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## Requiring Exhaustion: An International Law Perspective of the Alien Tort Claims Act in *Sarei v. Rio Tinto*

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## NOTE

### REQUIRING EXHAUSTION:

# AN INTERNATIONAL LAW PERSPECTIVE OF THE ALIEN TORT CLAIMS ACT IN *SAREI V. RIO TINTO*

## INTRODUCTION

Surrounded by dense rain forest and tropical stillness lies one of the world's largest man-made holes in the ground. When the ore is completely extracted, the pit will measure nearly 8,000 feet across and around 1,200 feet deep. It would take two Golden Gate Bridges to span the hole, and if the Empire State Building were set at the bottom, only the antenna on top would rise above the rim of the mine.<sup>1</sup>

The Panguna Mine, described above by environmentalist Jean Michael Cousteau as it appeared in 1988, is located in Papua New Guinea ("PNG").<sup>2</sup> The mine was built in the village of Panguna on Bougainville, an island province of PNG, in the 1960s by Rio Tinto PLC ("Rio Tinto").<sup>3</sup> The mine began operating in 1972.<sup>4</sup> Within ten years of commencing operations, it was one of the largest copper mines in the

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<sup>1</sup> *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1123 (C.D. Cal. 2002), *aff'd in part, rev'd in part, vacated in part*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007) (quoting First Am. Compl. ¶ 6)).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1121.

<sup>4</sup> *Id.* at 1122.

world.<sup>5</sup> Approximately 300,000 tons of ore and waste rock were removed from the pit, which in turn produced more than one billion tons of waste.<sup>6</sup> This waste was allegedly deposited into the Bougainville waterways.<sup>7</sup> In 1988, after sixteen years of environmental degradation, indigenous islanders engaged in acts of protest and sabotage that forced the mine to close.<sup>8</sup> In response, Rio Tinto allegedly coerced the PNG government into crushing the rebellion so that the mine could reopen.<sup>9</sup> The PNG army allegedly attacked the protestors in February 1990, killing many civilians, including a church pastor.<sup>10</sup> In response to this massacre, Bougainvilleans called for secession from PNG, and the struggle to close the mine became a fight for independence.<sup>11</sup> The ensuing civil war lasted for almost a decade.<sup>12</sup>

Most Americans would probably be surprised to learn that victims of atrocities committed in PNG filed a suit in a federal court in California against the transnational corporation that allegedly committed those acts. Even so, such a suit has been filed and is currently moving forward on appeal. Furthermore, most Americans would probably be equally surprised to learn that plaintiffs do not have to attempt to solve their claims through domestic mechanisms in their home country before filing suit in the U.S. court system. However, according to a three-judge panel in *Sarei v. Rio Tinto, PLC*,<sup>13</sup> there is no local remedies rule for claims alleging violations of the law of nations brought under the Alien Tort Claims Act (“ATCA”).<sup>14</sup>

This Note will analyze the opinion of the three-judge panel of the Ninth Circuit regarding exhaustion of local remedies in *Sarei*. The panel majority concluded that the court could not read an exhaustion requirement into the ATCA “where Congress has declined to do so, and in an area of international law where the Supreme Court has called for

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<sup>5</sup> *Id.* at 1123

<sup>6</sup> *Sarei*, 221 F. Supp. 2d at 1122-23 (quoting First Am. Compl. ¶ 6).

<sup>7</sup> *Id.* at 1123.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1125.

<sup>10</sup> *Id.* at 1126.

<sup>11</sup> *Id.*

<sup>12</sup> *Sarei*, 221 F. Supp. 2d at 1126 (quoting First Am. Compl. ¶ 6).

<sup>13</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1223 (9th Cir. 2007), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>14</sup> The term “law of nations” is coterminous with international law. See BLACK’S LAW DICTIONARY 365 (7th ed. 2001). The Restatement of Foreign Relations defines customary law as “a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

the exercise of judicial caution rather than innovation.”<sup>15</sup> The Ninth Circuit has granted en banc rehearing in *Sarei*,<sup>16</sup> and the matter remained pending as this Note went to press. However, regardless of whether the en banc panel can or should read an exhaustion requirement into the ATCA, Congress should amend the statute to clearly require exhaustion of local remedies before claims alleging a violation of the law of nations can be brought in U.S. courts under the ATCA.

As a practical matter in many cases, including *Sarei*, the exhaustion requirement would be easily satisfied by a showing that no effective remedies are available or that it would be futile to seek local remedies.<sup>17</sup> However, Congress should still require a showing of exhaustion for three reasons: first, including an exhaustion requirement would bring the ATCA in accord with customary international law and the law of nations; second, including an exhaustion requirement would show respect for the sovereignty of foreign states and prevent unjustified interference in the resolution of a foreign conflict; and last, including an exhaustion requirement would serve to strengthen human rights law abroad and the rule of law in general.

Part I of this Note explores the case history of the ATCA from its inception to the present day and then discusses the local remedies rule as it is applied in international law. Part II analyzes the majority and dissenting opinions in the panel decision in *Sarei*, focusing on what each had to say regarding the exhaustion requirement. Part III argues that Congress should amend the ATCA to include an exhaustion requirement. This Note concludes that exhaustion of local remedies should be a prerequisite to bringing ATCA claims in U.S. courts.

## I. BACKGROUND AND HISTORY

The ATCA was passed by the First Congress as part of the Judiciary Act of 1789.<sup>18</sup> The statute has been modified on a number of occasions

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<sup>15</sup> *Sarei*, 487 F.3d at 1219 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“These reasons argue for great caution in adapting the law of nations to private rights.”)).

<sup>16</sup> *Sarei v. Rio Tinto, PLC*, 499 F.3d 923, 924 (9th Cir. 2007) (granting en banc rehearing).

<sup>17</sup> Plaintiffs have consistently contended that they did not file suit in PNG because of fear of physical reprisals. Plaintiffs have also indicated that their claims would be barred under the applicable statute of limitations if asserted in PNG. Either of these two factors, if proven true, would be sufficient to establish the futility of pursuing local remedies. See Plaintiffs-Appellants’ Cross-Appellees’ Reply Brief and Response to Defendants-Appellees’ Cross-Appeal at 43-44, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007) (Nos. 02-56256, 02-56390), 2003 WL 22717377.

<sup>18</sup> The original statute provided that district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Act of

since it was originally enacted; most recently, the statute was amended in 1991 by the Torture Victim Protection Act (“TVPA”).<sup>19</sup> The ATCA currently provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.”<sup>20</sup>

Similarly, the local remedies rule can be traced back several hundred years and has evolved over time.<sup>21</sup> In its current form, the local remedies rule is a well-entrenched principle of international law.<sup>22</sup> It requires that before resort can be made to international law, claimants must first seek local remedies or show that such remedies are unavailable.<sup>23</sup>

#### A. THE ALIEN TORT CLAIMS ACT

For over 170 years after its enactment in 1789, the ATCA provided jurisdiction in only two cases.<sup>24</sup> In 1975, Judge Henry Friendly of the Second Circuit referred to the statute as a “kind of legal Lohengrin . . . no one seems to know whence it came.”<sup>25</sup> Then in 1980, the Second Circuit decided a watershed case: *Filartiga v. Pena-Irala*.<sup>26</sup>

The Filartigas were citizens of Paraguay.<sup>27</sup> They brought suit in the United States District Court for the Eastern District of New York against Americo Norberto Peña-Irala, also a citizen of Paraguay, for wrongfully causing the death of their seventeen-year-old son, Joelito.<sup>28</sup> Peña, who was then Inspector General of Police in Asuncion, Paraguay, allegedly kidnapped Joelito and tortured him to death.<sup>29</sup> The Filartigas claimed

Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.

