, limitation for actions, forfeiture and the calculation of interests for late payment."<sup>41</sup> The rule was invoked in cases of diplomatic protection to ensure that before a State

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38. See Udombana, *supra* note 34, at 3; see also Garrity-Rokous & Brescia, *supra* note 27, at 587.

39. See generally J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?*, 31 BRIT. Y.B. INT'L L. 452 (1954). Some scholars insist that the local remedies rule is a substantive rule. See also C.H.M. Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 31 BRIT. Y.B. INT'L L. 96, 101 (1954) (stating that "the local remedies rule, although it may have the look of a jurisdictional rule, is undoubtedly a substantive rule concerned with the rights and obligations of the interested States *inter se* under international law"); CASTOR H.P. LAW, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW 32-34 (1961).

40. See T. HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS 23-27 (1968); see also Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391, 413 n.97 (1991) [hereinafter, Murphy, *The ELSI Case*], ("Uncertainty about who must show that the claimant has or has not exhausted local remedies may arise from the debate over whether the local remedies rule constitutes a rule essentially procedural in nature or a substantive element of the claimed violation. If it is a procedural rule, exhaustion is a condition precedent to the claimant state's exercise of the right of diplomatic protection of its injured national, and the respondent state must show that the injured party has not fulfilled this condition. If on the other hand it is a substantive rule, exhaustion is a condition precedent to the accrual of international liability, and the claimant state must prove exhaustion in order to prevail on its claim.")

41. See LONDON CONFERENCE REPORT, *supra* note 23, at 9; see also Karl Doehring,

could assert the claims of a national alleging injury abroad, the national must have availed him—or herself of the remedies available in the host country. Indeed, the exhaustion of local remedies doctrine serves to temper the requirements of State responsibility.<sup>42</sup>

Parties may exclude the application of the exhaustion rule by agreement or treaty.<sup>43</sup> However, the exclusion must be explicit; otherwise a treaty invoked for the protection of aliens may be deemed to contain a requirement to exhaust domestic remedies.<sup>44</sup> In the *ELSI* case, the ICJ declined to accept the proposition that such “an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of words making clear an intention to do so.”<sup>45</sup> The importance of the rule is perhaps attributable to its rationale, purpose, and benefits.

#### A. *Rationale, Purpose, and Benefits of the Local Remedies Rule*

A close examination of the local remedies rule shows some underlying basis and benefits of the rule. Respect for State sovereignty provides a principal rationale for the requirement to exhaust domestic remedies.<sup>46</sup> “The particular *motif* of this rule is to protect against outside intervention the right of the territorial State to apply its own municipal laws and jurisdiction to all persons within its boundaries.”<sup>47</sup> This is especially of great import where the claimant is an influential foreign investor backed by

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*Local remedies, exhaustion of*, III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 238, 240 (1997).

42. See Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1957 (1990) (reviewing THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989)); see also Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1159 (1992) (stating that the doctrine “makes the international law responsibility of the offending state to the state of the individual’s nationality contingent on the individual’s having sought and been denied redress in the offending state’s local courts”) (citation omitted).

43. See Pearce & Coe, *supra* note 22, at 323.

44. See Adler, *supra* note 15, at 651.

45. Case Concerning Elettronica Sicula S.P.A. (U.S. v. Italy), 1989 I.C.J. 15, 42, ¶ 50 (July 20) [hereinafter *Elsi*]. For a critique of the ICJ’s position on this point, see Murphy, *The Elsi Case*, *supra* note 40, at 408-09.

46. See CHITTHARANJAN FELIX AMERASINGHE, *Local Remedies in International Law* 200 (2d ed. 2004) [hereinafter AMERASINGHE, *LOCAL REMEDIES*] (“Respect for the sovereignty of the respondent or host State constitutes the foundation of the rule that local remedies must be exhausted.”).

47. Waldock, *supra* note 39, at 100.

the superior might of a powerful home State. The local remedies rule becomes of immense utility to a host State that is keenly interested in resisting such intrusion and insisting on an assertion of its sovereignty.<sup>48</sup>

Related to the present point is that the local remedies rule has as one of its objects—the reduction of interstate tensions.<sup>49</sup> Since it discourages the internationalization of claims, the doctrine of exhaustion of local remedies plays an important role in the promotion of friendly relations between States.<sup>50</sup> By allowing a State to address and redress violations of international law that occurred in its territory, the doctrine also evinces a preference for, and contributes toward, the maintenance of stable international relations.<sup>51</sup> The rule also aims at prompt and peaceful resolution of disputes.<sup>52</sup> According to Judge Algot Bagge, sole arbitrator of the celebrated *Finnish Ships* arbitration:<sup>53</sup>

This rule is justified from several points of view. If by using the local remedies the subject of the intervening State has got satisfaction for the damage incurred, a claim of the intervening State, having for its object a sanction for a breach of international law by redress of the damage inflicted on the subject, lacks foundation. The State which has committed the act inflicting the damage has ordinarily a right to demand that, before the claim on the international plane may be considered receivable, the channel of local remedies shall be tried and the State thus has an opportunity to do justice in its own way. The sensibilities of the defendant State against the intervention as being an infringement of its sovereignty should thereby be mitigated and inter-state friction diminished.<sup>54</sup>

It bears emphasizing that while respect for sovereignty and minimization of inter-State friction are laudable goals, strict ad-

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48. See Bernardo Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 HOUS. J. INT'L L. 565, 585 (1997) (citing to the views of Eduardo Jimenez de Arechaga, in E. JIMENEZ DE ARECHAGA, *EL DERECHO INTERNACIONAL CONTEMPORANEO* 37 (1991)).

49. See A. A. CACADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 11-12 (1983).

50. See Schochet, *supra* note 11, at 328.

51. See Yale-Loehr, *supra* note 7, at 372.

52. See CACADO TRINDADE, *supra* note 49, at 11-12.

53. Claim of Finnish Shipowners (Fin. v. Gr. Brit.), 3 R.I.A.A. 1479 (1934).

54. Bagge, *supra* note 15, at 165-66.

herence thereto should not be encouraged when manifest injustice, such as deprivation of human rights, would result. On this point, the situation with civil rights enforcement, particularly in the 1960s, provides a useful analogue.<sup>55</sup> It was then compellingly argued that the exhaustion requirement should be relaxed or jettisoned even when state sovereignty concerns were apparent if the alternative would impede the vindication of the constitutional rights of citizens.<sup>56</sup>

The doctrine of exhaustion of remedies is also justified on the basis that it allows a State to preserve its dignity by providing an opportunity to remedy a wrong before it escalates into a public controversy.<sup>57</sup> Preference for prior national resolution therefore also flows from the natural tendency of individuals and groups to show a resistance toward "outside intrusion in private affairs"<sup>58</sup> or to avoid airing their dirty laundry in public when not inevitable. "The value of the local remedies rule is that it is a safety valve to prevent all disputes from becoming governmental squabbles with their possible impact on 'national honor' or

55. The exhaustion requirement was introduced in U.S. jurisprudence to promote comity and minimize friction between the federal and state judicial systems. See Mathew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1202 (1995); see also Jason M. Halper, Comment, *Harris v. Reed: A New Look at Federal Habeas Jurisdiction Over State Petitioners*, 58 FORDHAM L. REV. 493, 503 n.86 (1989).

56. See Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1207 (1968) [hereinafter *Exhaustion of State Remedies*] ("The development of the exhaustion doctrine represented, at least in part, an attempt to minimize inter-governmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs. However, ritual genuflection in the direction of federalism should be avoided. The states are not the only legitimately interested parties.").

57. See David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 391 (1964) [hereinafter Mummery, *Content of the Duty*]. Professor Mummery reasons that this explains the directive of the Lord Jesus Christ in the Gospel of Mathew 18: 15-17 to settle a dispute in private with the person believed to be in the wrong before bringing it to the attention of third parties and the Church. See *id.* at 391 n.12; see also David R. Mummery, *Increasing the Use of Local Remedies*, 58 AM. SOC'Y INT'L L. PROC. 107, 107 (1964) [hereinafter Mummery, *Use of Local Remedies*] (citing *Matthew 18:15—18:17* (King James)) ("[I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church . . .").

58. See Mummery, *Content of the Duty*, *supra* note 57, at 391.

'face.'"<sup>59</sup> Moreover, "as is well known from common experience, there is every advantage to be gained in settling a dispute as close to its source as possible."<sup>60</sup> In addition, the person that takes the decision to travel to or reside in another country is assumed to have made an implicit declaration that he or she is comfortable with the laws in that country and expressed some faith in the legal system thereof to provide satisfactory justice. Thus, the local remedies rule also has its roots and finds justification partly on the proposition that "the citizen going abroad is presumed and should ordinarily be required to take into account the means furnished by local law for the redress of wrongs."<sup>61</sup>

Giving the State alleged to be in breach of its international obligations an opportunity to remedy the wrong or present its own side of the case before it is hauled before an external adjudicatory forum is also consistent with a system of justice that is anchored on fair dealing.<sup>62</sup> Viewed from that perspective, the local remedies rule may be considered an application or extension of the *audi alterem partem* rule of domestic law that insists on hearing the other party.<sup>63</sup> Other purposes behind the design of the local remedies rule include the avoidance of duplication of remedies and prevention of a premature pursuit of the diplomatic remedy.<sup>64</sup> Further, national courts are considered more suitable for the resolution of claims of individuals and corporations.<sup>65</sup> The local remedies rule also obviates the "multiplication of small claims on the level of diplomatic protection."<sup>66</sup>

The requirement to exhaust local remedies as a general pro-

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59. B.A. Wortley, *The Protection of Property Situated Abroad*, 35 TUL. L. REV. 739, 749 (1961).

60. Mummery, *Use of Local Remedies*, *supra* note 57, at 108.

61. See *Harvard Research on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L. L. 133, 152-53 (1929); see also BORCHARD, *supra* note 15, at 817 ("The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the State of residence implies as its corollary that the remedies for a violation of his rights must be sought in the local courts.").

62. See Mummery, *Content of the Duty*, *supra* note 57, at 108.

63. See *id.*

64. See Wortley, *supra* note 59, at 744.

65. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 497 (6th ed. 2003); see also B.O. Iluyomade, *Dual Claim and the Exhaustion of Local Remedies Rule in International Law*, 10 VAN. J. TRANSNAT'L L. 83, 84 (1977).

66. See BROWNLIE, *supra* note 65, at 497; see also Iluyomade, *supra* note 65, at 84.

position accords with common sense and that fact probably explains the general acceptance and enduring quality of the rule.<sup>67</sup> A further explanation is that reciprocity is an in-built component of the rule or its application.<sup>68</sup> Both the State whose national is believed to have been wronged (sending State) and the State alleged to have perpetrated the wrong (receiving State) have an incentive to keep the rule alive and accord each other the privilege knowing full well that it may not be long before the shoe gets to be on the other foot.<sup>69</sup> The principle of reciprocity is the basis of the efficacy of many international legal norms.<sup>70</sup>

Notwithstanding the merits of the rule as shown in the foregoing paragraphs, the local remedies rule is not without its drawbacks. The rule allows the State that is the author of the wrongful act to achieve the internationally required result by stages.<sup>71</sup>

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67. For the proposition that the rule has been accepted widely for a long time, see *Interhandel Case (Switz. v. U.S.)* 1959 I.C.J. 6, 29 (Mar. 21) ("the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law."); Bagge, *supra* note 15, at 165 (attesting to the universal acceptance of the principle); Iluyomade, *supra* note 65, at 95 ("there can be no doubt that the rule serves some very useful purpose and has become generally accepted."); Mummery, *Use of Local Remedies*, *supra* note 57, at 107 ("The rule of international law requiring in certain cases the exhaustion of local remedies before a claim may be made on the international level has had such a wide and unchallenged acceptance . . .").

68. See Mummery, *Content of the Duty*, *supra* note 57, at 392.

69. See *id.*

70. See *id.*; see also Michael Byers, *Custom, Power and the Power of Rules—Customary International Law From an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 162 (1995) (discussing the place of reciprocity in social relations and the formation of customary international law); Robert MacLean, *Does Anyone Still Ask the Question "Is International Law Really Law?"*, 1991 JURID. REV. 230, 238 (stating that "the element of reciprocity is at the root of all international obligations"). For a summary of the rationale, see LONDON CONFERENCE REPORT, *supra* note 23, at 8-9.

The rule aims at offering States the opportunity to rectify the behavior of their organs within their own legal systems and thereby to do justice to the claimant. This reason is emphasized in general international law as well as in human rights law. Various aspects can be distinguished. First, one of the rule's objectives is to protect the interest of respondent States in preserving their sovereignty. Second, there are practical reasons: the investigative machinery found in the host State might be better equipped to determine the existence of an international wrong; the resort to local courts might be cheaper both for the host State and for the alien, it will generally be less time-consuming, it prevents the tying up of significant numbers of what are very often poorly staffed government departments and serves the minimization of international disharmony. In that sense, . . . the exhaustion rule acts like a filter, keeping off the international plane cases that can be settled elsewhere.")

71. See *International Law Commission*, *supra* note 14.



Moreover, the fact that the application of the rule may give rise to postponement and delays "both in correcting situations incompatible with the result aimed at by an international obligation and in establishing that the obligation has been definitively breached"<sup>72</sup> does not increase the rule's allure. The local remedies rule is viewed as a major obstacle to progress by some human rights advocates that yearn for a more direct, swift, and effective protection of human rights.<sup>73</sup> As the International Law Commission has observed, the practical disadvantages accompanying the principle of exhaustion of local remedies are the precise reasons for the express exclusion of the rule's application in certain matters by some conventions.<sup>74</sup>

### B. *Scope of the Local Remedies Rule*

The local remedies rule requires that before an international intercession can be made on behalf of a national, there must be an exhaustion of all available legal remedies, effective and sufficient to provide adequate redress, relief, or reparation to the claimant.<sup>75</sup> In a nutshell, the scope of the exhaustion doctrine encompasses the features of "all legal remedies," "availability," "effectiveness," and "sufficiency."<sup>76</sup>

#### 1. All Legal Remedies

A claimant is expected to exhaust all internal legal remedies in the host country.<sup>77</sup> Ordinarily, legal remedies refer to those remedies of a judicial nature, but some commentators assert persuasively that the requirement extends to those remedies that are administrative or legislative in form.<sup>78</sup> The *Harvard Draft* of

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72. *See id.*

73. *See id.*

74. *See id.*

75. *See* LONDON CONFERENCE REPORT, *supra* note 23, at 14.

76. *See id.* ("In accordance with the rationale of the rule, the essential criterion for determining the procedural devices which have to be exhausted is the efficacy and sufficiency of the remedy in question in order to obtain adequate reparation."); *see also* *Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 91, 120 (1956).

77. *See* Kurt Lipstein, *The Ambatielos Case Last Phase*, 6 INT'L & COMP. L.Q. 643 (1957); *see also* C.F. Amerasinghe, *The Exhaustion of Procedural Remedies in the Same Court*, 12 INT'L & COMP. L.Q. 1285 (1963).

78. *See, e.g.*, *Phosphates in Morocco Case*, 1938 P.C.I.J. (ser. A/B) No. 74, at 28 (noting that there could be cases of failure to exhaust local remedies resulting "either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies.").

1961 in Article 19 incorporates "all administrative, arbitral or judicial remedies."<sup>79</sup> An explanatory comment thereto states: "By administrative remedies are meant all those remedies which are available through the executive branch of the government, as well as special remedies which may be provided by legislative action if claims are routinely handled through private bills for relief."<sup>80</sup>

An example of a largely legislative remedy surfaced in the *Anglo-Iranian Oil Co. Case* where Article 3 of the Iranian Oil Nationalization Act of May 1, 1951 provided for the examination of claims by the government under the supervision of a "Mixed Board" composed of five Senators, five Deputies, the Minister of Finance; and the submission of the government's suggestions to the two Houses of Parliament for implementation of same after approval by the two Houses.<sup>81</sup> Whether judicial, executive, or administrative, the remedies must be legal in the sense that a claimant may have recourse to them as a matter of law, not on the basis of discretion, grace, or favor.<sup>82</sup>

## 2. Availability

The duty incumbent on an aggrieved alien is to exhaust only those remedies that are available or accessible to him.<sup>83</sup> This feature is quite self-explanatory and does not need elaborate discussion. It is instructive to note, however, that while serious doubt about the existence of this requirement does not exist, it is difficult coming across cases (outside the area of human rights) in which an international court or organ has decided that remedies have not been available or accessible.<sup>84</sup>

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79. *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT'L. L. 548, 577 (1961).