<sup>19</sup> The Torture Victim Protection Act is codified at 28 U.S.C. § 1350 and includes an explicit local remedies rule. Congress enacted the TVPA to codify the cause of action for torture recognized by the Second Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. See *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995).

<sup>20</sup> 28 U.S.C.A. § 1350 (Westlaw 2008).

<sup>21</sup> See CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 22 (Cambridge Univ. Press 2d ed. 2004) (stating that the requirement that local remedies be exhausted was recognized in the early history of Europe, before the modern nation state had been born).

<sup>22</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964) (finding that exhaustion is generally a recognized feature of international law).

<sup>23</sup> See *Id.*

<sup>24</sup> *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citing *Bolchos v. Darrell*, 3 Fed. Cas. No.1,607, p. 810 (D.S.C.1795); *Adra v. Clift*, 195 F. Supp. 857, 863-65 (D. Md.1961)).

<sup>25</sup> *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

<sup>26</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>27</sup> *Id.* at 878.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

that Peña tortured and killed Joelito because of his father's political beliefs and activities.<sup>30</sup> Despite Peña's claim that the court lacked subject-matter jurisdiction, the court interpreted the law of nations "not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>31</sup> Holding that the right to be free from torture is among the rights recognized under the law of nations, the Second Circuit allowed the claim to proceed.<sup>32</sup> The Filartigas were eventually awarded \$10,385,364 in damages.<sup>33</sup>

A similar case, *Tel-Oren v. Libyan Arab Republic*, was decided by the District of Columbia Circuit four years after *Filartiga*. In March 1978, survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel brought suit in a federal district court against the government of Libya, the Palestine Liberation Organization ("PLO"), the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.<sup>34</sup> The district court dismissed the case for lack of subject-matter jurisdiction.<sup>35</sup> A per curiam decision by a three-judge panel of the D.C. Circuit affirmed dismissal of the claim, although each judge filed a separate concurring opinion on the reason why dismissal was proper.<sup>36</sup> Judge Harry T. Edwards adhered to the legal principles established in *Filartiga* but affirmed dismissal of the case against the PLO because he did not believe the law of nations should be read as imposing the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law.<sup>37</sup> In contrast, Judge Robert Bork strictly construed the ATCA and opined that the case should be dismissed for lack of jurisdiction because neither the law of nations nor any of the relevant treaties provided a cause of action that could be

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<sup>30</sup> *Id.*

<sup>31</sup> *Filartiga*, 630 F.2d at 881.

<sup>32</sup> *Id.* at 887.

<sup>33</sup> The district court dismissed the action for want of subject-matter jurisdiction. On appeal, the Second Circuit held that the Alien Tort Statute provided federal jurisdiction, and reversed. Following remand, defendant took no further part in the action and a default judgment was granted. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

<sup>34</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring). Generally, "under 'color' of law" means "under 'pretense' of law." For example, a government employee acts under color of state law while acting in an official capacity or while exercising his or her responsibilities pursuant to state law. *See West v. Atkins*, 487 U.S. 42, 50 (1988).

asserted in U.S. courts.<sup>38</sup> Judge Roger Robb believed the case should be dismissed as posing a nonjusticiable political question.<sup>39</sup>

Twelve years later, in 1995, the Second Circuit broadened the scope of the ATCA to include liability for certain private, individual actions.<sup>40</sup> In *Kadic v. Karadžić*, Croat and Muslim citizens of Bosnia-Herzegovina brought suit against Radovan Karadžić, another citizen of Bosnia-Herzegovina who was the President of the self-proclaimed Bosnian-Serb “Republika Srpska.”<sup>41</sup> The plaintiffs alleged that they were victims, and representatives of victims, of “various atrocities including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution . . . as part of a genocidal campaign conducted in the course of the Bosnian Civil War” that Karadžić directed.<sup>42</sup> The court held that the trial court had subject-matter jurisdiction and that Karadžić could be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.<sup>43</sup> Following this decision, the number of lawsuits being brought against private individuals and corporations increased dramatically.<sup>44</sup>

The broad reading of the ATCA in *Filartiga* and *Tel-Oren* that allowed for a modern interpretation of the law of nations and claims to be pursued against private individuals opened the door to further ATCA litigation. Although many cases were brought against both private and governmental actors, most of those cases were dismissed for lack of subject-matter jurisdiction or failure to state a cognizable violation of the law of nations.<sup>45</sup> Without guidance from either Congress or the Supreme

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<sup>38</sup> *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring).

<sup>39</sup> *Id.* at 823 (Robb, J., concurring). Under the political-question doctrine, controversies that involve policy decisions and value determinations constitutionally committed for resolution to the legislative branch or the executive branch are deemed nonjusticiable. See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

<sup>40</sup> Hannah R. Bornstein, Note, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L. J. 1077, 1084 (2007).

<sup>41</sup> *Kadic v. Karadžić*, 70 F.3d 232, 237 (2d Cir. 1995).

<sup>42</sup> *Id.* at 236-37.

<sup>43</sup> *Id.* at 236.

<sup>44</sup> Hannah R. Bornstein, Note, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L. J. 1077, 1084 (2007).

<sup>45</sup> For example, in *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), plaintiff brought suit against a mining corporation, alleging that the corporation engaged in environmental abuses, human rights violations, and cultural genocide. The district court dismissed his claims and the Fifth Circuit agreed, holding in part that cultural genocide “has [not] achieved universal acceptance as a discrete violation of international law.” *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999). In another similar case, *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), Peruvian residents brought suit against another mining corporation, alleging that pollution from the mine had caused plaintiffs’ lung disease, thereby violating their right to life, health, and sustainable development. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 (2d Cir.

Court, the lower federal courts have been virtually on their own to decide how to interpret the ATCA. Despite the increase in litigation since *Filartiga*, it was not until 2003 that the United States Supreme Court agreed to hear a case on the issue. In *Sosa v. Alvarez-Machain*, the Court interpreted the scope of the ATCA for the first time.<sup>46</sup>

In *Sosa*, an agent of the Drug Enforcement Administration was captured while on assignment in Mexico, tortured over the course of two days, and then murdered.<sup>47</sup> Finding that Alvarez, a Mexican physician, was present at the scene and prolonged the agent's life in order to extend the interrogation and torture, a federal grand jury indicted Alvarez in 1990 and issued a warrant for his arrest.<sup>48</sup> When negotiations with the Mexican government for extradition proved fruitless, the Drug Enforcement Administration approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial.<sup>49</sup> A group of Mexicans, including Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him to Texas, where federal officers arrested him.<sup>50</sup> Alvarez was subsequently acquitted and returned to Mexico.<sup>51</sup> In 1993, while in Mexico, Alvarez brought suit against the agents responsible for his arrest, alleging that his arbitrary detention amounted to a violation of the law of nations under the ATCA.<sup>52</sup>

After a thorough examination of the history of the ATCA and its legislative history, the Supreme Court concluded that the best reading of the ATCA is that the founders intended it to furnish jurisdiction for a "relatively modest set of actions alleging violations of the law of nations."<sup>53</sup> Therefore, although the ATCA is a jurisdictional statute that creates no new causes of action, the Court held that claims based on the present-day law of nations are allowed so long as they rest on a "norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we

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2003). The district court dismissed for lack of subject-matter jurisdiction, finding the plaintiffs had not alleged a violation of customary international law. The Second Circuit affirmed the dismissal. *Id.* at 254-55.

<sup>46</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>47</sup> *Id.* at 697. The Drug Enforcement Administration is an agency of the U.S. Department of Justice whose mission is to enforce the controlled-substances laws and regulations of the United States. See Department of Justice, Drug Enforcement Administration, <http://www.usdoj.gov/dea/index.htm> (last visited Feb. 17, 2008).

<sup>48</sup> *Sosa*, 542 U.S. at 697-98.

<sup>49</sup> *Id.* at 698.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 720.



have recognized.”<sup>54</sup> The Court gave no further direction about what might satisfy this standard, but it acknowledged that a judge deciding what constitutes a cognizable international norm would have a substantial amount of discretion.<sup>55</sup> The Court ultimately held that Alvarez’s claim of arbitrary detention was not sufficiently entrenched in customary international law to constitute a violation of the law of nations under the ATCA.<sup>56</sup>

Although *Sosa* provided a standard for determining when courts have jurisdiction over claims brought under the law of nations, it did not provide clear guidelines. Furthermore, *Sosa* failed to address several other issues posed by ATCA litigation, such as whether local remedies must first be exhausted before a claim can be filed in U.S. courts. While the *Sosa* Court briefly declared in a footnote that it would certainly consider the requirement in an appropriate case, it did not impose an exhaustion requirement in that case.<sup>57</sup> Thus, the question whether the ATCA should be read to include an exhaustion requirement was left open.

## B. THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW

Historically, the local remedies rule developed in the context of diplomatic protection. In the early stages of international law, states could extend diplomatic protection to their nationals “wherever they might be located, including another State’s territory.”<sup>58</sup> Although termed “diplomatic protection,” states were not limited to providing protection only through diplomacy.<sup>59</sup> Rather, states were allowed to adopt any means to protect their nationals, including the use of force.<sup>60</sup> However, before a state could take up its nationals’ claims against another state, local remedies had to be exhausted.<sup>61</sup>

More recently, the local remedies rule has been incorporated in contemporary international instruments on human rights protection.<sup>62</sup>

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<sup>54</sup> *Sosa*, 542 U.S. at 724-25.

<sup>55</sup> *Id.* at 726.

<sup>56</sup> *Id.* at 738.

<sup>57</sup> *Id.* at 733.

<sup>58</sup> Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT’L & COMP. L.J. 821, 823 (1996).

<sup>59</sup> *Id.* at 824.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Organization of American States, American Convention on Human Rights, art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 155 (requiring that the remedies under domestic law have been pursued and exhausted in accordance with the generally recognized

Currently, the local remedies rule requires that before resort can be made to international law, claimants must first seek local remedies or show that such remedies are unavailable.<sup>63</sup> As the rule has evolved, recognition of interests of the alien, such as avoiding undue hardship and excessive expense in pursuing local remedies, has resulted in exceptions being made to the operation of the rule.<sup>64</sup> Thus, as generally applied, the local remedies rule only requires exhaustion of domestic remedies that are available, sufficient, and effective.<sup>65</sup>

The requirement that domestic remedies must only be exhausted if they are available, sufficient, and effective works as an exception to the local remedies rule. Regarding availability, the requirement means just what it says: that an aggrieved alien must only exhaust those remedies that are available or accessible to him.<sup>66</sup> However, there are few cases outside the human rights arena in which an international court or organ has decided that domestic remedies have not been available.<sup>67</sup> Regarding sufficiency and effectiveness, local remedies must only be exhausted when they are sufficient or effective for the object sought.<sup>68</sup> Generally, the state alleging non-exhaustion of remedies must prove the existence of specific domestic remedies that should have been utilized.<sup>69</sup> In discussing the rule in *The Velásquez Rodríguez Case*, the Inter-American Court of Human Rights stated:

[W]hen it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from

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principles of international law before admission of a petition); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), 213 U.N.T.S. 222, amended by Protocol No. 3, E.T.S. 55 and Protocol No. 8, E.T.S. 118 (requiring that the court only review matters after all domestic remedies have been exhausted, according to the generally recognized rules of international law); International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, para. 3, Jan. 4, 1969, 660 U.N.T.S. 195 (“The Committee shall deal with a matter referred to it . . . after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.”).

<sup>63</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964).

<sup>64</sup> CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 202 (Cambridge Univ. Press 2d ed. 2004).

<sup>65</sup> *Id.* at 181.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 182.

<sup>68</sup> *Id.* at 192.

<sup>69</sup> See *The Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (Ser. C.) No. 4, ¶ 60 (Judgment of July 29, 1988), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

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invoking internal remedies that would normally be available to others . . . resort to those remedies becomes a senseless formality.<sup>70</sup>

Thus, the sufficiency and effectiveness requirements operate so that a claimant in a foreign State is not required to exhaust justice if there is no justice to exhaust.<sup>71</sup>

Other situations in which the non-exhaustion of local remedies will be excused include where there is undue delay in the administration of justice or a likelihood of further damage or repetition of injury to the alien.<sup>72</sup> Furthermore, local remedies need not be exhausted when it would be obviously futile to seek to do so.<sup>73</sup> The futility exception is often interpreted broadly and can include the following situations: when the court or local organ lacks jurisdiction over the issue raised by the alien; when a national law justifying the acts of which the alien complains would have to be applied by the court or local organ, thus rendering recourse to them obviously futile; when the local courts are not independent; when the remedies available will not satisfy the object sought by the claimant; and when due process of law in the legal system of the host state is absent.<sup>74</sup>

## II. ANALYSIS OF *SAREI V. RIO TINTO, PLC*

Alexis Holyweek Sarei filed suit in a United States District Court against Rio Tinto PLC and Rio Tinto Limited on November 2, 2000.<sup>75</sup> On January 21, 2001, Rio Tinto filed a motion to dismiss the plaintiff's complaint, on numerous grounds, including failure to exhaust local remedies.<sup>76</sup> All of the plaintiffs' claims were ultimately dismissed.<sup>77</sup> In a decision issued before the case was granted en banc rehearing, a divided three-judge panel of the Ninth Circuit concluded that the ATCA does not currently include an exhaustion requirement and that most of

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<sup>70</sup> *Id.* at ¶ 68.

<sup>71</sup> CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 202 (Cambridge Univ. Press 2d ed. 2004).

<sup>72</sup> *Id.* at 210-12.

<sup>73</sup> *Id.* at 204.

<sup>74</sup> *See Id.* at 204-10.