80. See Louis Sohn and Richard R. Baxter, *Convention on the International Responsibility of States For Injuries to Aliens* (Draft no. 12 with Explanatory Notes), Explanatory Note to art. 19, at 164 (1961). For a critique of the explanatory comment, particularly on the basis that it is broad, see AMERASINGHE, *Local Remedies*, *supra* note 46, at 194.

81. See Mummery, *Content of the Duty*, *supra* note 57, at 394 n.4.

82. See *Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 55th Sess., Supp. No. 10, at 516, ¶ 188, U.N. Doc. A/56/10 (2001); J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 281 (Sir H. Wadlock ed., 1963); A.P. Fachiri, *The Local Remedies Rule in the Light of the Finnish Ships Arbitration*, 17 BRIT. Y.B. INT'L L. 19 (1936).

83. See AMERASINGHE, *Local Remedies*, *supra* note 46, at 181.

84. See *id.* at 182.

### 3. Adequacy and Effectiveness

The onus is on the claimant to exhaust remedies but the host State has the responsibility to ensure that such remedies are adequate and effective.<sup>85</sup> Nevertheless, one scholar has observed that: "The precedents on the issue of adequacy and effectiveness in the law of diplomatic protection are sparse. In general they have tended to deal with the issue as one concerning the exception to the application of the rule."<sup>86</sup> The next section deals with exceptions to the rule in greater detail.

#### *C. Limitations on or Exceptions to the Rule*

While respect for, and disinclination to impinge on, the sovereignty of the receiving State provides the underpinning for the rule of local remedies, other significant interests are not necessarily ignored or jettisoned. Consequently, limitations or exceptions regarding the rule's operations have been developed in recognition of these interests, including the alien claimant's interest in avoiding unwarranted exposure to hardship and unnecessary expense in seeking recourse to local remedies.<sup>87</sup> There has been some debate as to which term is the more appropriate one between "limitations" and "exceptions."<sup>88</sup> The present work does not dabble into that dispute, but uses both terms to refer to those situations where the rule is inapplicable either because it falls outside the scope of the application of the rule or in which a plaintiff or claimant is relieved of the duty to exhaust local remedies because certain circumstances so dictate.<sup>89</sup>

Broadly speaking, the exceptions are the flip or negative side of the positive parameters or scope of the rule of local remedies. For instance, the requirement that remedies should be available translates to the negative prescription that where remedies are unavailable, exhaustion is excused. The exceptions mitigate the rigidity of the rule or its application and are not a

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85. *See id.* at 192. ("There is general agreement in the field of diplomatic protection, it would appear, that local remedies must be exhausted when they are adequate for the object sought or effective.").

86. *Id.* at 191.

87. *See id.* at 200; *see also* LONDON CONFERENCE REPORT, *supra* note 23, at 18 ("It is generally accepted that the application of the exhaustion rule has certain limits.").

88. *See* CASCADO TRINDADE, *supra* note 49, at 110. For a critique of the mechanistic exception-limitation distinction, *see* LAW, *supra* note 39, at 68 n.18.

89. *See* CASCADO TRINDADE, *supra* note 49, at 110.

closed category.<sup>90</sup>

The rule of local remedies is inapplicable in cases of State direct claims where the injury alleged is a direct injury to the State, not just its national.<sup>91</sup> The non-applicability of the local remedies rule in cases of direct injury is understandable since, in such cases, the State is the real claimant, representing its own interests and not the interests of its nationals.<sup>92</sup> “It follows that a request by the respondent State that the claimant State should exhaust the legal remedies available in the former State would run counter to the principle *par in parem non habet imperium, non habet jurisdictionem*.”<sup>93</sup>

However, in those situations referred to as “mixed cases” where a State alleges injury both to its national (for which it seeks monetary redress) and to itself, the rule is not excused.<sup>94</sup> The ICJ held in the *ELSI* case that in such cases, there is the need to exhaust local remedies.<sup>95</sup> However, where the State’s claim seeks a declaration of its rights as well as the derivative rights of its nationals, unaccompanied by a monetary claim on behalf of nationals injured in the same transaction giving rise to the State’s claim, exhaustion of domestic remedies is not required.<sup>96</sup>

The application of the rule is also conditioned on a breach both of the local law of the defendant country and of an international agreement or customary law.<sup>97</sup> The jurisprudence of the

90. *See id.* at 111 (“There has been some judicial recognition of the fact that the local remedies rule is far from being a sacrosanct or rigid principle, but admits of many exceptions.”).

91. *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12, 35, ¶ 40 (Mar. 31).

92. *See* Case Concerning The Aerial Incident of 27 July 1955 (Israel v. Bulgaria), 1959 I.C.J. 127 (May 26). Israel used this point as a basis for its objection to Bulgaria’s argument for the exhaustion of remedies. *See id.* at 154 (“We can recall no precedent in which a government complaining of actions by another government *jure imperii* has been referred to the Courts of the respondent State as a preliminary condition to the obtaining of international satisfaction. Our claim is for a declaration of Bulgarian responsibility under *international law*, and we submit that no domestic court . . . is competent to make such declaration which alone can lead to the satisfaction of our international claim. *Par in parem non habet imperium, non habet jurisdictionem*.”).

93. Meron, *supra* note 33, at 85.

94. *Cf.* Phosphates in Morocco (Preliminary Objections), 1938 P.C.I.J. (ser. A/B) No. 74 (discussing claim of a mixed character).

95. *See ELSI*, *supra* note 45.

96. *See* Adler, *supra* note 15, at 652.

97. *See* James E.R. Lord, *Article 14(2) of the North American Agreement on Environmen-*

ATS already indicates a requirement that the conduct in question be unlawful in the State of occurrence, while all ATS cases allege a breach of international law, thus making this requirement less of an inconvenience to ATS plaintiffs than ordinarily would have been the case.<sup>98</sup>

Where a State inflicts an injury on an alien who is, at the time the injury occurred, not within that State's jurisdiction, the rule of local remedies is said to be of no application.<sup>99</sup> In providing the justification for the characterization of such a situation as an exception to the general rule, one scholar argues that: "[I]t would be very strange indeed if a State which interfered illegally with an alien, who did not—except for that interference—have any connexion with it, should be allowed to derive any advantage from its illegal acts."<sup>100</sup> In a similar line of reasoning, another scholar notes: "State responsibility under such circumstances is immediately of an international quality; the state cannot compel the alien to submit his claims to its municipal courts for these are without jurisdiction and not therefore competent to deal with the claim."<sup>101</sup>

One of the major exceptions is that of the existence of the remedies that ought to be exhausted. It stands to reason that one cannot be required to exhaust non-existent remedies. The law of exhaustion of remedies therefore "presupposes the existence of state-provided remedies, and is the logical counterpart to the right to a remedy under international law."<sup>102</sup>

Non-availability of remedies provides another exception to the duty of exhaustion of domestic remedies.<sup>103</sup> For instance, where it is impossible for claimants to communicate with their counsel or where the local court's decision was given with such

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*tal Cooperation: How High is the Hurdle?*, 2 GREAT PLAINS NAT. RESOURCES J. 43, 47 (1997); see also BROWNLIE, *supra* note 64, at 497.

98. See Meloni, *supra* note 6, at 354 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980)).

99. See Ivan L. Head, *A Fresh Look at the Local Remedies Rule*, 5 CANADIAN Y.B. INT'L L. 142, 153 (1967).

100. Meron, *supra* note 33, at 96.

101. Head, *supra* note 99, at 153; see also C. Parry, *Some Considerations Upon the Protection of Individuals in International Law*, 90 RECUEIL DES COURS 688 (1957); CHITTHARANJAN FELIX AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 185-87 (1967); Law, *supra* note 39, at 104.

102. Naomi Rohit-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 479 (1990) (citation omitted).

103. AMERASINGHE, *LOCAL REMEDIES*, *supra* note 46, at 181.

speed that a claimant, residing far away, did not have the opportunity to present any claim or defense, the requirement to exhaust remedies is excused.<sup>104</sup>

The requirement to exhaust remedies ceases where such remedies or the pursuit thereof would be ineffective to rectify the situation complained of or to provide appropriate reparation.<sup>105</sup> In the *Norwegian Loans Case*, Judge Lauterpacht stated that an indication of the level of flexibility with which international tribunals approach the rule, as opposed to viewing it as a "purely technical or rigid rule," is their "refus[al] to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it."<sup>106</sup> Seeking judicial remedies against executive action is an unnecessary endeavor where the executive branch of government dominates the courts. According to one international tribunal, local remedies are ineffective where the courts have been "reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions."<sup>107</sup>

Where resort to local remedies would be obviously futile, the requirement to exhaust local remedies will be excused.<sup>108</sup> Thus, for instance, where a State's judiciary has established a consistent course of decisions or *jurisprudence constante* which could only lead to a hopeless pursuit of a remedy, it will be unnecessary to seek to exhaust local remedies.<sup>109</sup> In the *Panevezys-Saldutskis Railway* case, the Permanent Court of International Justice ("PCIJ") declared: "There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if

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104. See Jan Hostie, *A Systematic Inquiry into the Principles of International Law Dealing with Diplomatic Protection*, 19 TUL. L. REV. 79, 110 (1944); see also Ted L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1, 24 (1984).

105. See Mummery, *Content of the Duty*, *supra* note 57, at 401.

106. *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9, 39 (July 6) (Lauterpacht, Judge, concurring and dissenting).

107. *Robert v. Brown* (U.S. v. Gr. Brit.), 6 Int'l Arb. Awards 120, 129 (Perm. Ct. Arb. 1923).

108. See *Claim of Finnish Shipowners* (Fin. v. Gr. Brit.), 3 R.I.A.A. 1479, 1503 (1934); Jonathan S. Gowdy, Note, *Exposing Kodak: A Critique of the Toleration of Anticompetitive Practice Provision of Section 301 of the Trade Act of 1974*, 47 FLA. L. REV. 459 n.59 (1995).

109. See Schochet, *supra* note 11, at 231.

the result must be a repetition of a decision already given.”<sup>110</sup>

Undue delay also constitutes a valid ground for exempting a claimant from the duty to exhaust domestic remedies.<sup>111</sup> “Undue delay” is a relative term, as a tribunal would look at the totality of the circumstances of a case to determine whether inordinate delay makes it unfruitful to insist on exhaustion of local remedies.<sup>112</sup> In a particular case, nine years was deemed too long, while in another even a delay of ten years did not warrant a relief from the duty to pursue local remedies.<sup>113</sup>

In situations of continuing injury or repetition of the same injury, resort to local remedies would be a waste of time and impose undue hardship on a claimant. In such cases, there is no requirement to exhaust the available remedies.<sup>114</sup>

## II. EXHAUSTION OF REMEDIES AND HUMAN RIGHTS PROTECTION

The doctrine of exhaustion of domestic remedies owes a lot of its re-invigoration and currency to developments in the human rights area.<sup>115</sup> A number of international human rights regimes provide for the exhaustion of local remedies as a condi-

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110. *Panevezys-Saldutiskis Railway*, (Est. v. Lith.) 1939 P.C.I.J. (ser. A/B) No.76, at 18 (Feb. 28). Note however, that merely alleging that the courts of a State would not take a case, without substantiation from previous decisions or making efforts to approach the courts may not necessarily suffice to establish ineffectiveness. In the *Panevezys-Saldutiskis Railway* case, a railway line belonging to an Estonian corporation had been seized by Lithuania. Estonia brought an international claim and, when confronted with the issue of exhaustion of local remedies, argued that Lithuanian courts would not have accepted jurisdiction over the matter considering it an “act of state,” an act *jure imperii* occurring in the course of the performance of the government’s public functions and therefore not a question of civil rights under Lithuanian law. The P.C.I.J. rejected the argument in the absence of a decision by the Lithuanian courts on the question or a course of decisions that would clearly indicate that the pursuit of legal action by the company would have been futile. *See id.* at 21.

111. *See El Oro Mining and Railway Co. (Gr. Brit. v. Mex.)*, 5 Int’l Arb. Awards 191, 198 (Perm. Ct. Arb. 1931) (where a court had no evidence of action in a period of nine years).

112. *See id.*; A. A. Cancado Trindade, Book Review, 86 AM. J. INT’L L. 629 (1992) [hereinafter Cancado Trindade, Book Review].

113. *See AMERASINGHE, LOCAL REMEDIES*, *supra* note 46, at 210-11.

114. *See id.* at 212; *see also De Sabla Claim (U.S. v. Pan.)*, 28 AM. J. INT’L L. 607 (1934).

115. *See Richard B. Lillich*, Book Review, 81 AM. J. INT’L L. 271 (1987) (noting how the local remedies rule was thrown into irrelevance or insignificance through a number of post-World War II practices); *see also Enrico Grillo Pasquarelli, The Question of the Exhaustion of Domestic Remedies in the Context of the Examination of Admissibility of an Applica-*

tion of admissibility of international petitions or communications. The *International Covenant on Civil and Political Rights* ("ICCPR") provides that the Human Rights Committee—the implementing body of the Covenant—with respect to complaints brought before it "shall deal with the matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law."<sup>116</sup> This provision, which is similar to the one guiding individual complaints under the *Optional Protocol* to the ICCPR,<sup>117</sup> also adds that the rule so stated "shall not be the rule where the application of the remedies is unreasonably prolonged."<sup>118</sup>

A similar provision appears in the *European Convention on the Protection of Human Rights and Fundamental Freedoms* emphatically stating that the European Court of Human Rights "may only deal with [a] matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law."<sup>119</sup> The African Charter on Human and Peoples' Rights permits the consideration of communications relating to human and peoples' rights if, inter alia, they are "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."<sup>120</sup> The American Convention on Human Rights also provides for the exhaustion of domestic remedies with the necessary exceptions to its application.<sup>121</sup>

However, the re-vitalization of the rule has also been accompanied by the contention or plea for flexibility in its application to human rights cases. In essence, the central question on this point, believed to be of huge import, is whether the rule should be applied differently in human rights cases from diplomatic

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*tion to the European Commission of Human Rights, in PRIVACY AND HUMAN RIGHTS* 332 (A.H. Robertson ed., 1973).

116. *International Covenant on Civil and Political Rights, opened for signature* Dec. 16, 1966, art. 41(1)(c), 999 U.N.T.S. 171 [hereinafter ICCPR].

117. *See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature* Dec. 16, 1966, arts. 2, 5(2)(b), 999 U.N.T.S. 302.

118. ICCPR. *supra* note 116, art. 41(1)(c).

119. *European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature* Nov. 4, 1950, art. 35(1), 13 U.N.T.S. 221 [hereinafter *European Convention*].

120. *African Charter on Human and Peoples' Rights, adopted* June 27, 1981, art. 56, 1520 U.N.T.S. 217, 255.

121. *See American Convention on Human Rights, opened for signature* Nov. 22, 1969, art. 46, 1144 U.N.T.S. 123.



protection. The following section examines the position of those who argue that a difference in application is warranted and the opposition to that viewpoint.

A. *A Special Dispensation for Human Rights?*

In the application of the local remedies rule, a prominent view is that since it is a rule of customary international law that is essentially being applied in human rights cases, there should be no sharp distinction between the application of the rule in diplomatic protection and human rights protection.<sup>122</sup> This position is bolstered by the provision of human rights treaties that expressly state that domestic remedies must be exhausted "according to the generally recognized rules of international law."<sup>123</sup> However, a forceful counter-argument has been presented to the effect that the rule of local remedies should be applied differently in the case of human rights.<sup>124</sup> A rigid application is seen as being laden with the lethal capacity to destroy "the very purposes of securing an effective protection of human rights."<sup>125</sup>

Proceeding on the argument that it is the interest of the individual that is paramount here, especially considering that it is not necessarily a contest between States; proponents of this position contend that the rigid rules associated with the doctrine should be approached with flexibility and relaxation in the arena of human rights.<sup>126</sup> Thus, it is argued that the reference in such human rights treaties as the one establishing the European Court of Human Rights to exhaustion in accordance with the generally recognized rules of international law was for the purpose of "limiting the application of the local remedies rule to exhaustion of domestic remedies which were available and effective, and without undue delays by national courts; and not with

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122. *International Law Commission*, *supra* note 14.

123. *See, e.g.*, European Convention, *supra* note 119, art. 35.

124. *See* Cancado Trindade, Book Review, *supra* note 112, at 626.

125. TRINDADE, *supra* note 49, at 39; *see also* Cancado Trindade, Book Review, *supra* note 112, at 629 (stating that "the local remedies rule had had an application in human rights protection distinct from that in discretionary diplomatic protection, with far greater flexibility entailed by the necessity of fulfilling the object and purpose of human rights treaties and instruments").

126. *See* Antonio Augusto Cancado Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUMAN RIGHTS L. REV. 1 (1998).

the intention of warranting a rigid interpretation and application of the rule."<sup>127</sup> This argument also emphasizes that a different approach is warranted because States are traditionally the subjects of classic international law, while individuals are the subjects of international human rights law.<sup>128</sup>

A.A. Cancado Trindade has made the compelling argument that the rule of local remedies is applied in diplomatic protection as a prophylactic mechanism that aims at prior local resolution of disputes with the accompanying advantage of a reduction of the tension that would likely arise from interstate disputes pertaining to injuries to nationals abroad.<sup>129</sup> This is not necessarily the situation in the human rights context, where individuals have been granted direct access by States to vindicate their rights and the rule serves the more practical purpose of avoiding situations where international human rights organs are paralyzed by an avalanche of irrelevant complaints.<sup>130</sup> Trindade argues, *ipso facto*, no compelling reasons exist for applying the rule of exhaustion of local remedies in the same way in the arena of human rights protection as the practice in the context of diplomatic protection.<sup>131</sup>

The scholar further notes that the European Commission on Human Rights seemed to endorse the approach he subscribes to and "has clearly drawn attention to the distinctive character of the system of human rights protection, at times opting for the non-application of the local remedies rule in such cases, and has excluded the possibility of any absolute parallelism with the system of diplomatic protection."<sup>132</sup> The gravamen of this argument is that in the application of the local remedies

127. TRINDADE, *supra* note 49, at 6.

128. See Trindade, *supra* note 126 ("In the vindication of his rights, the human person is the subject of domestic law as well as of international law, endowed in both with juridical personality and capacity."); see also Udombana, *supra* note 34, at 7.

129. See TRINDADE, *supra* note 49, at 11.

130. See *id.* at 3; see also Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82, 2 Inter-Am. Ct. H.R. (ser. A) No.68, at 8 (Sept. 24, 1982) (stating that "in concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction").

131. See *id.* at 37.

132. *Id.* at 44; see also Julianne Kokott, Book Review, 80 AM. J. INT'L L. 993, 994 (stating that human rights tribunals apply the rule with flexibility and with a bias toward granting access to individuals to vindicate their rights).

rule in human rights cases, tribunals should “[tip] the balance in favor of the applicant, without necessarily detracting from general international law.”<sup>133</sup>

This position makes immense sense especially when considered in light of the fact that while respect for State sovereignty forms the prevailing rationale for the local remedies rule in the context of diplomatic protection, the same cannot exactly be said of the human rights context. Those who argue in favor of stringent application therefore leave themselves open to strident criticisms:

Such reiterated invocation of state sovereignty and the protection of the interests of the host state, to be somehow “balanced” with the interests of the “alien or individual” and of the international community in the application of the rule at issue in human rights protection, reveals once again a misunderstanding of the rationale of the rule in the protection of human rights. This is a context in which states themselves have relinquished sovereignty for the sake of protecting the human person; there is hardly any room for the invocation of state sovereignty in the interpretation of human rights treaties, which states have ratified or adhered to in the full exercise of their sovereignty. This domain of international law is concerned with the rights of human beings and not of states.<sup>134</sup>

C.F. Amerasinghe, approaching the matter from the opposite perspective, strongly disagrees with some of the views relating to the application of the rule as raised by Cancado Trindade. Responding to the latter’s review of (the first edition of) his book on the subject, Amerasinghe strongly asserts:

[T]here is no authority for the reviewer’s contention that the requirement that human rights organs apply the rule “in conformity with the generally recognized principles of international law” is a dead letter. That principle has never been denied by international organs and undoubtedly they have the rule as applied to diplomatic protection in mind when applying it to human rights protection. However, this does not mean that the application of the rule in the human rights area must relentlessly “mirror” its application to diplomatic protection. . . . Equally, I cannot subscribe to the reviewer’s

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133. TRINDADE, *supra* note 49, at 233.

134. Cancado Trindade, Book Review, *supra* note 112, at 630.

view that an important interest behind the rule as applied to human rights protection is not that of the state in having its sovereignty respected. There are certainly other important interests involved . . . but the interest of sovereignty cannot be denied. My reading of the cases and my discussions with judges of both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) certainly do not support the views expressed by the reviewer on both the above points.<sup>135</sup>

It appears that the truth lies somewhere in the middle. Obviously, the human rights protection regime accords the individual far greater recognition than applies to the individual (including those seeking diplomatic protection) under customary international law.<sup>136</sup> A logical progression therefore is that the influence of the individual here records an upgrade with a concomitant recession in the influence of the State. Nevertheless, to equate this appreciation of the position of the individual to a total abnegation or even abdication of sovereign rights on the part of States in human rights issues is to take the matter too far. It is difficult to posit that because a State signed on to international human rights agreements, it has lost every interest in ensuring that allegations of human rights abuses against it are not dealt with on its shores first before an international forum is afforded an opportunity to provide redress. The International Law Commission has adverted its attention to this point noting as follows:

The principal conventions relating to the protection of human rights always expressly impose the requirement of prior exhaustion of local remedies by the persons concerned. This is understandable for States are already disinclined to allow frequent intervention by other States when the purpose is to protect nationals of those other States, and they will naturally be even more unwilling when the purpose of the intervention is to protect their own nationals.<sup>137</sup>

The extent of the difficulty further grows in those cases where certain States are not parties to the human rights arrangement. In such cases, a decision to take action at the international level, without regard to the State's sovereign concerns, ap-

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135. C.F. Amerasinghe, *Correspondence*, 86 AM. J. INT'L L. 787, 788 (1992).

136. See Borchard, *supra* note 8.

137. *International Law Commission*, *supra* note 14.

appears to have the features of a prescription for unpalatable confrontation and interstate tension. This is the very problem that the doctrine of exhaustion of remedies seeks to obviate in the first place.

Moreover, while States participate in international human rights arrangements, it does not necessarily signify that they are suggesting that human rights issues are better addressed at the international level. Indeed, "the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level"<sup>138</sup> thus making imperative a proper, not necessarily a loosening of standards for, application of the requirement to exhaust domestic remedies.<sup>139</sup>

The International Criminal Court that handles, *inter alia*, the most egregious cases of human rights abuse, operates under the principle of complementarity, which emphasizes national disposition of cases or a lack of willingness or readiness to do so before an international interposition can be made.<sup>140</sup>

The point is also made that while a lot can be said for flexibility, it is important to bear in mind that a flexible approach is not coterminous with the most effective approach for accomplishing the purposes behind (international) human rights protection. If flexibility is interpreted to equate with a lower threshold, it could turn out to be counter-productive. On the contrary, insisting on high standards could have the effect of orchestrating changes at the national level and as a consequence fulfill the objective of ensuring that human rights are fully enjoyed at that level.<sup>141</sup> Finally, dispensing with local remedies may strike a ma-

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138. Udombana, *supra* note 33, at 9.

139. *See id.* "Consequently, 'a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.' Such an opportunity will enable the accused state to 'save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction.'" *Id.* (citations omitted).

140. *See* The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, July 17, 1998, 37 I.L.M. 999. For extensive discussions on the court including the principle of complementarity, see Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 *FORDHAM INT'L L.J.* 292 (2005); *see also* Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 *ANN. SURV. INT'L & COMP. L.* 19 (2003).

141. *See* Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation—The Burden of Proof Reconsidered*, 39 *INT'L & COMP. L.Q.* 191, 196 (1990)

major blow to overall human rights protection as it may lead to reluctance by some States to accept new international human rights obligations.<sup>142</sup>

*B. Application of Local Remedies Rule in Human Rights Protection*

Global and regional human rights institutions have been vigorous in applying the local remedies rule, resulting in the dismissal of many complaints for non-exhaustion of remedies. In applying the rule, tribunals have sought adherence to the doctrine as it exists in international law, but have also not completely shied from downplaying it or making the necessary modifications and alterations as they deem fit.<sup>143</sup>

The content or scope of the rule rests substantially on the same traditional criteria of availability, effectiveness, and adequacy or sufficiency.<sup>144</sup> In *Jawara v. The Gambia*,<sup>145</sup> the African Commission on Human and Peoples' Rights indicated that "three major criteria could be deduced . . . in determining [the] rule, namely: the remedy must be available, effective and sufficient."<sup>146</sup> The applicable remedies should also be available as a matter of law and not obtainable only on the basis of favor.<sup>147</sup>

Similarly, the general exceptions apply, although the inter-

(arguing along the same lines with respect to burden and standard of proof for exhaustion of remedies in human rights cases). [hereinafter, Robertson, *Burden of Proof*].

142. *International Law Commission*, *supra* note 14 (noting that complying with the requirement of developing countries to strengthen, instead of weaken, the local remedies rule within the framework of general international law "may well be the best guarantee of further substantial progress in the acceptance of new obligations concerning human rights").

143. *See, e.g.*, *Cyprus v. Turkey*, 1996 Y.B. Eur. Conv. on H.R. 130 (Eur. Comm'n H.R.); *De Geouffre de la Pradelle case*, 1992 Y.B. Eur. Conv. on H.R. 216 (Eur. Ct. H.R.).

144. *See Nielsen case*, 1961 Y.B. Eur. Conv. on H.R. 490 (Eur. Comm'n H.R.) ("The rules governing the exhaustion of domestic remedies, as these are generally recognized today, in principle require that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the respondent State is alleged to be responsible."); *see also Hashman & Harrup v. U.K.*, 1999-VIII Eur. Ct. H.R. 1; *Steel and Others v. U.K.*, App No. 24838194, 28 Eur. H.R. Rep. 603 (1999).

145. *Jawara v. The Gambia*, Comm. Nos. 147/95, 149/96, ¶ 31, 1999-2000 Afr. Ann. Act. Rep., Annex V.

146. *Id.*

147. *See Constitutional Rights Project (CRP) v. Nigeria*, Comm. No. 60/91, 1994-1995 Afr. Ann. Act. Rep., Annex VI; *see also* PIETER VAN DIJK & G.J.H VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 133 (1998).

pretation put on them may differ significantly in some aspects while involving a clear extension of the recognized categories in other cases.<sup>148</sup> In *Manoussakis v. Greece*,<sup>149</sup> a delay of more than sixteen years was held by the European Court of Human Rights to relieve the applicants of the duty to exhaust local remedies.<sup>150</sup> In the *Velasquez-Rodriguez* case, victims were imprisoned clandestinely and a number of formal requirements made existing procedures inapplicable in practice. When the authorities simply ignored actions brought against them and the attorneys and judges were under threat and intimidation by the authorities against whom the proceedings were brought, the Inter-American Court of Human Rights concluded that domestic proceedings were ineffective.<sup>151</sup>

The responsibility resides in the claimant to have recourse to remedies available to him locally before resorting to international proceedings. Where a claimant's inability to access available remedies was due to his own failure to comply with existing rules for accessing the remedies, such as filing appeals on time, the plaintiffs will be unable to complain about being prevented from exhausting remedies or argue for dispensing with exhaustion if an appellate court denied a request for an extension of time within which to appeal.<sup>152</sup> Thus, an international tribunal, in the absence of special circumstances, could hold that the claimant had not exhausted remedies available to him, even when the implication would be an inability to get redress in both domestic and international forums.<sup>153</sup>

Even where a local authority is answerable to an occupying army associated with various human rights abuses, those alleging human rights abuses are still expected to exhaust local remedies

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148. See, e.g., Augusto Cancado Trindade, *Thoughts on Recent Developments in the Case-Law of the Inter-American Court of Human Rights: Selected Aspects*, 92 AM. SOC'Y INT'L L. PROC. 192, 192 n.1 (1998).

149. *Manoussakis v. Greece*, 1996-IV Eur. Ct. H.R. at 1359-60, ¶ 33 (1996).

150. See *id.*; see also A.H. Robertson, *The European Convention for the Protection of Human Rights*, 27 BRIT. Y.B. INT'L L. 146, 154 (1950) (noting that "improper delay by national tribunals is deemed to be an exhaustion of local remedies").

151. See *Valásquez v. Honduras Case*, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4, at 34, ¶ 194 (July 29, 1988).

152. See *id.*

153. See A.A. Cancado Trindade, *Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and Its Optional Protocol*, 28 INT'L & COMP. L.Q. 734, 762 (1979) (discussing a case against Canada at the United Nations Human Rights Committee that was declared inadmissible on that ground).

in that occupied area. In *Cyprus v. Turkey*, Cyprus alleged that since the commencement of military operations in Northern Cyprus in July 1974, Turkey had breached virtually every human right guaranteed by the European Convention on Human Rights.<sup>154</sup> References were made in the complaints to Greek Cypriot missing persons and their relatives, to the homes and property of persons displaced as a result of the military operations, and to the living conditions of both Greek and Turkish Cypriots residing in Northern Cyprus. Cyprus contended that it was pointless expecting local judicial authorities of the Turkish Republic of Northern Cyprus (“TRNC”) to issue effective decisions against the people wielding power with the backing of the Turkish army in order to remedy human rights violations aimed at furthering the regime’s general policies.<sup>155</sup>

Turkey’s counter-argument was that the TRNC had a fully developed and independent judiciary.<sup>156</sup> Proceeding on the basis that the proper approach was not to simply disregard the judicial organs of the TRNC, the European Court of Human Rights took the position that the inhabitants were not automatically exempted from the requirement to exhaust local remedies unless it was proved that those remedies were absent or ineffective.<sup>157</sup>

Further, some exceptions may have more bearing in human rights protection than in any other context in which the local remedies rule is applied. For instance, the requirement to exhaust remedies is inapplicable in cases of *erga omnes* obligations “when the violations concerned are large in extent, have massive and systematic character, or constitute the policy and practice of the State concerned.”<sup>158</sup> Indeed, where there have been “systematic breaches” of *jus cogens*<sup>159</sup> or peremptory norms of interna-

154. See *Cyprus v. Turkey*, App. No. 25781/94, 2001 Eur. Ct. H.R. 1.

155. See *id.* at 26, ¶ 83.

156. See *id.* at 27-28, ¶¶ 86, 88.

157. See *id.* at 31, ¶ 98; see also Bernard Oxman, *European Convention on Human Rights—Attribution of Human Rights Violations in Northern Cyprus to Turkey—Exhaustion of Local Remedies – Obligations to Conduct Investigations Into Fate of Missing Persons – Refugees’ Right to Return—Living Conditions in Northern Cyprus*, 96 AM. J. INT’L L. 445 (2002).

158. Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241, 253 (2001); see also Van Dijk & Van Hoof, *supra* note 147, at 129-30.