<sup>75</sup> *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1127 (C.D. Cal. 2002), *aff'd in part, rev'd in part, vacated in part*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>76</sup> *Id.* at 1129.

<sup>77</sup> *Id.* at 1208-09.

plaintiffs' claims could move forward.<sup>78</sup> However, the dissent opined that an exhaustion requirement should be required.<sup>79</sup>

#### A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Rio Tinto PLC, a British corporation, and Rio Tinto Limited, an Australian corporation (collectively "Rio Tinto"), are part of an international mining group headquartered in London.<sup>80</sup> Rio Tinto operates numerous mines throughout the world, including in the United States.<sup>81</sup> During the 1960s, Rio Tinto decided to build the Panguna Mine.<sup>82</sup> Because building the mine would displace numerous indigenous people and destroy enormous portions of the rainforest, Rio Tinto allegedly needed the cooperation and support of the PNG government.<sup>83</sup> To obtain their approval, Rio Tinto allegedly offered the PNG government 19.1% of the mine's profits.<sup>84</sup> Plaintiffs assert that this financial arrangement in effect turned the mine into a joint venture between Rio Tinto and the PNG government.<sup>85</sup>

Mine operations began in 1972.<sup>86</sup> By 1983, the mine was one of the world's largest and generated huge profits for both Rio Tinto and the PNG government.<sup>87</sup> However, during these years of operations, billions of tons of toxic mine wastes were allegedly generated and dumped onto the land and into PNG waterways.<sup>88</sup> The sheer magnitude of the waste generated through operation of the mine allegedly destroyed the entire ecosystem of the island, which in turn undermined the health of the islanders.<sup>89</sup> Furthermore, Rio Tinto allegedly employed thousands of local islanders to work at the mine, most of whom were black and paid slave wages because they were seen as inferior and expendable.<sup>90</sup>

After years of environmental destruction, the islanders launched attacks against the mine's infrastructure in order to close the mine and

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<sup>78</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>79</sup> *Id.* at 1225 (Bybee, J., dissenting).

<sup>80</sup> *Sarei*, 221 F. Supp. 2d at 1121.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Sarei*, 487 F.3d at 1198.

<sup>85</sup> *Sarei*, 221 F. Supp. 2d at 1121.

<sup>86</sup> *Id.* at 1122.

<sup>87</sup> *Id.* at 1123.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1123-24.

<sup>90</sup> *Id.* at 1124.

stop the degradation.<sup>91</sup> As the violence grew worse, the mine was indeed forced to close.<sup>92</sup> In response, Rio Tinto allegedly threatened to close the mine definitively and withdraw all investment from PNG if the PNG government did not stop the uprising.<sup>93</sup> Rio Tinto allegedly made this demand knowing that because of its financial stake in the operation of the mine, the PNG government would respond with whatever force was necessary.<sup>94</sup> A PNG defense force was sent to quell the uprising, which resulted in a massacre that killed many civilians.<sup>95</sup> In response, the islanders consolidated their army and called for secession from the rest of PNG, and the island erupted in civil war.<sup>96</sup>

During the ensuing war, PNG allegedly committed human rights abuses at the behest of Rio Tinto.<sup>97</sup> In April 1990, the PNG government imposed a blockade against the island to isolate it and force the revolutionaries to surrender.<sup>98</sup> The blockade allegedly prevented medicine, clothing and other essential supplies from reaching the people of Bougainville.<sup>99</sup> One of the few reporters who witnessed the events in Bougainville noted: “Some [Bougainvilleans] were killed in combat or in civilian massacres . . . , but most died because of the lack of basic medical treatment caused by the blockade on an island where all hospitals were soon destroyed and all qualified doctors dead or gone.”<sup>100</sup> The nine-year civil war on the island of Bougainville ended in 1997 after claiming some 20,000 lives.<sup>101</sup>

Alexis Holyweek Sarei is a California resident who lived in Bougainville between 1973 and 1987.<sup>102</sup> On November 2, 2000, he filed a class action in the United States District Court for the Central District of California against Rio Tinto PLC and Rio Tinto Limited on behalf of himself and twenty-one individuals who continue to reside in Bougainville or elsewhere in PNG.<sup>103</sup> Plaintiffs alleged numerous causes

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<sup>91</sup> *Sarei*, 221 F. Supp. 2d at 1125.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1125-26.

<sup>95</sup> *Id.* at 1126.

<sup>96</sup> *Sarei*, 221 F. Supp. 2d at 1126.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Central Intelligence Agency, *The World Factbook: Papua New Guinea*, <https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html> (last visited Nov. 19, 2007).

<sup>102</sup> *Sarei*, 221 F. Supp. 2d at 1127.

<sup>103</sup> *Id.*

of action for acts that took place during the operation of the mine as well as the ensuing civil war.<sup>104</sup> Claims included the following: crimes against humanity; war crimes and murder; violations of the rights to life, health, and security of the person; racial discrimination; cruel, inhumane, and degrading treatment; a violation of international environmental rights; and a consistent pattern of gross violations of human rights.<sup>105</sup> While plaintiffs acknowledged that the war crimes and crimes against humanity claims were based on actions taken by the PNG government rather than Rio Tinto directly, they alleged that because of the joint venture partnership forged between Rio Tinto and the PNG government, Rio Tinto may be held vicariously liable for those actions.<sup>106</sup> Additionally, plaintiffs alleged claims for negligence, public and private nuisance, strict liability, equitable relief, and medical monitoring.<sup>107</sup> Several of the plaintiffs also pleaded specific facts in the complaint to support their claims.<sup>108</sup> For example, Sarei was allegedly exposed to toxic chemicals and tailings at the mine and in the rivers, which caused serious health problems.<sup>109</sup> Also, he was placed under arrest, had a gun put to his forehead, and was ordered to leave the island.<sup>110</sup>

On January 26, 2001, Rio Tinto filed a motion to dismiss the plaintiffs' complaint.<sup>111</sup> Claimed grounds for dismissal included lack of

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1142.

<sup>107</sup> *Id.* at 1127.

<sup>108</sup> *Sarei*, 221 F. Supp. 2d at 1128.

<sup>109</sup> *Id.* Tailings are the ground-up rock remaining after mined ore has been removed and processed. Tailings are usually just crushed rock. However, many tailings contain toxic residues left over from the extraction process. See Beth Leibowitz, *The New Gold Rush: Mine Tailings in Southeast Alaska and Perversion of the Clean Water Act*, 27 U. MICH. J.L. REFORM 919, 920 (1994) (citing Office of External Affairs, EPA Region 8, Mining Wastes in the West, Fact Sheet (Aug. 1987)).

<sup>110</sup> *Sarei*, 221 F. Supp. 2d at 1128. This is just one of several examples of claims raised by individual class members. Gregory Kopa, the paramount chief of the Moroni village that was located in the area that is now the Panguna Mine, also stated:

Despite our people's resistance, land for the mine was forcefully taken from our people. My mother was at the forefront of the fight against bulldozers and other heavy machinery used to force our people off the land. Where our village was is now a big hole. We have lost our land, the environment is destroyed, fishing rivers [are] contaminated and destroyed, sacred grounds [have been] destroyed and normal village life [has been] disturbed and destroyed through relocation. Relocation was done against our wishes to places unsuitable for farming, etc. A number of people in my village have died of unknown diseases. During the blockade, many people including babies died of preventable diseases including malaria, diarrhea, etc.