159. A *jus cogens* norm is “a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same



tional law, the local remedies rule does not apply.<sup>160</sup>

New exceptions are also being developed in the human rights area, a salient example of which is indigence.<sup>161</sup> According to the Inter-American Court of Human Rights, if a complainant's "indigency or a general fear in the legal community to represent him prevents a complainant before the [Inter-American] Commission from invoking the domestic remedies necessary to protect a right guaranteed by the Convention, he is not required to exhaust such remedies."<sup>162</sup>

### III. SOSA'S IMPLICATIONS FOR PARTIES: THE TVPA EXPERIENCE

Ordinarily, the rule of local remedies applies as a conflict rule; it is used to resolve conflicts of jurisdiction between municipal courts and international tribunals.<sup>163</sup> So, the rule usually applies in a vertical exercise of jurisdiction between national and international tribunals. However, in TVPA litigation (and now under the ATS), the rule is utilized in a situation where the exercise of jurisdiction is horizontal. The "conflict" is between national courts of coordinate jurisdiction and not necessarily an international tribunal *stricto sensu*. Nevertheless, the rule has had a similar application under the TVPA and the general principles discussed in Parts I and II above have provided the needed guidance. Thus, for instance, remedies are not required to be

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character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S 332, 344.

Federal courts in the United States have extended recognition to certain norms as *jus cogens* norms. They include norms prohibiting acts of piracy, war crimes, genocide, crimes against humanity and slavery. See Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act*, 19 ST. JOHN'S J. LEG. COMMENTARY 111, 140 (2004); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 15, § 404.

160. See Andrea Gattini, *A Return Ticket to 'Communitarisme', Please*, 13 EUR. J. INT'L L. 1181, 1197 (2002).

161. A possible new exception was also identified in *Parot v. Spain* by the United Nations Committee Against Torture. See Udombana, *supra* note 34, at 33.

162. *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion, 1990 Inter-Am. Ct. H.R. (Ser. A) No. 11, at ¶ 42 (Aug. 10, 1990).

163. See Fawcett, *supra* note 39, at 454. ("[T]he local remedies rule is really a conflict rule. It is, when properly constructed, a rule for resolving conflicts of jurisdiction between international law and municipal tribunals and authorities; the rule determines when and in what circumstances the local courts, on the one hand, and international tribunals, on the other, must or may assume jurisdiction over the issue.").

exhausted where existing remedies or forum are inadequate.<sup>164</sup> Further, the TVPA's requirement of exhaustion of domestic remedies is believed to be an offshoot of a desire to respect the sovereignty of other States with the attendant effect of enhancing or at least not offending interstate relationship.<sup>165</sup>

One preliminary observation on the introduction of a duty to exhaust domestic remedies in alien tort litigation is that the impact on plaintiffs would be minimal or non-existent. Experiences gathered from a similar requirement under the TVPA, and its application in practice, present a reasonable basis for this sentiment. The following conclusion is fairly representative: "In practice, however, the realities of lawless regimes indicate that the requirement of exhaustion of local remedies will not be problematic for litigants. This obstacle is more theoretical than practical."<sup>166</sup>

On the other hand, as was the case with the introduction of the requirement in the TVPA, it is not surprising to hear strong opinions along the lines that a requirement of exhaustion of local remedies portends serious impediments for plaintiffs. One scholar observes: "The TVPA, for example, establishes its own exhaustion requirement. This has been reason enough for some plaintiffs to avoid its invocation and rely, instead, on the ATCA."<sup>167</sup> In a similar line of reasoning, another commentator remarks in relation to the duty to exhaust domestic remedies under the TVPA: "This complicates litigation, and indeed forecloses it if the defendant is able to argue successfully that effec-

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164. See Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self after Wiwa*, 16 *EMORY INT'L L. REV.* 187, 209 (2002) ("It is highly unlikely that Congress intended for TVPA plaintiffs to exhaust remedies in countries that do not provide an adequate forum for the adjudication of their claims.").

165. See Matthew H. Murray, Note, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 *COLUM. J. TRANSNAT'L L.* 673 (1987) (stating that the exhaustion doctrine "strikes a balance between the international community's interest in avoiding unwarranted intrusion in matters properly left to a sovereign nation's domestic system and a human right victim's right to a judicial remedy"); see also Meloni, *supra* note 6, at 360 (stating that the TVPA requirement to exhaust all local remedies "diminishes any opportunity to offend state sovereignty."); Corrales, *supra* note 6, at 214 ("The exhaustion of local remedies rule also minimizes the possibility that our district courts will offend state sovereignty.") (citations omitted).

166. Engle, *supra* note 5, at 505.

167. David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 *GA. J. INT'L & COMP. L.* 255, 277 (1996).

tive local remedies do exist in the subject country.”<sup>168</sup> The writer further notes that “[t]his is a “catch 22” because the plaintiff would not be in U.S. courts if he could have prevailed in the potentially rigged foreign courts in the first place.”<sup>169</sup> The predictions of near-doom from concerned quarters continued, ostensibly with little cognizance taken of the fact that a proper application of the rule, including its exceptions, would lessen the fear.<sup>170</sup>

The following sections examine whether the fears were borne out in practice and explores the situation that would likely unfold under the ATS. Section III.A contains a survey of some of the cases on point and Section III.B continues with an analysis of the exhaustion requirement under the TVPA and its implications for ATS parties.

#### A. Survey of TVPA Cases Dealing with Exhaustion of Domestic Remedies

A number of cases under the TVPA have had to grapple with the question of exhaustion of local remedies required under the legislation.<sup>171</sup> In *Doe v. Karadzic*,<sup>172</sup> although the District Court did not resolve the question of exhaustion of domestic remedies under section two of the TVPA, the Court noted that on the record before it, there was insufficient evidence to show that plaintiffs did or did not make attempts to obtain remedies in the locus of the wrong.<sup>173</sup> Moreover, the evidence was

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168. G. Michael Ziman, *Holding Foreign Governments Accountable for their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976*, 21 *LOV. L.A. INT'L & COMP. L.J.* 185, 196 (1999).

169. *Id.*

170. See, e.g., Sebastian Caputto, *Semantic Victory: Why the Enforcement of AEDPA Judgments Should be Precluded*, 16 *EMORY INT'L L. REV.* 525 (2002).

Moreover, the TVPA contains an onerous requirement that the claimant must exhaust all adequate and available remedies in the locality where the averred acts were committed. This exhaustion of remedies requirement effectively renders the Act impotent; TVPA defendants can readily demonstrate that local remedies do exist, despite the fact that their biased courts may be no more than a judicial farce.

*Id.* at 537 (citations omitted).

171. For a helpful discussion of some of the cases, see James L. Buchwalter, *Construction and Application of Torture Victim Protection Act of 1991*, 28 *U.S.C.A. § 1350*, 199 *A.L.R. Fed.* 389 (2005).

172. *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

173. See *id.* at 742.

not sufficient to provide clarity on the issue of adequacy and availability or otherwise of the remedies in the Yugoslavia of that time.<sup>174</sup> Referring to an amicus brief submitted by the International Human Rights Law Group, the District Court noted that death sentences were passed in two criminal cases that were brought in Sarajevo not long before the case at bar.<sup>175</sup> It is not clear what conclusion the court would have reached on exhaustion of local remedies. But by the use of the word “additionally” at the commencement of the footnote discussing the rationale for the dismissal of the case,<sup>176</sup> it may be inferred that the court considered non-exhaustion of remedies an additional basis for discontinuation of the litigation.

The Court of Appeals reversed and remanded the case without paying much attention to the issue of exhaustion of local remedies, although the Court, in a passing reference to *forum non conveniens*, did indicate that the courts in Serbia or Sarajevo were not available at the time the appeal was decided.<sup>177</sup>

In *Xuncax v. Gramajo*, nine expatriate citizens of Guatemala and one citizen of the United States brought suit against a former Minister of Defense of Guatemala alleging summary execution or “disappearance” of plaintiffs’ relatives, torture, arbitrary detention, and cruel, inhuman, and degrading treatment.<sup>178</sup> In a default judgment, after defendant had filed a conclusory *pro se* answer, but declined further participation in the proceedings, the U.S. District Court found that the U.S. plaintiff had exhausted the remedies that were available to her in Guatemala by returning to that country approximately two and half years after she was abducted and giving twelve hours of in-court testimony.<sup>179</sup> Also, the criminal proceedings had not made any progress for several years and Guatemalan law did not allow for the institution of civil action before the conclusion of criminal proceedings.<sup>180</sup>

Elaborating on the requirement of exhaustion of local remedies under the TVPA, the Court stated:

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174. *See id.* at 742 n.14.

175. *See id.*

176. *See id.* at 742-43.

177. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

178. *See Xuncax v. Gramajo*, 886 F. Supp. 162 (D.Mass. 1995).

179. *See id.* at 178.

180. *See id.*

The legislative history of the TVPA indicates that the exhaustion requirement . . . was not intended to create a prohibitively stringent condition precedent to recovery under the statute. Rather, the requirement must be read against the background of existing judicial doctrines under which exhaustion of remedies in a foreign forum is generally not required "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile."<sup>181</sup>

This appears to be a restatement of extant international law and is not necessarily an indication of the court's intention to lower the bar for the exhaustion doctrine's application in cases brought under the TVPA.

A former Ghanaian trade counselor brought action in *Cabiri v. Assasie-Gyimah*, against the Ghanaian Deputy Chief of National Security for committing acts of torture against him.<sup>182</sup> The District Court found that the defendant would be in grave danger if he returned to Ghana. It held that exhaustion of remedies was not required as Ghana provided inadequate and unacceptable remedies for the plaintiff's claims.<sup>183</sup> Concluding that the TVPA's application encompassed only individuals and did not extend to corporations, the U.S. District Court in *Beanal v. Freeport-McMoran Inc.*, held that as the plaintiff could not satisfy the first element required to state a claim under the Act, the court need not reach the issue as to whether the exhaustion of local remedies requirement had been satisfied.<sup>184</sup>

In *Mushikiwabo v. Barayagwiza* where the Rwandan judicial system was considered virtually inoperative and not in a position to deal with civil claims in the near future, the court held that plaintiffs had satisfied the requirement to exhaust remedies under the TVPA.<sup>185</sup> Based on the finding that the defendant in *Chiminya Tachiona v. Mugabe*<sup>186</sup> essentially controlled Zimbabwe's judicial system and thus made the courts inaccessible to the plaintiffs, it was held that plaintiffs were not under any additional duty to exhaust domestic remedies.<sup>187</sup>

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181. *Id.*

182. *See* *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

183. *See id.* at 1199.

184. *See* *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362 (E.D. La. 1997).

185. *See* *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627, 1996 WL 164496, at \*2 (S.D.N.Y. April 9, 1996).

186. *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002).

187. *See id.* at 267.

In *Wiwa v. Royal Dutch Petroleum Co.*, due to the defendant's failure to demonstrate the amenability of Nigerian courts to suits for international law violations brought against a non-citizen, non-resident of Nigeria, such as the defendant, and due to the plaintiff's showing that the Nigerian court presented an inadequate forum, the district court took the position that the defendant had not met the burden to show that the plaintiff had failed to exhaust "available and adequate remedies."<sup>188</sup> In *Mehinovic v. Vuckovic*, the U.S. District Court noted that where there were no efforts to ensure that war criminals faced justice, it had been shown that any existing remedies in Republika Srpska would have been "unattainable, ineffective, inadequate or obviously futile."<sup>189</sup>

In *Estate of Rodriguez v. Drummond Co.*, relatives and heirs of murdered Colombian trade union leaders and the trade union brought an action against an Alabama mining corporation and others.<sup>190</sup> Although it made it clear that the defendant had the burden to raise the non-exhaustion of domestic remedies as an affirmative defense, the Court was satisfied that the union had made sufficient allegations to show that remedies were not available in Colombia.<sup>191</sup> In its first amended complaint, the union alleged that plaintiffs did not have access to an independent or functioning legal system in Colombia for presenting their complaints. Furthermore, they alleged that there was a huge risk from retaliation for those associated with challenging official or paramilitary violence, including prosecutors and leading human rights activists.<sup>192</sup>

In *Doe v. Savaria*, the Court held that the plaintiff was not required to exhaust domestic remedies because of the unavailability of a civil remedy in El Salvador from the Chief of Security for the organizer of Salvadoran paramilitary groups in relation

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188. See *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (KMW), 2002 WL 319887, at \*17 (S.D.N.Y. Feb. 28, 2002).

189. See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347. (N.D. Ga. 2002).

190. See *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

191. See *id.* at 1268.

192. On the issue of burden of proof resting on the respondent in TVPA exhaustion of local remedies, see *Cabello Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003); see also *Hilao v. Estate of Ferdinand Marcos*, 103 F. 3d 767, 778 (9th Cir. 1996); *Wiwa*, 2002 WL 319887, at \*17; *Sinaltrainal v. The Coca Cola Co.*, No. 02-20258-Civ., 2003 WL 1846195 (S.D. Fla. Mar. 31, 2003).

to the assassination of Archbishop Oscar Romero in 1980.<sup>193</sup> Besides, no successful prosecution of the Archbishop's killers had been undertaken, the country's Supreme Court and organizer had effectively frustrated the Chief's prosecution and an Amnesty Law existed that exempted the Chief from criminal or civil liability for the assassination.<sup>194</sup> This case also dealt with the issue of burden of proof, holding that it was incumbent on the defendant to demonstrate non-exhaustion of local remedies.<sup>195</sup>

Exhaustion of local remedies also came up in actions brought by *Falun Gong* practitioners against local government officials of the People's Republic of China ("P.R.C.") alleging torture and numerous other human rights violations.<sup>196</sup> In the *Liu Qi* and *Xia Deren* cases,<sup>197</sup> the Court stated that as the two defendants were in default; neither of them had raised the affirmative defense of non-exhaustion. The Court added, however, that properly raising the defense would not have affected the outcome because a demonstration of the ineffectiveness, inadequacy, or obvious futility of the local remedies by the plaintiff would have excused exhaustion.<sup>198</sup>

In *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, the defendants argued that because the plaintiffs have not asserted that they exhausted all available remedies in Lebanon, a claim could not be brought under the TVPA.<sup>199</sup> Plaintiffs did not respond to this argument, but the court refused to hold that this was a concession of the point on their part.<sup>200</sup> The court's reasoning was that so holding would run counter to the goals of the TVPA, which imposes a burden on defendants to raise non-exhaustion as an affirmative defense and show that domestic remedies existed that the claimant did not use.<sup>201</sup> According to the court, "[t]he defendants allude to the possibility of remedies in Lebanon but provide the court with no details or analysis concerning

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193. See *Doe v. Savaria*, 348 F. Supp. 2d 1112, 1152 (E.D. Cal. 2004).

194. See *id.* at 1152.

195. See *id.*

196. See *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

197. *Id.* at 1319.

198. See *id.*

199. See *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 242 (D.D.C. 2005).

200. See *id.* at 243.

201. See *id.*

what those remedies would be.”<sup>202</sup> Continuing, the court added: “The plaintiffs are remiss for neglecting to respond to this argument, but the court in its discretion and in accordance with congressional intent determines that the defendants failed to meet their burden.”<sup>203</sup>

In *Enahoro v. Abubakar*,<sup>204</sup> the 7th Circuit Court of Appeals, after stating that: “It may be that a requirement for exhaustion is itself a basic principle of international law,” noted the statement in the European Commission’s *amicus curiae* brief in *Sosa* regarding exhaustion and the U.S. Supreme Court’s comment that the exhaustion requirement would certainly be considered in an appropriate case.<sup>205</sup> The Circuit Court, in a majority opinion, further held that exhaustion of local remedies under TVPA is required even for certain claims brought under ATS even where plaintiffs have not pled under the TVPA and remanded the case to the District Court in Illinois, Eastern Division.<sup>206</sup> In June 2006, the District Court, in *Abiola v. Abubakar*<sup>207</sup> upon hearing testimony from experts on Nigeria’s judicial system and further relying on the State Department’s assessment of the human rights situation in Nigeria issued in 2006, held that plaintiffs did not need to exhaust local remedies as Nigeria did not present an adequate judicial forum and pursuit of available remedies would have been futile.<sup>208</sup>

Of particular significance to the present discourse is the dissenting opinion of Judge Cudahy on the exhaustion question to the following effect:

This question is far from settled, however, and the Supreme Court’s decision in *Sosa*, though suggestive, offers little guidance. While it recognizes the possibility of reading an exhaustion requirement into the ATCA, the Court states only that it “would certainly consider this [exhaustion] requirement in an appropriate case.” [ ] Other federal courts appear to be less receptive to the idea . . . . In short, it is far from clear that, purely as a matter of United States jurisprudence,

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202. *Id.*

203. *Id.*

204. 408 F.3d 877 (7th Cir. 2005).

205. *Id.* at 886.

206. *Id.* at 884-86.

207. 435 F.Supp.2d 830 (N.D.Ill. 2006.)

208. *Id.*



the ATCA contains any exhaustion requirement at all.<sup>209</sup>

It does not appear that the raging controversy in this area is likely to abate any time soon.

### B. *Analysis and Implications*

The above overview shows that in the vast majority of cases in which the exhaustion defense was raised, the courts rejected it and proceeded with the cases. This could lead to a quick conclusion that the survey's results provide a clear picture of the future of the doctrine in ATS litigation. However, this may not necessarily be the outcome. *Au contraire*, it is more likely that more cases would fail under the ATS than under the TVPA on account of this doctrine. A snapshot of the future scenario was provided in the following exchange at the Supreme Court between Justices and Counsel in *Sosa*:<sup>210</sup>

QUESTION: But wouldn't that doctrine require you to lose this lawsuit?

MR. HOFFMAN: Excuse me?

QUESTION: Wouldn't the doctrine of exhaustion of remedies require you to lose this lawsuit?

MR. HOFFMAN: Well, no, actually because I don't—we—we can't get a remedy in Mexico against—

QUESTION: Why not?

MR. HOFFMAN: We certainly can't get a remedy in Mexico against Mr. Sosa. Mr. Sosa is here, and the United States is here. And what remedy would he get in a Mexican court if he can't—this is a transitory tort. I mean, this is the kind of transitory tort that would have been well understood by Lord Mansfield, false imprisonment. That was—

QUESTION: What tort issue—what—

QUESTION: That's fine. Why—why couldn't you sue him in Mexico, service by mail?

MR. HOFFMAN: We could sue him here in the State court. He has a State cause of action. And in fact, one of the—

QUESTION: Why—why can't you sue in Mexico? We're talking about exhaustion of local remedies? Why couldn't you have sued him in Mexico?

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209. *Enahoro v. Abubakar*, 267 F. Supp. 2d at 890. Citations omitted.

210. Transcript of Oral Argument at 64-66, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), available at [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-339.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-339.pdf) (last visited Feb. 1, 2006).

MR. HOFFMAN: Where do we get—where do we get jurisdiction over him?

QUESTION: He committed the tort in Mexico.

MR. HOFFMAN: We don't have personal jurisdiction over—

QUESTION: You—you don't need it. You—you serve by mail.

QUESTION: That's notice. You certainly do have personal jurisdiction over him where he acted.

MR. HOFFMAN: Well, the only thing I can say is that for—we have now been litigating the case, as you know, since—for 12 years, and the exhaustion of—of local remedies has not come up as a defense. And I think it would be a defense that the defendant would have to—

QUESTION: That's because a lot of people don't think it's part of international law probably.

MR. HOFFMAN: But—

(Laughter.)

MR. HOFFMAN: I—I think—I think it is and it has been raised.

Thus, while the requirement to exhaust remedies does not appear as onerous to TVPA plaintiffs as defendants might have desired, there are good reasons to believe that the local remedies rule could prove more burdensome in the case of ATS plaintiffs and sound the death knell to hitherto acceptable claims. First, the TVPA is restricted primarily to the heinous wrongs of torture and extrajudicial execution.<sup>211</sup> Barring any change in government—a more responsible one—since the institution of the lawsuit, the local forum, whose officials arguably perpetrated or permitted the horrible acts, is less likely to have available remedies that need to be exhausted or be adjudged as capable of providing adequate or effective redress than most other forums.<sup>212</sup> Further, in consonance with the type of wrongs involved, TVPA cases are likely to emanate from countries that

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211. TVPA, 28 U.S.C.S. § 1350 (2005).

212. Conceivably, there are cases of torture in which non-exhaustion would militate against the lawsuit. In *Taye v. Negewo*, where claims were brought under both the ATS and TVPA and the court opted for the ATS, there was the probability that the torture claims would have been dismissed on account of non-exhaustion of remedies in Ethiopia if the court had relied on the TVPA. *Taye v. Negewo*, No. 1:90-cv-2010-GET, 1993 U.S. Dist. LEXIS 21158 (N.D. Ga. Aug. 2, 1993), *appeal docketed*, No. 1:90-CV-2010-GET (11th Cir. Sept. 10, 1993); *see also* Christopher W. Haffke, Comment, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1484 (1994) (surmising that since the plaintiffs had not exhausted all Ethiopian remedies, the court probably would have dismissed the torture claims had the TVPA been applied).

thrive on despotism and have no functioning judicial systems. A number of ATS cases are of a different species and involve countries whose vibrant judicial systems are clearly evident.<sup>213</sup> Moreover, cases of torture, especially on a repeated scale, invite a rigid stance and resistance by the courts and regimes that embark on them elicit little sympathy in civilized circles.<sup>214</sup> Not all ATS cases are of that magnitude of evil. In such cases, ATS plaintiffs are not very much in positive territory and may brace themselves for the strong likelihood of federal courts declining to hear their matters prior to the exhaustion of local remedies.<sup>215</sup> This point is perhaps amplified by the exchange above between the Court and Counsel in *Sosa*.<sup>216</sup>

From one perspective, the exhaustion doctrine could be viewed as a narrower, and thus weaker, requirement than the more demanding requirement of *forum non conveniens*.<sup>217</sup> In that sense, the requirement poses little or no challenge in alien tort litigation and may therefore not affect the extent of litigation in U.S. courts. According to one scholar:

Courts in the United States do not require exhaustion of remedies in a foreign forum when foreign remedies are unobtain-

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213. ATS cases have been brought, for instance, against German and Austrian companies for activities that took place in Europe creating strong bases for defendants to argue for exhaustion of local remedies. See, e.g., *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

214. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (noting that the act of torture is universally renounced in modern times). The European Commission on Human Rights reasoned in the *Greek Case* that in places where torture is practiced, remedies would become ineffective due to the difficulty of securing probative evidence, and if administrative inquiries would even be instituted, they would likely be half-hearted and incomplete. See *The Greek Case*, 12 Y.B. Eur. Conv. On Hum. Rts 360 (1969); see also *Ireland v. U.K.*, 19 Y.B. Eur. Conv. on H.R. 512, 754 (1976) (Eur. Comm. on H.R.); Michael O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. U.K.*, 71 AM. J. INT'L L. 674, 691 (1977). But see Hurst Hannum & Kevin Boyle, *The Donnelly Case, Administrative Practice and Domestic Remedies Under the European Convention: One Step Forward and Two Steps Back*, 71 AM. J. INT'L L. 316 (1977); Edmond McGovern, *The Local Remedies Rule and Administrative Practices in the European Convention on Human Rights*, 24 INT'L & COMP. L.Q. 119 (1975).

215. See, e.g., Transcript of Oral Argument, *supra* note 210, at 64-66.

216. See *id.*

217. For extensive discussions of *forum non conveniens* in alien tort litigation, see Helen E. Mardirosian, *Forum Non Conveniens*, 37 LOY. L.A. L. REV. 1643 (2004); see also 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); Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 66 (1998).

able, inadequate or futile. This is a much lower standard for a plaintiff to overcome than the *forum non conveniens* presumption against foreign plaintiffs, and the unbalanced weighing of convenience factors against them. Unlike an exhaustion of remedies analysis, under *forum non conveniens*, defendants can always consent to service of process and to other conditions which will enable a court to more easily dismiss.<sup>218</sup>

This point is accentuated by the fact that even a plaintiff that would prevail on exhaustion grounds may still be defeated if, in seeking to make a determination on an appropriate forum under *forum non conveniens* analysis, the court decides that a third country would be a suitable forum to hear the suit.<sup>219</sup> Viewed from that perspective, the local remedies rule may well be considered a redundancy that does not perceptibly alter the position of the parties in a good number of cases.

Nevertheless, the exhaustion doctrine could also be viewed from another prism as providing hopes of gain, albeit modest, for a defendant, even in these circumstances, and as a consequence placing such a defendant at a distinct advantage. While a plaintiff's woes are not over merely by prevailing on exhaustion of local remedies grounds, a defendant could avoid a grueling *forum non conveniens* battle (including the third country option) if he or she can dismiss on exhaustion grounds. For example, before the case was settled, the defendants in the *Holocaust*

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218. Boyd, *supra* note 217, at 66.

219. See Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 *ARIZ. J. INT'L & COMP. L.* 271, 312-13 (1994); Margaret G. Perl, Note, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 *GEO. L.J.* 773, 792 (2000) (discussing the notion that "[i]n an ATCA suit for genocide, the plaintiffs will probably be able to prove that violence and corruption preclude the availability of redress in the country in which the actions occurred, but the foreign plaintiffs will not have the benefit of the presumption that the United States is a better forum than a third country chosen by the defendant"). Furthermore, Aric K. Short has noted the following:

[T]he exhaustion provision in the TVPA is not as broad as *forum non conveniens*. In particular, even if a TVPA plaintiff has exhausted local remedies in the country where the alleged abuse took place, a third country might still provide the most appropriate and convenient forum for litigating the dispute. In such a case, the TVPA's exhaustion provision should not be interpreted to block consideration of a *forum non conveniens* motion seeking dismissal to a third country.

Short, *supra* note 217, at 1038-39.

case<sup>220</sup> were already expending energy and resources in marshaling strong arguments and mounting a successful resistance to the case on the basis of Switzerland being an adequate alternative forum. The chances of the defense prevailing on exhaustion grounds were quite good considering that Switzerland not only had a functioning legal and judicial system, but its government had already embarked on a number of measures to investigate and provide redress to the Holocaust victims that suffered injuries in consequence of the Second World War.<sup>221</sup> Prevailing at this stage would have avoided the costs and might have strengthened defendants' hands in the settlement negotiations. The ATS litigation based on occurrences during the apartheid era in South Africa probably also would have been disposed of on exhaustion grounds without inviting the resulting political hullabaloo.<sup>222</sup>

Beyond the implications for parties, the TVPA's incorporation of an exhaustion of domestic remedies requirement was also expected to have broader public policy effects, particularly in the improvement of human rights protection apparatuses in rights-abusing countries.<sup>223</sup> Part IV discusses public policy implications in an ATS setting.

#### IV. PUBLIC POLICY IMPLICATIONS OF EXHAUSTION DOCTRINE

If U.S. courts make a practice of requiring exhaustion of domestic or international remedies in alien tort litigation, a number of broad public policy implications will likely flow from it. An initial assumption was that an exhaustion requirement would be largely cosmetic with an infinitesimal chance of making any substantial difference in the volume or success of cases litigated under the Alien Tort Statute. However, as has been demonstrated herein, this conclusion largely based as it were on

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220. *In re Holocaust Victim Assets*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

221. For an extensive discussion of the case, see Short, *supra* note 217, at 1090-96.

222. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). For a discussion of the political storm created by the apartheid litigation, see Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, 16 ST. THOMAS L. REV. 627, 638 (2004).

223. See, e.g., BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 9-10 (1996); Alvin H. Chu, *Vindicating The Tiananmen Square Massacre "The Case Against Li Peng"*, 20 WIS. INT'L L.J. 199, 222 (2001).

the experience under the TVPA may prove misleading and erroneous.

This assertion is based on the fact that TVPA litigation covers a much narrower category of wrongs and countries that militate against a confident argument for dismissal and trial in the place of the wrong.<sup>224</sup> ATS litigation, on the other hand, incorporates a wider variety of cases with some of them originating in countries that do not pose as much hindrance to a credible argument for a proper trial in those countries.<sup>225</sup> Today, it is therefore acknowledged that the question of exhaustion of local remedies provides a fertile ground for future and further litigation in ATS cases.

Beyond adversarial disputation and implications for parties to ATS litigation, public policy issues may also arise from an introduction of an exhaustion requirement. The local remedies rule can be utilized as a vehicle for engineering institutional reforms at the municipal and international levels. Not only would doing so express fidelity to the original purpose of the rule, but it would also hold out prospects of advancing the core rationale of modern alien tort litigation, namely, the enhancement of human rights promotion and protection across the world.<sup>226</sup> There was the expectation that the TVPA's exhaustion provision would accomplish similar purposes.<sup>227</sup> However, such results do not necessarily materialize because we wish so, but demand a concentration of action and resources to bring them to fruition.

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224. See, e.g., Jennifer Corrales, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 *PAGE INT'L L. REV.* 197, 211-214 (2004).

225. See *id.*

226. The principal point here is that one can effectively promote human rights worldwide if they can be protected domestically, for instance, if human rights defenders and individuals have legal or some form of "assurance" of international protection. This reasoning is borne out by the conclusion of an international instrument pertaining to human rights defenders. See G.A. Res. 53/144, ¶ 13, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

227. The TVPA's exhaustion requirement has been viewed as possessing the potential to birth and nurture the development of meaningful remedies in other countries and at the international level. See H.R. REP. NO. 102-367, pt. 1, at 5 (1991) (noting that TVPA's exhaustion provision "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred" and "will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries").

A. *Implications for Domestic Legal Systems*

It is a truism that the hope and cause of the protection of international human rights cannot rest upon one country alone. Expecting that lawsuits launched in the United States alone will lead to the eradication of human rights abuses or even make a very serious dent on the struggle against the perpetrators of these atrocities is more of a pipe dream.<sup>228</sup> ATS litigation certainly is of substantial utility on a number of fronts. For instance, it acts as an international check against domestic impunity, sending the right signals to brutal dictators and their acolytes that impunity for human rights violations will no longer be accommodated.<sup>229</sup> Notwithstanding our innermost wishes however, and without disregarding or disparaging the commendable job that the ATS has done in advancing the promotion and protection of human rights, the fact remains that U.S. courts are insufficient forums for addressing the numerous human rights abuses that occur daily across the world.<sup>230</sup> As Professor Richard Lillich has insightfully noted: “The courts of a single state, of course, cannot provide even a partial solution to the problem of providing redress to victims of gross human rights violations.”<sup>231</sup> That being the case, the scholar proffers an additional solution in the form of encouraging other countries to enact laws that

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228. Anne-Marie Slaughter & David Bosco, *Alternative Justice*, GLOBAL POLICY FORUM, 2001, <http://www.globalpolicy.org/intljustice/atca/2001/aljust.htm> (noting that “[i]t is unlikely that civil litigation in U.S. courts will, in the long run, represent an effective means of deterring or punishing massive human rights abuses”).

229. See Emeka Duruigbo, *Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 34 (2004).

230. See Gruzen, *supra* note 6, at 242 (discussing the limitations of ATS litigation in “accomplish[ing] the goal of ridding the world of torture and human rights abuses”). Some scholars even go as far as raising doubts about the propriety or suitability of domestic American courts as forums for the adjudication of many international human rights claims. Anita Bernstein notes the following:

From my own vantage point outside the community of international law scholars, I am not entirely convinced that American municipal courts are the best (or even a good) place to adjudicate international human rights claims made by such persons as the Amungme of Indonesia, or Ecuadorians of the Amazon interior.

Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 WASHBURN L.J. 382, 385-86 (2001); see also Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 261 n.8 (2004).

231. Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 HUM. RTS. Q. 216 (1993).

empower their courts “to provide similar redress against human rights violators found within their jurisdiction.”<sup>232</sup> Further, an approach built on cooperation and our interconnectedness would more likely serve the interests of humanity and the cause of human rights better.<sup>233</sup>

A proper application of the local remedies rule would take cognizance of the purpose of both the exhaustion doctrine and the human rights protection regime. With regard to the former, the rule was designed to take into account the importance of promoting the rule of law in the municipal setting. Because of the basic requirements on which its application is contingent, the rule positions itself as a strong and positive influence for the improvement of the machineries and processes for the internal administration of justice in the countries invoking it.<sup>234</sup> Professor Ivan Head has amplified this point and stressed the imperativeness of its support by all countries:

From another point of view, the rule’s purpose is even more exemplary: it fosters the creation and proper functioning of effective municipal legal machinery. In this sense it may be regarded as international law’s contribution to the development of the rule of law at the domestic level. To this commendable end all states, particularly those with well-established legal systems should subscribe.<sup>235</sup>

On the human rights angle, it has been pointed out that the *raison d’être* of regional and international human rights regimes is “to cause States internally to guarantee basic rights and not merely to allow access to the [regional or international] system.”<sup>236</sup> This observation can be said to also apply, to an extent, to alien tort litigation, seeing that it can be considered a species of international human rights litigation.<sup>237</sup> The purpose is defeated, at least partially, when there is an overemphasis on inter-

232. *Id.*

233. The suggestion here is not that the United States alone is involved in the battle against human rights abuse through the courts or that international cooperation of some sort does not exist. The larger point being made is that an “all hands on deck” approach is preferable to, and is likely to be more effective than, the actions of a few countries.

234. Head, *supra* note 99, at 155.

235. *Id.* For a critique of this point, see TRINDADE, *supra* note 49, at 47.

236. Robertson, *Burden of Proof*, *supra* note 141, at 196.

237. Numerous articles refer to ATS litigation as international human rights litigation in their titles or in the corpus.



national access at the expense of, or with scant regard to, the development of internal guarantees at national levels. Indeed, the trend in the adjudication and punishment of international crimes is to show preference for efforts at the national level to bring violators to book, failing which the international system kicks in. This is the basis of the principle of complementarity enshrined in the International Criminal Court Statute.<sup>238</sup>

In addition, the current approach to alien tort litigation may be sowing seeds of disenchantment and laying the foundation for a scenario where regimes emerge in the developing world seriously questioning or challenging the propriety of a situation that dichotomizes the application of international rules. Unwittingly, the present system is fostering a situation in which developed countries and their developing counterparts, because of the state of their judicial systems and political structures, are not enjoying the same benefits or bearing the same burdens, which could be the very definition of inequality.<sup>239</sup> Writing almost five decades ago in another context where the internal legal systems of developing countries were deemed inadequate for addressing issues arising from foreign investment, one commentator sounded a cautionary note and expressed a preference for developing the legal structures in these countries:

Either steps must be taken to bring the municipal law system 'up to scratch' and thus at the same time, to retain control over their national affairs, or this particular legal function must be abdicated either directly (as seems unlikely, by treaties), or indirectly (as seems likely, by reference to arbitration coupled with acquiescence in the growth of a system which is to bind them) thus, to that extent, abandoning control over national affairs. At the present stage of development of many of these countries, it may matter little to them whether they retain control or not, but let us not forget, as we so frequently have in the past, that these are the pupae from which emerge the larvae [ ] of intensely nationalistic new states which are not likely to take kindly to subjection to such external regulation whilst other, developed, nations claim and enjoy freedom from it.<sup>240</sup>

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238. See Brief for European Commission as Amici Curiae Supporting Neither Party, *supra* note 2, at \*24.

239. H.G. Calvert, *The Law Applicable to Concessions*, 1 U. MALAYA. L. REV. 265, 281 (1959).

240. *Id.*; see also Muthucumaraswamy Sornarajah, The Simon Reisman Lecture in

Developing these national legal systems would not only obviate the anticipated conflicts, but would also assure a better environment for human rights protection and economic development to the benefit of the local and foreign inhabitants of these countries.<sup>241</sup>

Even those who strongly support foreign litigation generally or vehemently oppose the exhaustion requirement would readily concede that the courts in States where the alleged abuses took place are more familiar than a foreign one with local factors that ensure the proper dispensation of justice.<sup>242</sup> Opposition to local adjudication only arises and garners strength because local courts would not step up to the plate to perform their functions, mainly because they are hamstrung in doing so by the difficult political environment in which they operate. Foreign litigation therefore is not necessarily the panacea, as it may not be particularly aimed at effecting the appropriate changes in the abusive country. Identifying ways of strengthening judicial institutions and reforming political structures in these countries may be a more beneficial approach to enhancing the protection and enjoyment of human rights.

Apart from deterring the provision of a cannon fodder for inflaming nationalist feelings and preventing unwarranted friction among States, human rights law is still being developed and it is only fair and proper that every State be given a clear opportunity to participate in the process of development.<sup>243</sup> A major source of controversy in the past has been the argument by

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International Trade Policy at the Norman Paterson School of International Affairs: The Clash of Globalisations and the International Law on Foreign Investment 16 (Sept. 12, 2002), available at <http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf> (last visited Feb. 3, 2006) (noting that the exhaustion doctrine was developed in recognition of the fact that stronger States may abuse the rights of weaker countries where there is an unbridled right of intervention by external interests and tribunals, and the opposition of some countries to such a situation led to the development of the doctrine in one of its later incarnations to appease them).

241. Murray, *supra* note 165, at 714 (noting that the deterrence of repeated human rights abuses and the overall cause of human rights can be better pursued through the development and enforcement of reasonable remedies at the domestic level).

242. This point is based on the assumption that in general matters are better handled in courts that are close to the circumstances and can deal more efficiently and expeditiously with matters of proof and other details of the court proceedings.

243. See Makau Mutua, *Savages, Victims, and Saviors*, 42 HARV. INT'L L.J. 201, 215-16 (2001) (decrying the exclusionary atmosphere that has led to limited participation of developing countries in the making of human rights law).

scholars from the developing world that certain rules of international law were inapplicable to their peoples because these countries were not participants in the creation of those aspects of the law.<sup>244</sup> When political leaders in the developing world pass laws dealing with human rights and judicial and allied institutions interpret and enforce them, they are contributing their own quota toward the development of human rights law.

The problem with the present paradigm and practice on this issue, leading to the continuation and perhaps perpetuation of the status quo, is that we are confronted with two vocal extremes. On one side, we have advocates advancing the case for the exhaustion of domestic remedies even in situations that are manifestly precarious. On the other extreme, are champions for dispensing with the rule's application where the dangerous situation in certain locations warrants it, but are not enthusiastic about looking beyond that position. What is lost in the midst of the battle of the titans is that there is a sensible middle position

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244. See generally WILFRED JENKS, *THE COMMON LAW OF MANKIND* 231-54 (1958). See PRAKASH SINHA, *NEW NATIONS AND THE LAW OF NATIONS* (1967); see also PATRICIA BUIRETTE-MAURAU, *LA PARTICIPATION DU TIERS-MONDE A L'ELABORATION DU DROIT INTERNATIONAL* (1983); B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* 19 (1993) (noting that "international lawyers from the Third World have challenged, often with success, Western perceptions of the history and content of international law and pointed to the inequitable nature of the body of rules bequeathed from the past . . ."); Georges Abi-Saab, *The Newly Independent States and the Rules of International Law*, 33 *HOW. L.J.* 106 (1963); S. Jorge Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 *INT'L ORG.* 38 (1961); A.A. Fatouros, *International Law and the Third World*, 50 *VA. L. REV.* 783 (1964); Wolfgang Friedmann, *The Position of Underdeveloped Countries and the Universality of International Law*, 2 *COLUM. J. TRANSNAT'L L.* 78 (1963); Grigory Ivanovich Tunkin, *Co-existence and International Law* 95 *RECUEIL DES COURS, HAGUE ACAD. OF INT'L L.* 1 (1958); Karin Mickelson, *Rhetoric And Rage: Third World Voices In International Legal Discourse*, 16 *WIS. INT'L L.J.* 353 (1998); Christian N. Okeke, *International Law in the Nigerian Legal System*, 27 *CAL. W. INT'L L.J.* 311, 315 (1997) (noting Nigeria's opposition to some rules of customary international law partly because of its non-participation in their formulation); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 *INT'L & COMP. L. Q.* 121 (1965); Tunku Sofiah Jewa, *The Third World and International Law*, 4 *J. MALAYSIAN & COMP. L.* 215 (1977). A similar argument is already gaining currency in international human rights law where developing countries are suspicious of, or object to, certain norms as originating from and applicable to the West. See Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 *HUM. RTS. Q.* 130, 174-75 (2003). It is instructive to note also that contemporary arguments on these and related issues are being made by some scholars from the developing world under the umbrella of "Third World Approaches in International Law" ("TWAIL"). See Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reforms in our Time: A TWAIL Perspective* 43 *OSGOODE HALL L.J.* 172, 177-78 (2005).

that deserves and demands adequate elaboration and exploration.

This alternative to the extreme position takes as its starting point the posing of important questions on the reasons behind the situations in those countries that make redress clearly infeasible and possible mechanisms for entrenching a credible system of remedies and redress.<sup>245</sup> This should be a far more important objective as it caters not only to the parties to a particular dispute, but concerns itself with the larger cause of justice for all. One commentator adequately captures this sentiment:

The law of exhaustion of remedies says that individuals must exhaust their avenues of redress in domestic legal systems before turning to international law. However, this notion presupposes that some form of remedy exists in the state. When remedies are ineffective or inadequate, such as when domestic laws do not provide such relief, or the courts lack independence, then the claimant may turn to international adjudication. Thus, the international dichotomy of remedies provides just two options: effective domestic remedies or international adjudication. But is there no middle ground? What of pressures to encourage domestic capacity? Are there options for institutional reform from internal factors? What of the multinational [corporation]? Does it offer any opportunities for legal reform in patrimonial host countries?<sup>246</sup>

Certainly, multinational corporations that engage in extensive, profitable businesses in these countries and are increasingly becoming the subject of alien tort lawsuits<sup>247</sup> can play a leading role in improving domestic regulatory capacity and local adjudicatory structures.<sup>248</sup> Indeed, savvy business leaders may see in

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245. See *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, 5 J. INT'L L. & PRAC. 417, 443 (1996).

246. *Id.*

247. See LINDA A. WILLETT ET AL., *THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS* (Nat'l Ctr. for the Public Interest 2003); See also Kenny Bruno, *De-Globalizing Justice: The Corporate Campaign to Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right to Sue in U.S. Courts*, MULTINATIONAL MONITOR, 2003, at 13, <http://multinationalmonitor.org/mm2003/03march/march03corp2.html>.

248. See Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, FOR. AFF. March/April 1998, at 7 (discussing how U.S. corporations doing business overseas can be powerful instruments in the promotion of human rights and theorizing that embarking on this enterprise can be a commercially beneficial activity).

such support a self-interested intervention in domestic affairs in a way that does not necessarily antagonize the ordinary citizen or politician in these countries.<sup>249</sup> Corporations should use their goodwill with governments with which they are often in partnership to encourage human rights protection. Even judicial reforms aimed at accelerating economic growth, and not necessarily geared toward enhancing human rights protection, may end up advancing the cause of human rights and improving the general situation in the country.<sup>250</sup> Corporations should play more than a passive role in efforts to create an independent judiciary in any country in which they are heavily invested, which can also serve the purpose of building a stronger economy through the attraction of (international) investors.<sup>251</sup> The multinational corporation can embark on this venture, even if it could not care less about the rights of the people in developing countries or subscribes to the ideological position that human rights protection is not the business of business.

The U.S. government can also take more effective steps to encourage the growth of democracy in many countries and thus stem the constant infringement of valued rights and fundamen-

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249. See Schrage, *supra* note 7, at 169.

Ironically, but appropriately, multinational corporations may well conclude that it is in their financial interest to take steps to improve the effective administration of justice in the countries where they do business. This reasoning should hold true even if it increases the odds that they and their operations will face legal action. Local courts can be far better suited to adjudicating claims than U.S. courts. Local proceedings as well as potential judgments are generally far less costly. By contrast, U.S. courts and juries may have little appreciation of the challenges of doing business in developing countries or the important benefits of global trade and investment to local communities. Some companies have recognized these benefits and begun to invest in local justice.

*Id.*

250. See Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 *WORLD BANK RESEARCH OBSERVER* 8-9 (1998), [www.worldbank.org/research/journals/wbro/obsfeb98/pdf/article1.pdf](http://www.worldbank.org/research/journals/wbro/obsfeb98/pdf/article1.pdf) (last visited Feb. 3, 2006).

251. See Daniel A. Farber, *Rights As Signals*, 31 *J. LEGAL STUD.* 83, 83, 98 (2002). Noting that "human rights enforcement may help encourage investment and thereby indirectly foster economic growth," Professor Farber concludes that "[t]his effect may bolster the motivation for protecting human rights or at least help counter the fear that human rights protection is too much of a luxury for poorer countries." Ostensibly with this background as motivation, the Norwegian oil company, Statoil, embarked on a project, in collaboration with Amnesty International, the U.N. Development Program ("UNDP") and the local judiciary, for training judges in Venezuela in human rights. See Schrage, *supra* note 7, at 169; see also Sarah Murray, *When Exploration Rights Meet Human Rights*, *FIN. TIMES (LONDON)*, Mar. 15, 2002, at 12 (reporting on multinational corporate efforts in judicial capacity-building for human rights).

tal freedoms that is often a concomitant of governmental systems devoid of public participation.<sup>252</sup> Even where democracy does not exist or does not seem realizable, the United States can lend support to the strengthening of institutions, including measures to build independent judiciaries that can exist even in entities where democracy is absent.<sup>253</sup> Thus, the non-existence of democracies should not pose a hindrance to efforts to improve the state of things in many countries from which the ATS lawsuits (may) originate.

A vibrant or functioning judiciary, even in a non-democratic setting, will provide a forum for citizens to use legal tools to resist infractions on their rights. With courts and tribunals willing to hear their claims and with the attendant publicity surrounding judicial decisions, citizens will be further empowered, human rights awareness will grow significantly, and increased education on how citizens can vindicate their rights will result. These ingredients form the staple of a society that will free itself from the shackles of dictatorial rule and appropriate the guarantees enshrined in various international human rights instruments.<sup>254</sup>

In some instances, the local remedies rule will be ruled inapplicable because plaintiffs will not be availed the benefit of a legal aid system in countries where such a system is not in place to assist indigent claimants.<sup>255</sup> Allowing such a claimant to pro-

252. See generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 163-77 (1999) (discussing efforts by the United States to promote democracy and rule of law abroad and their limited effectiveness to date).

253. See Anne-Marie Slaughter, *The Real New World Order*, FOR. AFF. Sept/Oct. 1997, at 194 (noting the existence of relatively independent judicial systems in some non-democratic countries).

254. See generally Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 469 (2001) (criticizing Alien Tort Statute litigation as lacking the local connection that would engender the internalization of human rights norms that would have been the case if local resolution were adopted); M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, at 1140 (1999) ("One significant effect of 'individual rights' litigation in courts purporting to apply 'universal' law may be to deprive the local courts in strife-ridden countries the opportunity to develop and internalize those very same norms."); Farooq Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 257-58 (1983) (arguing for making home governments answerable before the domestic courts or tribunals existing in their countries); Charles F. Hollis, III, *Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts*, 1 SANTA CLARA J. INT'L L. 1, 51 (2003).

255. See Udombana, *supra* note 34, at 31.

ceed with litigation in a foreign forum where his or her meager resources are not put under unbearable strain is almost arguably the right step to take. But would it not be in the best interest of everybody if efforts were made toward the introduction and entrenchment of a legal aid system in those countries? Would it not be best to build and support a network of public interest attorneys in these countries that would be able and available to handle similar cases in the future, instead of continuing to plead it as a basis for the continuation of litigation or quasi-judicial action abroad?