*Id.* For more examples, see *Id.*

<sup>111</sup> *Id.* at 1129.

subject-matter jurisdiction, forum non conveniens, and nonjusticiability.<sup>112</sup> Nonjusticiability grounds included reliance on three separate principles: the political question doctrine, the act of state doctrine, and the doctrine of international comity.<sup>113</sup> Defendants also claimed that plaintiffs had failed to exhaust local remedies.<sup>114</sup>

The district court held that it had subject-matter jurisdiction over the claims of crimes against humanity, war crimes, racial discrimination, and violation of international environmental rights.<sup>115</sup> It denied defendant's motion to dismiss on forum non conveniens grounds.<sup>116</sup> The court also found that plaintiffs were not required to exhaust domestic remedies before filing suit in the United States.<sup>117</sup> However, it dismissed plaintiffs' environmental tort and racial discrimination claims on act of state and international comity grounds and dismissed all of plaintiffs' claims on the basis of the political question doctrine.<sup>118</sup>

## B. THE NINTH CIRCUIT PANEL'S ANALYSIS

### 1. *The Majority Opinion*

A divided three-judge panel of the Ninth Circuit, in a decision issued before the court granted en banc rehearing, concluded that the court had subject-matter jurisdiction to try most of plaintiffs' claims.<sup>119</sup> Regarding the question of justiciability, the majority held that the district court erred in dismissing all of the plaintiffs' claims as nonjusticiable political questions and in dismissing plaintiffs' racial discrimination

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<sup>112</sup> *Id.* To obtain dismissal on forum non conveniens grounds, a defendant must demonstrate that an adequate alternative forum exists, and that private and public interests favor trial in the alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

<sup>113</sup> The "act of state" doctrine precludes a United States court from adjudicating claims if doing so would require that the court invalidate a foreign sovereign's official acts within its own territory. *See Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1346 (9th Cir. 1997). International comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Under this doctrine, courts sometimes defer to the interests or laws of a foreign country in declining jurisdiction.

<sup>114</sup> *Sarei*, 221 F. Supp. 2d at 1132.

<sup>115</sup> *Id.* at 1208.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1139.

<sup>118</sup> *Id.* at 1208-09.

<sup>119</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

claim under the act of state doctrine.<sup>120</sup> The majority also vacated for reconsideration of the district court's dismissal of the plaintiffs' environmental claim under the act of state doctrine and its dismissal of the racial discrimination and environmental claims under the international comity doctrine.<sup>121</sup> Regarding exhaustion, the majority affirmed the district court's holding that no exhaustion requirement currently exists under the ATCA.<sup>122</sup>

In deciding whether the exhaustion requirement applied to claims brought under the ATCA, the majority noted that "congressional intent is of 'paramount importance' to any exhaustion inquiry."<sup>123</sup> To determine whether Congress intended to include an exhaustion requirement, the panel majority looked at the express language used in the ATCA, the legislative history, and the recent congressional activity.<sup>124</sup> The majority found that there is no dispute that the statute does not explicitly require exhaustion and there is complete silence in the legislative history on the issue of exhaustion.<sup>125</sup> In analyzing the recent congressional enactment of the TVPA, the majority found it could not discern what Congress intended by including an exhaustion requirement in the TVPA but failing to amend the ATCA to include an exhaustion requirement.<sup>126</sup> Therefore, the majority held it could not conclude that legislative intent supported including an exhaustion requirement in the ATCA.<sup>127</sup>

The majority then stated that where Congress has not clearly required exhaustion, sound judicial discretion governs.<sup>128</sup> In exercising its discretion, the majority concluded that "the balance tips against judicially engrafting an exhaustion requirement onto a statute where Congress has declined to do so, and in an area of international law where the Supreme Court has called for the exercise of judicial caution rather

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1214.

<sup>124</sup> *Sarei*, 487 F.3d at 1214.

<sup>125</sup> *Id.* at 1215.

<sup>126</sup> The panel majority found that Congress "may have affirmatively declined to add an exhaustion requirement to the ATCA while incorporating such a requirement in the TVPA." Or, Congress may have "intended or understood the exhaustion requirement to apply to international law-based causes of action across-the-board." *Id.* at 1218.

<sup>127</sup> *Id.*

<sup>128</sup> *Sarei*, 487 F.3d at 1214.



than innovation.”<sup>129</sup> Accordingly, the panel majority left it “to Congress or the Supreme Court to take the next step, if warranted.”<sup>130</sup>

## 2. *The Dissent*

The dissent of Judge Bybee focused specifically on whether the ATCA should be read to include an exhaustion requirement.<sup>131</sup> First, Judge Bybee’s dissent discussed whether Congress had statutorily precluded exhaustion.<sup>132</sup> Judge Bybee agreed with the majority panel that there is no express requirement of exhaustion and the legislative history is silent on the issue of exhaustion and also agreed that where Congress has not explicitly required exhaustion, sound judicial discretion governs.<sup>133</sup> However, in contrast to the panel majority, Judge Bybee relied on the TVPA’s inclusion of an express exhaustion requirement as evidence that the ATCA should be read to include an exhaustion requirement.<sup>134</sup> Judge Bybee explained that Congress codified torture as a specific cause of action in the TVPA, which eliminated any question of an available remedy for torture claims in federal courts.<sup>135</sup> Therefore, he reasoned, it would make little sense for Congress to restrict these same claims by adding an exhaustion requirement if the ATCA did not already require exhaustion.<sup>136</sup> Judge Bybee concluded that it would make more sense to think that Congress included an exhaustion requirement in the TVPA because it thought such a requirement was consistent with international law and therefore already a requirement under the ATCA.<sup>137</sup>

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<sup>129</sup> *Id.* at 1219 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“These reasons argue for great caution in adapting the law of nations to private rights.”)).

<sup>130</sup> *Id.* at 1223 (citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005) (per curiam) (“Although we find its disposition to have been in error, . . . the Seventh Circuit felt bound to apply [precedent], even though it expressed grave doubts. . . . This was a prudent course. It neither forced the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried the issue by proceeding in a summary fashion. By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review.”)).

<sup>131</sup> *Sarei*, 487 F.3d at 1224 (Bybee, J., dissenting). Judge Jay S. Bybee is perhaps best known for his role in signing and sending the now-infamous August 1, 2002, torture memorandum to Alberto Gonzales while Bybee was Assistant Attorney General for the Office of Legal Counsel. This memorandum was written before now-Judge Bybee was confirmed as a federal appellate judge on March 13, 2003. See generally Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9 (2005).

<sup>132</sup> *Sarei*, 487 F.3d at 1227.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1228.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1229.

Second, Judge Bybee discussed international norms. He first noted that exhaustion is a well-established principle of international law that has been recognized both domestically and abroad.<sup>138</sup> Judge Bybee then discussed the scope of the exhaustion requirement as applied in various treaties and international tribunals and explored the exhaustion requirement through reference to several United Nations reports, International Court of Justice opinions, and international and domestic law journals.<sup>139</sup> Judge Bybee concluded that “such a fundamental tenet of international law deserves recognition in U.S. courts bound to apply the law of nations under the ATCA.”<sup>140</sup>

Third, Judge Bybee analogized to the exhaustion rule applied domestically. He noted that under domestic law, exhaustion was originally a prudential or judge-made rule designed to prevent premature interference in state proceedings.<sup>141</sup> He further found that the exhaustion requirement applies in the habeas corpus context to prevent unnecessary conflict between state and federal courts, in the tribal context so as not to impair the sovereignty of the Indian tribes, and in the administrative context to express executive and administrative autonomy.<sup>142</sup> Judge Bybee opined that an exhaustion requirement should be recognized for ATCA claims for the same reasons that it is required domestically in the state, tribal, and administrative settings: first, requiring exhaustion demonstrates respect for the courts of a separate sovereign or the administrative agencies of a coordinate branch of government; second, requiring exhaustion permits such courts or agencies to apply their own expertise and to correct any errors in their own procedures; and last, requiring exhaustion mandates that the parties refine their issues and develop the record in a way that will aid decision if the case does come before a U.S. court.<sup>143</sup> Furthermore, Judge Bybee stated that courts should be wary of impinging on the right of the legislative and executive branches to manage foreign affairs, and that requiring exhaustion would preserve the role of the court in a government of separated powers.<sup>144</sup> Judge Bybee concluded that even if international law did not require exhaustion, it should be required as a matter of domestic law.<sup>145</sup>

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<sup>138</sup> *Sarei*, 487 F.3d at 1231.

<sup>139</sup> *See Id.* at 1231-34.

<sup>140</sup> *Id.* at 1236.

<sup>141</sup> *Id.* at 1225.

<sup>142</sup> *Id.* at 1225-26.

<sup>143</sup> *Id.* at 1238.

<sup>144</sup> *Sarei*, 487 F.3d at 1245.

<sup>145</sup> *Id.* at 1225.

### III. CONGRESS SHOULD AMEND THE ALIEN TORT CLAIMS ACT TO INCLUDE AN EXHAUSTION REQUIREMENT

Neither the Supreme Court nor any of the courts of appeals have decided the issue of whether the ATCA should be read as including an exhaustion requirement. The Supreme Court in *Sosa* said that the ATCA does not create causes of action, but looks to non-domestic sources of law to create such causes of action.<sup>146</sup> Therefore, since claims brought under the ATCA are defined by international law, these claims should be subject to an exhaustion requirement because international law generally requires exhaustion of local remedies.

There is no explicit statutory requirement in the ATCA that plaintiffs exhaust local remedies before filing suit in federal court.<sup>147</sup> Nor is there any indication in the legislative history that Congress intended to impose any such requirement.<sup>148</sup> Therefore, both the district court and the Ninth Circuit panel refused to find that ATCA plaintiffs must first exhaust all available domestic remedies before filing suit in the United States.<sup>149</sup> However, regardless of whether the court should or can read an exhaustion requirement into the ATCA, Congress should amend the statute to clearly require exhaustion of local remedies before claims alleging a violation of the law of nations can be brought in U.S. courts under the ATCA. Congress should do so for three reasons: first, including an exhaustion requirement would bring the ATCA in accord with customary international law and the law of nations; second, including an exhaustion requirement would show respect for the sovereignty of foreign states and prevent unjustified interference in the resolution of a foreign conflict; and last, including an exhaustion requirement would serve to strengthen human rights law abroad and the rule of law in general.

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<sup>146</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

<sup>147</sup> *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1137 (C.D. Cal. 2002), *aff'd in part, rev'd in part, vacated in part*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007); see 28 U.S.C.A. § 1350 (West 2008).

<sup>148</sup> *Sarei*, 221 F. Supp. 2d at 1137.

<sup>149</sup> See *Id.* at 1139 (holding that plaintiffs are not required to demonstrate that they have exhausted local remedies, or that doing so would be futile, in order to state a claim under the ATCA); *Sarei*, 487 F.3d at 1223 (concluding it would be inappropriate to superimpose an exhaustion requirement where none has been required before).

A. INCLUDING AN EXHAUSTION REQUIREMENT WOULD BRING THE ATCA IN ACCORD WITH CUSTOMARY INTERNATIONAL LAW AND THE LAW OF NATIONS

The exhaustion of local remedies rule is a well-known principle of customary international law.<sup>150</sup> As Judge Bybee stated in his dissent, “Such a fundamental tenet of international law deserves recognition in U.S. courts bound to apply the law of nations under ATCA.”<sup>151</sup> This important feature of international law should not be excluded from a statute that creates a cause of action for violations of the law of nations.

The Restatement (Third) of Foreign Relations Law of the United States says that “a state may pursue formal, bilateral remedies . . . only after the individual claiming to be a victim of a human rights violation has exhausted available remedies under the domestic law of the accused state.”<sup>152</sup> Provisions requiring exhaustion of local remedies are commonly found in international human rights instruments.<sup>153</sup> For example, the American Convention on Human Rights refers to the exhaustion of “remedies under domestic law”<sup>154</sup> and the European Convention on Human Rights requires the exhaustion of “all domestic remedies.”<sup>155</sup> The African Charter on Human and Peoples’ Rights states that the African Commission on Human and People’s Rights “can only

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<sup>150</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964) (finding that exhaustion is generally a recognized feature of international law and holding that before resort can be made to international law, claimants are required to first seek local remedies or show that such remedies are unavailable); *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21) (finding that the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law); RESTATEMENT (THIRD) OF 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.”).

<sup>151</sup> *Sarei*, 487 F.3d at 1236 (Bybee, J., dissenting).

<sup>152</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. d (1987).

<sup>153</sup> See A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT’L L.J. 1, 3 (1977); see also Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT’L L.J. 1245, 1265-67 (2006).

<sup>154</sup> Organization of American States, American Convention on Human Rights, art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 155 (requiring that the remedies under domestic law have been pursued and exhausted in accordance with the generally recognized principles of international law before admission of a petition).

<sup>155</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), 213 U.N.T.S. 222, amended by Protocol No. 3, E.T.S. 55 and Protocol No. 8, E.T.S. 118 (requiring that the court only review matters after all domestic remedies have been exhausted, according to the generally recognized rules of international law).

deal with a matter submitted to it after making sure that all existent local remedies have been exhausted, unless the procedure of achieving these remedies would otherwise be unjustifiably prolonged.”<sup>156</sup> The International Convention on the Elimination of All Forms of Racial Discrimination also incorporates a local remedies rule,<sup>157</sup> as does the International Covenant on Civil and Political Rights.<sup>158</sup> Furthermore, most treaties on economic cooperation and many on the pacific settlement of disputes include a local remedies rule.<sup>159</sup> The Rome Statute that created the International Criminal Court (“ICC”), which adjudicates alleged human rights violations, also requires exhaustion.<sup>160</sup> The ICC effectively operates as a court of last resort under the doctrine of complementary jurisdiction, whereby the Court is subsidiary or complementary to national courts and jurisdiction may only be exercised in limited circumstances.<sup>161</sup>

The exhaustion of local remedies rule is a well-known principle of customary international law and is routinely applied in international law tribunals, especially tribunals that enforce human rights.<sup>162</sup> Much of the same reasoning justifying an exhaustion requirement in the international setting also applies in ATCA cases, where U.S. courts decide claims that rely on international law. Including a local remedies rule would bring the ATCA in accord with customary international law.