Corruption in the judiciary frustrates efforts to hold powerful defendants accountable in certain countries and may therefore provide a veritable basis for dispensing with the requirement that local remedies are exhausted.<sup>256</sup> In the long run, it is submitted, the strengthening of the judiciaries in these countries would be a more useful measure. The judiciary may be strengthened through training of judges and court workers,<sup>257</sup> incentivizing service in the judicial department through enhanced remuneration, high scale assistance in the recruitment of the most qualified people not only in learning but also in character,<sup>258</sup> and building a strong press,<sup>259</sup> and funding watchdog institutions to monitor activities in the judiciary.<sup>260</sup> Seeing that the adequate protection of human rights presupposes the existence of a strong judiciary, the importance of an independent judiciary

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256. See *Wiwa v. Royal Dutch Petroleum Co.*, 96 CIV. 8386 (KMW), 2002 WL 319887, at \*17 (S.D.N.Y. Feb 28, 2002 (citing U.S. Dept. of State, 2000 *Country Reports on Human Rights Practices, Nigeria* (2001))) The U.S. State Department's assessment of Nigeria's judiciary as corrupt was relied on by the district court in *Wiwa* to reject the defendant's contention on exhaustion of remedies. Writing about the Nigerian situation, the State Department stated: "The judiciary is subject to political influence, and is hampered by corruption and inefficiency. The judicial system was incapable of providing citizens with the right to a speedy, fair trial." *Id.*

257. Cf. Thomas Carothers, *The Rule of Law Revival*, FOR. AFF., March/April 1998, at 104 (arguing that "[t]raining for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact").

258. See Posner, *supra* note 250, at 7 ("If judicial salaries are high enough and tenure sufficiently secure, the judiciary of even a poor country will be able to attract competent and honest lawyers.").

259. See Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005) (discussing how media scrutiny can highlight, and hopefully lead to a correction of, the problems in a country's justice system).

260. See Paul H. Brietzke, *The Politics of Legal Reform*, 3 WASH. U. GLOBAL STUD. REV. 1, 22 (2004) (discussing funding for non-governmental organizations and the role of civil society groups in the promotion of the rule of law).

cannot be overemphasized.<sup>261</sup>

Judicial corruption is often a microcosm and symptomatic of the pervasive corruption in the wider society. Corruption thrives in developing countries partly because the western world winks at the corrupt practices of the rulers of these countries or even actively or tacitly endorses them by providing safe havens for the rulers to hide their stolen loot.<sup>262</sup> Often, western countries form some form of political or economic alliance with corrupt or human rights-abusing rulers impelling the western countries to shield them, ignore their misdeeds, or not do anything that would imperil their symbiotic or lucrative relationships.<sup>263</sup>

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261. See Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87, 87, 90, 92 (1999); see also Clair Apodaca, *The Rule of Law and Human Rights*, 87 JUDICATURE 292, 295-96, 298 (2004) (concluding from an examination of 154 developing and transitional countries that an independent judiciary is important to the securing of a number of human rights).

262. See Chris Okeke, *The Debt Burden: An African Perspective*, 35 INT'L LAW. 1489, 1499 (2001); Lawrence Malkin & Yuval Elizur, *Terrorism's Money Trail*, 19 WORLD POL'Y J. 60, 67 (2002), available at <http://www.worldpolicy.org/journal/articles/wpj02-1/Malkin.pdf>.

[T]raditionally, the U.S. Treasury has welcomed foreign money from any source to fill the gap in the country's balance of payments. Only in the last years of the Clinton administration did the Treasury begin to draw the line at laundered money, and even then it was tentative, lest it impede global money flows into Wall Street.

*Id.*; see also Jesse S. Morgan, *Dirty Names, Dangerous Money: Alleged Unilateralism In U.S. Policy On Money Laundering*, 21 BERKELEY J. INT'L L. 771, 797 (2003); Josh Richman, *Ukraine's Ex-Leader Convicted in S.F.; Jury Finds Former Prime Minister Guilty of Fraud, Money Laundering*, OAKLAND TRIB., June 4, 2004, at 8 (stating that a former Ukrainian Prime Minister, who was convicted in federal court in San Francisco in June 2004 had transferred millions of dollars in stolen funds into the United States). Support for public-sector corruption has also taken the indirect form of home governments officially endorsing the practice of multinational corporations bribing foreign government officials. An example is allowing corporations deduct foreign bribes as business expense, although support for this practice is now dying down. See John Brademas & Fritz Heilmann, *Tackling International Corruption: No Longer Dying Taboo*, FOR. AFF. Sept./Oct. 1998, at 17. A number of modern international and regional instruments such as the *United Nations Convention Against Corruption* and the *New Partnership for Africa's Development* contain provisions on stolen funds stashed abroad and the repatriation thereof. See Organization for African Unity, *The New Partnership for Africa's Development*, 68, ¶ 188, (Oct. 2001), available at <http://www.iss.co.za/AF/RegOrg/nepad/nepaddoc.pdf>; see also Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 206-12 (2005).

263. See Philip C. Aka, *Human Rights As Conflict Resolution In Africa In The New Century*, 11 TULSA J. COMP. & INT'L L. 179, 190 (2003) (stating that "developed countries provided moral comfort and financial support to African dictators, such as Mobutu Sese Seko, who committed human rights atrocities so long as these dictators remained in their camp in the ideological Cold War rivalry between the U.S. and the Soviet Union")



Besides, multinational corporations and other foreign investors generally tend to favor the continuation of corruption and authoritarianism in these countries, seeing that it is beneficial.<sup>264</sup> In fact, “the widespread notion [is] that foreign investors would ideally prefer to deal with authoritarian regimes, where they can use corruption and other informal methods to protect themselves, while ignoring the interests of the local population.”<sup>265</sup> In fairness to them, there is some reason to suggest that some investors are not necessarily adverse to the rule of law and an independent judiciary and even find such institutions attractive.<sup>266</sup>

If developed countries (and multinational corporations) take a principled stand—in practice not just in precepts—that sends a clear message that corruption does not pay and that stolen wealth will no longer find safe havens in their countries, corruption will be greatly reduced. Anti-corruption commissions, tribunals, and other arrangements in developing countries should be supported with meaningful technical and financial assistance. Where they do not exist, their emergence should be encouraged. The reduction of corruption, without doubt, will improve the lot of the people in the developing world and make some of the alien tort lawsuits unnecessary.<sup>267</sup>

The U.S. government could channel additional resources, beyond existing efforts, toward providing technical assistance

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(citation omitted); see also Lynne Stewart, *Defending the Right to Defend*, 2 SEATTLE J. SOC. JUST. 85, 90 (2003); Juan E. Mendez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 393-94 (2002); Christopher B. Jochnick & Josh Zinner, *The Day Of The Dictator: Zaire's Mobutu And United States Foreign Policy*, 4 HARV. HUM. RTS. J. 139, 139 (1991).

264. See Cyril Uchenna Gwam, *Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic, and Dangerous Wastes and Products on the Enjoyment of Human Rights*, 14 FLORIDA J. INT'L L. 427, 470 (2002) (stating that multinational corporations, in furtherance of their objectives and to their advantage, frustrate the implementation of human rights at the national level). See generally Amos Adeoye Idowu, *Human Rights, Environmental Degradation and Oil Multinational Corporations in Nigeria: The Ogoniland Episode*, 17 NETH. Q. HUM. RTS. 62 (1999).

265. See Farber, *supra* note 251, at 85.

266. See *id.*; see also Tom Ginsburg, *Does Law Matter for Economic Development?*, 34 L. & SOC. REV. 829, 839 (2000).

267. See Matthew J. Spence, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1186 (2005) (discussing how anti-corruption prosecution by the U.S. government can advance the collateral goal of promoting democracy abroad and yield benefits to these countries and the United States).

and finances to build a vibrant public interest legal community and train judicial officers with the purpose of building independent judiciaries that protect the rights of all the people in the country.<sup>268</sup> Capacity building was attempted several decades ago by international institutions under the aegis of the law and development movement,<sup>269</sup> but was generally considered a failure.<sup>270</sup> New rule of law initiatives have emerged.<sup>271</sup> Obviously, these efforts do not owe their emergence or sustenance to the existence of the exhaustion doctrine. But the introduction of the rule in alien tort litigation can provide a basis for the formation of some

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268. See Schrage, *supra* note 7, at 169.

269. See David M. Trubek, *Toward A Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 223-24 (1972); see also David M. Trubek, *Law and Development: Then and Now, Panel Discussion: Are International Institutions Doing Their Job: Law and Development*, 90 *AM. SOC'Y INT'L L. PROC.* 223, 223-26 (1996); Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 *FLA. J. INT'L L.* 159, 171-80 (2001).

270. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457, 481 (1977) ("The mainstream law and development movement, dominated by the American legal style, was bound to fail and has failed.") (citation omitted); see also Steven D. Jamar, *A Lawyering Approach to Law and Development*, 27 *N.C. J. INT'L L. & COM. REG.* 31, 31 (2001) (noting that the law and development movement had not recorded the level of success envisaged by its early proponents.); Carol Rose, *The "New" Law & Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 *L. & SOC. REV.* 93, 93-4, 120-21 (1998); David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 *FLA. ST. U.L.REV.* (1990); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, 1063, 1100-02. But see World Bank, *Law and Development Movement*, <http://www.worldbank.org/publicsector/legal/ldmovement.htm> (noting that the assessment of failure may have been premature).

271. See generally BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds. 2003); see also Carothers, *Rule of Law Revival*, *supra* note 257; Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 *MICH. J. INT'L L.* 99 (2004); Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 *WIS. INT'L L.J.* 1, 18-22 (2004) (noting that the law and development movement is still vibrant in its new incarnation); Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 *DEPAUL L. REV.* 383 (2002) (analyzing the old and new law reform initiatives); Jonathan L. Hafetz, *Pretrial Detention, Human Rights and Judicial Reform in Latin America*, 26 *FORDHAM INT'L L.J.* 1754 (2003) (discussing judicial reform projects in Latin America funded by the World Bank and the U.S. Agency for International Development); W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 *FALL L. & BUS. REV. AM.* 551 (2002) (discussing the different "waves" of judicial reform in developing countries and the role (or sometimes inactivity) of international institutions such as the World Bank and the United Nations at various stages of the enterprise).

kind of informal partnership between the judiciary in the United States and those engaged in strengthening judicial and political institutions in the developing world. One commentator sums it up this way: "Along with [the] new foreign assistance initiatives, the Alien Tort Statute should be an effective tool to support the development of the rule of law."<sup>272</sup>

The U.S. government has been intervening in a number of ATS cases through advisory letters from the State Department adducing reasons why pending suits should not be allowed to proceed.<sup>273</sup> An intervention on the basis of non-exhaustion would not be manifestly insupportable if based on any substantial progress that the U.S. government has made in developing the rule of law in countries with weak judiciaries and anti-democratic political structures.

It may not be injudicious for the courts to be favorably disposed toward requests for intervention on the basis of non-exhaustion. Indeed, the courts could cooperate with these efforts by recognizing the cases where progress—even if incomplete—has been made and sending back the cases to their respective countries. Such judicial attitude could in turn spur efforts to build and capacitate the relevant institutions in developing countries. Human rights advocates and public interest attorneys would also be propelled to contribute their expertise in helping to discover and develop talent in the developing world and position them properly for service to their countries. Further, the practice of funding visits by delegations of U.S. judges and lawyers to other countries to conduct workshops and explore options for creating independent judiciaries should be continued with special emphasis on countries with bad records on human rights instead of greater attention paid to reform of commercial legislation to enhance the business operations of multinational corporations.<sup>274</sup> To be successful, efforts to reform the judicial

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272. See Schrage, *supra* note 7, at 164.

273. See Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM. L. & POL'Y J. 467, 467, 469-70, 473-76 (2003) (discussing the use of Executive Opinions in alien tort litigation).

274. See Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 B.Y.U. L. REV. 229, 232 ("Public and private groups regularly send lawyers and judges out to developing countries as missionaries preaching the importance of an independent judiciary, fair and settled substantive rules, and even-handed application of the law.").

systems in these countries should avoid the pitfalls of previous or ongoing efforts and take into account peculiar features in those countries and adapt ideas to local conditions.<sup>275</sup>

The United States has already started taking some steps in the direction being proposed here. It has launched an initiative called "Plan Colombia,"<sup>276</sup> an investment of almost four billion dollars so far that aims not only at eradicating narcotics in Colombia but also at "shor[ing] up other Colombian institutions, including a legal system perhaps best known for assassinations of judges."<sup>277</sup> One writer discusses the objectives and accomplishments of Plan Colombia and recent U.S. actions in relation to that country in the following words:

Plan Colombia is in the midst of recasting the nation's courts in the U.S. image by replacing an inquisition-like criminal justice system controlled by powerful fact-finding judges. In its place will stand an adversarial system, said to be more balanced, open and efficient. On the civil side, Plan Colombia has gone American by establishing alternative dispute resolution programs. Finally, growing impatient with the Colombians investigations of the Santo Domingo bombing and other human rights complaints, the United States in early 2003 cut off aid to the air force unit involved. Afterward, Colombian military authorities eventually turned three helicopter crew members over to civilian prosecutors to face involuntary manslaughter charges.<sup>278</sup>

The bombing referred to above constitutes the basis of an ATS lawsuit pending in U.S. district court in Los Angeles against the California oil corporation, Occidental.<sup>279</sup> It is perhaps still early

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275. See Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 *VAND. J. TRANSNAT'L L.* 109 (2005) (discussing the importance of designing laws and institutions in a form that is appropriate to local conditions); see also Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (Carnegie Endowment for International Peace, Rule of Law Series, Working Paper No. 34, 2003), available at <http://www.carnegieendowment.org/files/wp34.pdf> (last visited Feb. 12, 2006); David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present and Future* (June 2003).

276. For a scathing criticism of Plan Colombia, see *AmazonWatch*, *Challenging U.S. Military Aid to Colombia*, available at [http://www.amazonwatch.org/amazon/CO/plancol/index.php?page\\_number=99](http://www.amazonwatch.org/amazon/CO/plancol/index.php?page_number=99) (last visited Oct. 5, 2006).

277. See John Gibeaut, *Foreign Fight*, *A.B.A.J.* 29, 33 (July 2005).

278. *Id.* at 33.

279. See *id.* at 32; see also Press Release, International Labor Rights Fund, *Lawsuit Filed Against Occidental Petroleum for Involvement in Infamous Colombian Massacre* (April 24, 2003), <http://www.laborrights.org/press/oxy042403.htm>.

to determine how far-reaching these changes would go or adjudicate their possible impact on the present and subsequent litigation stemming from the activities of the Colombian government in furtherance of the business operations of their foreign corporate partners that infringe on human rights.

It should be noted that apart from the noble goal of protecting and guaranteeing human rights, building stable democracies and independent judiciaries across the world would redound to the economic benefit of citizens of these countries.<sup>280</sup> There is no gainsaying the fact there is a connection between the absence of such vital institutions as an independent and competent judiciary and the state of underdevelopment in these countries.<sup>281</sup> After all, it has been noted that “the absence of an independent, professionally competent, and well-respected judiciary represents a serious deficiency in a country’s social and economic capital and is likely to be a significant impediment to economic development.”<sup>282</sup>

Direct economic development initiatives should also be highly encouraged.<sup>283</sup> Responding to the Congressional endorsement of the Central American Free Trade Agreement

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280. See David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U.L.REV. 879, 887-88 (2003).

281. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999), MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* (2000), ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 196 (2000), Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51 (1993). But see Amanda Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT’L & COM. L.Q. 779 (2000).

282. See Farber, *supra* note 251, at 91 (quoting Michael J. Trebilcock, *What Makes Poor Countries Poor: The Role of Institutional Capital in Economic Developments*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* 43 (Edward Buscaglia, William Ratliff, & Robert Cooter eds. 1997)). This point, however, should not be construed to suggest the absolute indispensability of an independent judiciary to growth, as the counter examples of China and Vietnam adequately illustrate. See *id.* at n.36; see also STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 75 (1999). Also, an effective judicial system does not necessarily translate to economic development. See Posner, *supra* note 250, at 2 (noting that “England, with one of the finest judicial systems in the world, was for many decades among the poorer economic performers in the industrial world”).

283. On the expectation of developing countries with regard to economic cooperation and partnership with developed countries as tabled at the United Nation’s Monterrey Conference in Mexico in March 2002, see Innamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. INT’L & COMP. L. REV. 219 (2004).