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<sup>156</sup> African Charter on Human and Peoples’ Rights, art. 50, June 27, 1981, 1520 U.N.T.S. 217, 255.

<sup>157</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, para. 3, Jan. 4, 1969, 660 U.N.T.S. 195 (“The Committee shall deal with a matter referred to it . . . after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.”).

<sup>158</sup> International Covenant on Civil and Political Rights, art. 41 (I) (c), G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, 57, U.N. Doc. A/6316 (1966) (treaty came into force on March 23, 1976) (“The Committee shall not consider any communication from an individual unless it has ascertained that . . . the individual has exhausted all available domestic remedies. This shall not be the rule where application of the remedies is unreasonably prolonged.”).

<sup>159</sup> A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT’L L.J. 1, 6 (1977).

<sup>160</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF/183/9, art. 20(3) (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

<sup>161</sup> See *Id.* at art. 1.

<sup>162</sup> See Organization of American States, American Convention on Human Rights, art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 155; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), 213 U.N.T.S. 222, amended by Protocol No. 3, E.T.S. 55 and Protocol No. 8, E.T.S. 118; African Charter on Human and Peoples’ Rights, art. 50, June 27, 1981, 1520 U.N.T.S. 217, 255.

B. INCLUDING AN EXHAUSTION REQUIREMENT WOULD SHOW RESPECT FOR THE SOVEREIGNTY OF FOREIGN STATES AND PREVENT UNJUSTIFIED INTERFERENCE IN THE RESOLUTION OF A FOREIGN CONFLICT

International law is premised on the notion of states as sovereign actors.<sup>163</sup> Thus, under international law, states are allowed to pass laws and regulate activity that takes place within their borders.<sup>164</sup> In international law, this respect for state sovereignty serves as the foundation of the local remedies rule.<sup>165</sup> Similarly, another fundamental norm of international law is the duty of nonintervention.<sup>166</sup> This norm also functions as a premise behind the exhaustion requirement in international law through the general rule that states must be given a chance to redress alleged injuries occurring within their territory before the claim rises to the international plane.<sup>167</sup> The importance of upholding the entrenched international law norms of sovereignty and nonintervention is equally applicable in claims brought under the ATCA, where U.S. courts are adjudicating claims based on international law.

Including an exhaustion requirement would show respect for the sovereignty of foreign states. Even though many ATCA claims, such as the ones asserted in *Sarei*, are brought against private actors, the actions of private actors are often entwined with the actions of the government. In fact, several ATCA claims involve private actors that were acting with governmental approval or support.<sup>168</sup> In *Sarei*, the acts of Rio Tinto were

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<sup>163</sup> U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note (1987).

<sup>164</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987).

<sup>165</sup> CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 200 (Cambridge Univ. Press 2d ed. 2004).

<sup>166</sup> The principle or norm of nonintervention has a long history in international law and is expressed in several international law treaties and agreements. See, e.g., Charter of the Organization of American States Apr. 30, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, Art. 18 (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”); United Nations Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”); United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”).

<sup>167</sup> See AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW, at 13.

<sup>168</sup> See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Iwanowa v.*

so intertwined with those of the government that Plaintiffs brought their crimes against humanity and war crimes claims on the basis of vicarious liability and sought to show that Rio Tinto and the PNG government were joint venture partners.<sup>169</sup> Even in cases that do not rely on claims of vicarious liability that directly implicate the government, the fact that such acts took place within their territory at least partially implicates the government for complicity in allowing the acts to occur. Requiring exhaustion would give deference to the domestic decisions made by a sovereign state and thereby show respect to those states as sovereign actors.

Furthermore, requiring exhaustion of local remedies before claims can be brought in U.S. courts would give sovereign states the opportunity to solve the problem domestically before plaintiff could resort to outside adjudication based on international law, thus preventing unjustified interference in the resolution of a foreign conflict. In *Sarei*, the PNG government indicated to the U.S. State Department when the case was first filed that it did not want the United States to move forward with the claims because litigation of the action would interfere with internal affairs and might disrupt peace efforts.<sup>170</sup> Although this position was possibly rescinded, this indicates that, at a minimum, the PNG government experienced some discomfort with the idea of such a claim proceeding in U.S. courts while the peace process was still underway.<sup>171</sup> In a country at war or emerging from a long period of civil war, exercising jurisdiction in U.S. courts over these types of claims may do more harm than good.<sup>172</sup>

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Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

<sup>169</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>170</sup> *See Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1190-91 (C.D. Cal. 2002) (“[The U.S. State Department’s statement of interest] clearly express[es] the view . . . that adjudication of this lawsuit will negatively impact United States foreign relations with PNG. . . . [O]n August 30, 2001, the PNG government and representatives of Bougainville signed a peace agreement. . . . [I]mplementing this agreement ‘will require sustained effort’ . . . and that, consequently, countries participating in the peace process, particularly PNG, have expressed concern that litigation of the action might disrupt the peace effort.”), *aff’d in part, rev’d in part, vacated in part*, 487 F.3d 1193 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>171</sup> *See Sarei*, 487 F.3d at 1207 n.15 (“The plaintiffs have submitted recent letters from members of PNG’s government urging that the suit will *not* harm or affect the ongoing Bougainville peace process. . . . [¶] Whether these letters are properly authenticated is in dispute.”).

<sup>172</sup> For example, in *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2007), individual plaintiffs sued various multinational corporations doing business in South Africa under the TVPA and ATCA for alleged injuries arising out of the practice of apartheid in South Africa. Penuell Mpapa Maduna, the Minister of Justice and Constitutional Development for South Africa, submitted a declaration to the court stating that the proceedings interfered with South Africa’s sovereign efforts to address matters in which it has the predominant interest. *See Khulumani v. Barclay Nat’l Bank*

Moreover, exercising jurisdiction before local remedies have been exhausted imparts a tone of judicial imperialism that suggests the United States does not respect or recognize a foreign state's ability to administer justice within its own territory.<sup>173</sup> This seeming imperialism may heighten hostility toward the United States and expose the hypocrisy of judging the acts of foreign states or actors when the United States itself will not even fully submit to the jurisdiction of international law.<sup>174</sup> Requiring exhaustion before adjudicating claims under the ATCA based on international law would show appropriate respect and deference to foreign states by allowing them to attempt to resolve cases before they rise to the international level. This would help to eliminate the imperial tone otherwise set by allowing U.S. courts to decide cases before domestic processes have been exhausted.

By allowing a state to address and redress violations of international law that occurred in its territory, exhaustion of local remedies contributes to the maintenance of the international law system and therefore stable international relations.<sup>175</sup> Requiring exhaustion for claims brought under the ATCA allows a state to preserve its dignity by providing an opportunity to remedy a wrong before it escalates into a public controversy.<sup>176</sup> By requiring exhaustion for claims brought under the

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Ltd., 504 F.3d 254, 259 (2007). Mr. Maduna further stated that these cases interfered with the policy embodied by the South African Truth and Reconciliation Commission, which "deliberately avoided a 'victor's justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici Curiae* 7a, ¶ 3.2.1.

<sup>173</sup> See *Sarei v. Rio Tinto, PLC*, 487 F.3d at 1239-40 (9th Cir. 2007) (Bybee, J., dissenting) (quoting Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 176 (2003)).

<sup>174</sup> Recent examples of the United States refusing to submit itself to the jurisdiction of international law include incidents with the Kyoto Protocol and the Rome Statute creating the ICC. The Kyoto Protocol regulates the emissions of greenhouse gases. Although the United States is a signatory to the treaty, political leaders within the country have expressed no interest in implementing the treaty and it has not been ratified. See Cory C. Miller, Comment, *Developments in Climate Change in 2004: Three Cheers for Russia*, 2004 COLO. J. INT'L ENVTL. L. & POL'Y 143, 145 (2004). The Rome Statute established the world's first permanent international criminal tribunal and was entered into force on July 1, 2002. Although the United States signed the statute on Dec. 31, 2000, in May 2002 the United States declared that it has no intention of becoming a party to the Rome Statute; it has not been ratified. See Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 104 (2005).

<sup>175</sup> Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1255-57 (2006).

<sup>176</sup> *Id.*



ATCA, the United States can show respect for the sovereignty of foreign states and uphold the principle of nonintervention.

C. INCLUDING AN EXHAUSTION REQUIREMENT WOULD SERVE TO STRENGTHEN HUMAN RIGHTS LAW ABROAD AND THE RULE OF LAW IN GENERAL

In international law, the exhaustion rule is part of an international effort to encourage countries to provide effective domestic remedies for the enforcement of human rights.<sup>177</sup> Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights stress that the local remedies rule is directly related and complementary to the state's duty to provide effective local remedies.<sup>178</sup> Similarly, a central rationale for modern alien tort litigation is to promote and enhance human rights protection around the world.<sup>179</sup> Including an exhaustion requirement for claims brought under the ATCA in U.S. courts would force more cases to be handled at the domestic level, thus expressing fidelity to the original purpose of the rule while advancing human rights law and the rule of law in general in countries where gross human rights violations occur.<sup>180</sup>

Moreover, requiring exhaustion before claims can be brought in U.S. courts allows other nations the chance to address their own conflicts and craft their own solutions.<sup>181</sup> Therefore, as the International Court of Justice has stated, “[B]efore resort may be had to an international court . . . it has been considered necessary that the State where the violation occurred should have an opportunity to reach it by its own means, within the framework of its own domestic legal system.”<sup>182</sup> Furthermore, the courts in states where violations take place are more familiar with the customs and norms of the society and are, therefore, in a better place to ensure the proper dispensation of justice.<sup>183</sup>

Analysts from the global south have argued that certain rules of international law and human rights law are inapplicable to their peoples

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<sup>177</sup> See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1240 (9th Cir. 2007) (Bybee, J., dissenting), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>178</sup> A.A. CANCADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 4 (Cambridge Univ. Press 1983).

<sup>179</sup> Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 *FORDHAM INT'L L.J.* 1245, 1288 (2006).

<sup>180</sup> *Id.*

<sup>181</sup> *Sarei*, 487 F.3d at 1240 (Bybee, J., dissenting).

<sup>182</sup> *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21).

<sup>183</sup> Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 *FORDHAM INT'L L.J.* 1245, 1292 (2006).

because these countries did not participate in the creation of those laws and the laws do not accurately reflect these countries' societal norms.<sup>184</sup> Thus, it is important that as human rights law develops, individual nations be given the chance to meaningfully participate in its creation and formation. Allowing and encouraging individual states to provide redress in their own way for human rights abuses will help accomplish this goal.

South Africa's Truth and Reconciliation Commission is an example of how domestic remedies have been utilized in the past to promote democracy and the rule of law. The primary objective of South Africa's Truth and Reconciliation Commission was:

[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights . . . ; [to grant] amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past . . . ; [to afford] victims an opportunity to relate the violations they suffered; [to take] measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights . . . .<sup>185</sup>

Ultimately, the overall goal of the Commission was to promote democratic justice by way of a non-adversarial, truth-telling process.<sup>186</sup> From a western perspective, the adversarial process is the preferred way of dealing with gross human rights abuses.<sup>187</sup> However, westerners generally reach this conclusion because of their experience with stable democracies.<sup>188</sup> In contrast, South Africa was transitioning from authoritarianism to a democracy.<sup>189</sup> Despite the absence of a judicial declaration, the Commission is generally recognized as being a success and having done more for closure and understanding than the imposition of responsibility upon a person or group by a governmental official or tribunal would have.<sup>190</sup> The South African Truth and Reconciliation

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<sup>184</sup> *Id.* at 1292-93.

<sup>185</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 pmbl., available at <http://www.info.gov.za/acts/1995/a87-95.pdf>.

<sup>186</sup> *See Id.*

<sup>187</sup> Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Facade*, 95 AM. J. INT'L L. 32, 35 (2001).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See, e.g.*, Justice Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C.J. INT'L L. & COM. REG. 799, 807-8 (2001) (stating that the Commission facilitates the processes of creating, restoring and establishing a balance of fairness and trust and that the

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Commission thus provides an example of how a domestic forum can more appropriately deal with local violations of human rights than an international tribunal or U.S. courts. Allowing and encouraging nations to deal with human rights abuses within their own borders on their own terms ultimately helps to strengthen the rule of law throughout the world and international human rights law specifically.

## IV. CONCLUSION

By allowing claims for violations of the law of nations to be brought in U.S. courts, the ATCA serves a very important purpose. However, because the claims are based on the law of nations, the statute inherently relies on international law. Therefore, the ATCA should uphold important international law norms. Including an exhaustion requirement would bring the statute in accord with international law, show respect for the important international law principles of sovereignty and nonintervention, and help develop and strengthen international human rights law. These principles deserve recognition and inclusion in a statute that is based on the law of nations.

As a general matter, exhausting local remedies or showing that one of the exceptions to the exhaustion requirement applies may make cases brought under the ATCA harder to prosecute.<sup>191</sup> In *Sarei*, including an exhaustion requirement likely would not change the outcome of the case. However, the ATCA was passed over 200 years ago. Rather than force the courts to grapple with the interpretation and application of the ATCA, Congress should amend the statute to clearly include an exhaustion requirement.

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Commission functions extraordinarily well). Justice Sachs is a Justice of the Constitutional Court of South Africa; Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 77 (2002) (stating that the Truth and Reconciliation Commission was so successful that countries around the world want to copy it.). *But see* Paul Lansing and Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 787 (1998) (stating that while the Truth Commission accomplished much in the way of allowing victims of human rights abuses to move forward individually, a great deal more is needed for the country to move forward.); Jeanne M. Woods, *Reconciling Reconciliation*, UCLA J. INT'L L. & FOREIGN AFF. 3 81, 126 (1998) (stating that the Truth and Reconciliation process cannot achieve the asserted goals of providing a remedy, justice, healing, and unity.).

<sup>191</sup> Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1252 (2006).

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