("CAFTA")<sup>284</sup> between the United States and five Central American countries, President George W. Bush noted that economic development was vital to the fortification of fragile democracies in that sub-region.<sup>285</sup> While opponents may argue that the vessel chosen—a free trade agreement—is not an effective or useful mechanism for accomplishing the objective of economic development, it is hardly controvertible that economic development would only be beneficial to democracy-building efforts.<sup>286</sup> It is needless to state that strengthening democracies translates to enhanced human rights protection.

This work does not lose sight of the fact that there are critics to the whole notion of using American power to promote democracy on the basis that U.S. national interest should be the determining factor. But it is in U.S. interest to see that democracy thrives around the world, as major global problems today such as terrorism are more likely to arise from non-democratic countries, posing a potent threat to leading democracies, including the United States.<sup>287</sup> Moreover, supporting the rise of stable democracies in some countries in the developing world frees the United States from the need to intervene continually in these countries to confront internal crises or poverty that is the cause or fruit of the crises.<sup>288</sup> Furthermore, even from an ideological perspective, there is some level of attractiveness for democracy-

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284. See generally Central American Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., May 28, 2004, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html) (last visited Feb. 12, 2006).

285. See Daniela Deane, *Bush Signs Controversial Trade Law: Central American Pact Was Top Presidential Priority*, WASH. POST, Aug. 2, 2005.

286. Some scholars have presented the forceful argument that economic development leads to a plethora of social and cultural changes such as occupational specialization, urbanization and higher levels of education. These changes in turn lead to democracy. See RONALD INGLEHART, *MODERNIZATION AND POST-MODERNIZATION* 163 (1997); see also Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 75-85 (1959); Karl W. Deutsch, *Social Mobilization and Political Development*, 55 AM. POL. SCI. REV. 493 (1961). It should be noted however that economic progress or wealth does not necessarily result in democracy especially in the absence of these social and cultural changes. See INGLEHART, *supra* note 286, at 161 ("Is the linkage between development and democracy due to wealth per se? Apparently not: if democracy automatically resulted from simply becoming wealthy, then Kuwait and Libya would be model democracies.").

287. See Michael Byers, *International Law and the American National Interest*, 1 CHI. J. INT'L L. 257, 259 (2000) ("When democracy outside the United States is threatened, democracy within the United States may be under threat as well.").

288. See Joel D. Barkan & David F. Gordon, *Democracy in Africa: No Time to Forsake It*, FOR. AFF., July/Aug. 1998, at 107, 111.

building abroad both to those who clamor for *realpolitik* and their counterparts that are enamored of *idealkolitik*.<sup>289</sup>

### B. *Implications for International Human Rights System*

It has been observed that the United States has a major interest in promoting stability in international politics through engagement with international law and international institutions.<sup>290</sup> The doctrine of exhaustion of domestic remedies provides an opportunity to sustain that interest. The local remedies rule, a rule that aims at stability in inter-State relations,<sup>291</sup> could form a springboard for assisting countries that do not have efficient judicial and political systems, but are amenable to making effective remedies available if other States are willing to cooperate with them in that venture. This is accentuated by the fact that modern human rights law owes its origins to “the recognition that domestic political conditions have consequences for international security.”<sup>292</sup> It is reasonable, therefore, to surmise that the pursuit of “a multinational approach to the development and enforcement of human rights norms in countries across the world would appear to be an important part of ensuring [international political] stability.”<sup>293</sup>

Constructing and strengthening international institutions for the protection and promotion of human rights also seems to be another plausible avenue for accomplishing the objective.<sup>294</sup> Beyond bilateral initiatives, the U.S. government, as part of its foreign policy, can also engineer and promote efforts at the international level to use international law and global resources to strengthen political processes and institutions in developing countries.<sup>295</sup>

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289. See Slaughter, *The Real New World Order*, *supra* note 253, at 192 (noting former Deputy Secretary of State Strobe Talbott’s argument that “promoting democracy worldwide satisfies the American need for *idealkolitik* as well as *realpolitik*”).

290. See Byers, *American National Interest*, *supra* note 287, at 257. For the stance against U.S. engagement with international institutions, see John Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205 (2000); see also Paul Stephan, *International Governance and American Democracy*, 1 CHI. J. INT’L L. 237 (2000).

291. See Yale-Loehr, *supra* note 7, at 372.

292. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EURO. J. INT’L L. 503, 538 (1995) [Hereinafter Slaughter, *Liberal States*].

293. Short, *supra* note 217, at 1078 n.331.

294. See Byers, *American National Interest*, *supra* note 287, at 260-61.

295. In several of her writings, Professor Anne-Marie Slaughter has discussed the role of international law and institutions in promoting democracy and identifying sev-

The United States should strongly support and strengthen existing multilateral initiatives to build the capacity of countries to respect, promote, protect, and fulfill human rights aspirations and obligations. For a start, the United States should substantially increase its funding of the U.N. Human Rights Advisory Services and Technical Cooperation Programme under the Office of the High Commissioner for Human Rights ("OHCHR").<sup>296</sup> This program aims at providing a panoply of advisory services and technical assistance including constitutional and legislative reform, training for judges, lawyers, and law enforcement officers and strengthening of national human rights institutions.<sup>297</sup> A number of countries have already benefited from the services provided thereby but funding remains a critical issue.<sup>298</sup> The United States should also be at the forefront of other areas of the international human rights system that require attention and reform.<sup>299</sup>

One way of reading Justice Souter's statement in *Sosa* on the exhaustion of remedies available through international tribunals is to view it as conveying the sense that where remedies exist under international tribunals, the pursuit of such remedies is encouraged.<sup>300</sup> Another way of looking at it though is as an invitation or signal for the development of forums, mechanisms and processes to address these issues at the international level, the

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eral measures the United States can take in that connection. See Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223 (2000); Slaughter, *Liberal States*, *supra* note 292; Slaughter, *The Real New World Order*, *supra* note 253.

296. See generally Office of the United Nations High Commissioner for Human Rights, *Technical Cooperation*, <http://www.unhchr.ch/html/menu2/techcoop.htm> (last visited Feb. 12, 2006).

297. For an excellent discussion of the work of this program, see Cyril Uchenna Gwam, *The Need For Nigeria to Seek Advisory Services and Technical Assistance in the Field of Human Rights*, J. HUMANITARIAN ASSISTANCE (2000), <http://www.jha.ac/articles/a055.htm>.

298. See Cees Flinterman & Marcel Zwamborn, *From Development Of Human Rights To Managing Human Rights Development: Global Review Of The OHCHR Technical Cooperation Programme: Synthesis Report*, Netherlands Institute of Human Rights (SIM)/MEDE European Consultancy, September 2003 (reporting on the success and low points of advisory services and technical assistance in Bosnia and Herzegovina, Guatemala, Malawi, and Mongolia and identifying funding and making the most effective use of limited resources, inter alia, as major challenges).

299. For a sample discussion of the many areas of the international human rights system that require attention from States, see INTERNATIONAL COMMISSION OF JURISTS, *REFORMING THE HUMAN RIGHTS SYSTEM: A CHANCE FOR THE UNITED NATIONS TO FULFIL ITS PROMISE* (June 2005).

300. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).



import of which would be to make resort to alien tort litigation in the United States unnecessary and unappealing. For instance, ATS cases have been trending toward having multinational corporations as the bulk of the defendants, but there is not a credible international mechanism for holding corporations accountable for human rights abuses. New efforts, such as the work of the Sub-commission on the Promotion and Protection of Human Rights can be built upon to ensure corporate accountability.<sup>301</sup>

Many a plaintiff wants redress and would not care where it comes from; he has no obvious preference for litigating in the United States save that the United States provides him with the possibility of redress for what he has suffered in the hands of human rights violators.<sup>302</sup> An effective international arrangement that at the least receives complaints on corporate human rights violations could even serve as a warning signal to multinational corporations and prevent matters from getting to a point that egregious human rights violations occur. Where the abuses eventually occur, the international body could also provide some remedies and a forum for accessing them.

An international arrangement can also internationalize or universalize the remedies and redress under the ATS and make them available and accessible in many countries in the world.<sup>303</sup> Not only would this reduce the burden on U.S. courts,<sup>304</sup> obviate a loss of popular support if ATS cases become viewed as a drain on U.S. resources,<sup>305</sup> reduce resentment against the United

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301. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

302. For a discussion of the advantages that U.S. courts provide that are largely absent in other countries, see Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 8 (2002); see also Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 409-413 (2001); Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 393-95 (2001).

303. See generally EMEKA A. DURUIGBO, *MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY* 144 (2003).

304. See *id.* at 186.

305. See Duruigbo, *supra* note 229, at 36 n.216 and accompanying text.

States for serving as the world's judge,<sup>306</sup> and remove competitive disadvantage against U.S. companies,<sup>307</sup> it will further the cause of international human rights protection by expanding the pool of people with reasonable prospects of vindicating their rights at the relevant forums across the world.<sup>308</sup> If the exhaustion of local remedies rule could be harnessed and resources channeled toward constructing such a structure in the international legal system, its introduction would have been worth all the effort.

### CONCLUSION

It is acknowledged that egregious human rights abuses in some countries and the apparent inability or unwillingness of these countries to protect or vindicate the rights of their nationals necessitate the assumption of jurisdiction by, and adjudication of cases in, foreign courts without reference to local remedies. A similar scenario undoubtedly propelled the relaxation of the exhaustion requirement in civil rights protection and litigation in the United States.<sup>309</sup>

It can safely be stated that the protection and promotion of the civil rights of racial minorities, especially black people, owed a lot to the whittling down of the requirement to exhaust state remedies. After the exhumation<sup>310</sup> of Section 1983,<sup>311</sup> a feat ee-

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306. *See id.* at 36.

307. *See id.* at 28-29 nn.173-79 and accompanying text.

308. *See DURUIGBO, supra* note 303, at 185-86 (noting that the ATS does not cover all human rights abuses and environmental claims with the automatic implication that many victims of corporate and official misdeeds are left without a remedy or forum to vindicate their rights).

309. *See Note, Federal Judicial Review of State Welfare Practices*, 67 *COLUM. L. REV.* 84, 105, 106 & n.130 (1967).

To a large extent, the evolution of the relaxed exhaustion requirement in the school desegregation cases was the result of nearly a decade of experience and judicial impatience with a particular type of local agency. The decade of frustration with the manifold attempts by both local communities and states to avoid desegregation is, perhaps, epitomized by *Griffin v. County School Bd.*, 377 U.S. 218 (1964), where, when the case reached the Supreme Court, public schools had been inoperative for more than five years. Confronted with situations like that in Prince Edward County, it is no wonder that the Supreme Court ultimately had to ensure access to the federal courts as quickly as possible.

*Id.*

310. Section 1983 of Title 42 of the United States Code was enacted by the First Congress as Section One of the Civil Rights Act of 1871, but it was hardly utilized by

rily similar to the resurrection of the ATS in the 1980 *Filartiga* case,<sup>312</sup> civil rights plaintiffs, like victims of foreign human rights abuses today, resorted to the Act as a vehicle for vindicating their rights.<sup>313</sup> With the judicial floodgates thrown open,<sup>314</sup> civil rights claimants viewed the federal courts as the last bastion for the protection and enforcement of rights guaranteed them under the U.S. Constitution against errant state officials.<sup>315</sup> Doubtless, persisting in entrusting the protection of citizens' rights to recalcitrant state courts and institutions would have been grossly detrimental to the victims of civil rights violations, showcasing the imprudence of an incongruous dependence on the fox to guard the henhouse.<sup>316</sup> A different approach to exhaustion was inevitable.<sup>317</sup>

Similarly, and without question, there is substantial merit in dispensing with exhaustion in international human rights litigation where the State in which the alleged abuse took place refuses to provide adequate venue and avenues for redress. Nevertheless, we should not lose sight of the fact that the requirement of exhaustion of local remedies provides a window of opportu-

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plaintiffs or broadly construed by the courts for ninety years until the 1961 *Monroe v. Pape* decision after which activities in this area took a frenzied pace. See Robert C. Wigton, *The Second Circuit, Civil Rights Litigation, and Expanding Federal Jurisdiction*, 15 VT. L. REV. 301, 301, 304 (1991); see also H. Camilla Emanuel, *Civil Rights-Federal Jurisdiction-Exhaustion of Adequate and Appropriate State Administrative Remedies is a Prerequisite for Judicial Review Under Section 1983*, 51 MISS. L.J. 283, 287-88 (1980). See generally *Monroe v. Pape*, 365 U.S. 167 (1961).

311. 42 U.S.C.S. § 1983 (Lexis 2005).

312. The ATS was exhumed in *Filartiga* after almost two hundred years in hibernation. See ANTHONY D'AMATO, *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* vii (Ralph G. Steinhardt et al. eds., 1999).

313. See Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486-88 (1969).

314. The invocation of section 1983 in modern litigation has led to an avalanche of lawsuits in federal courts. See Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1771 (2003); see also Paul F. Wingenfeld, Note, *Section 1983 and the Parratt Doctrine after Zinermon v. Burch: Ensuring Due Process Rights or Turning the Fourteenth Amendment into a 'Font of Tort Law'*, 39 CLEV. ST. L. REV. 445, 451 (1991) (referring to a flood of section 1983 actions); Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON U. L. REV. 1, 6 (1988-1989) (discussing the "deluge" or "flood" of cases under section 1983); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1137, 1169 (1977).

315. See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1318-20 (2001).

316. See James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 409-16 (2003).

317. See *Exhaustion of State Remedies*, *supra* note 56, at 1206-08.

nity to beam the searchlight on the existing state of affairs in developing countries and let such discovery inform and form the basis for meaningful social, economic, political, and legal reforms in these countries. This development, while entailing a measure of hardship to some plaintiffs, will augur well for the well-being of people in these countries while staying faithful to the aspirations of the progenitors and proponents of the modern international human rights protection system.<sup>318</sup>

Instituting or litigating human rights cases in the United States based on violations that occurred abroad already invites criticism, opprobrium, disapprobation, and condemnation.<sup>319</sup> Continuing to do so without seeking ways of involving other countries in appropriate cases either within their domains or as a part of an international arrangement is only likely to fuel resentment and garner greater condemnation.<sup>320</sup> Institutional and attitudinal improvements in other countries will reduce the volume of ATS litigation with wide wide-ranging results for the United States and international forums.<sup>321</sup> There are a number of measures the United States can take to improve things in developing, non-democratic countries, but for these efforts to be credible, they must be seen to be devoid of selectivity, partiality

318. One of the criticisms leveled against ATS litigation is that it excessively focuses on redressing individual wrongs instead of directly addressing communal problems so that the whole country and the international human rights protection system, instead of a few individuals exclusively, profit from the exercise. See Hollis III, *supra* note 254, at 38-39 (2003).

319. See Pamala Brondos, *The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 *LAND & WATER L. REV.* 221, 233 (1997) ("Trying international figures in United States courts for human rights violations invites criticism. Nations can argue that the United States is acting both as a global police force and as a global court.").

320. See Charles F. Marshall, *Re-framing the Alien Tort Act after Kadic v. Karadzic*, 21 *N.C.J. INT'L L. & COM. REG.* 591, 614 (1996) ("It is clear that when a federal court seeks to regulate the activities of foreign citizens or governments which occur in foreign states, it is almost certain that such actions will provoke resentment and possibly retaliation from the foreign state."); see also Kontorovich, *supra* note 25, at 125, 130 (noting that the assertion of universal jurisdiction as is the case under the ATS, while potentially beneficial in ensuring that perpetrators of heinous crimes are brought to justice could negatively affect diplomatic relations and engender interstate conflict); *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 *I.C.J.* 12, 20, ¶ 48 (FEB. 14) (separate opinion of Judge Higgins, Judge Kooijmans, and Judge Buergenthal) (noting that the United States' assertion of universal civil jurisdiction in the alien tort statute has "not attracted the approbation of States generally").

321. See Jacques Delisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sini- cal" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 *DEPAUL L. REV.* 473, 541 (2002).

and double standards. Sincere efforts to promote democracy abroad and strengthen international institutions are in the national interest of the United States for a threat to democracy outside the United States may be a threat to democracy inside the United States as well.