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AN ANALYSIS OF WHETHER ALIENS SHOULD BE REQUIRED TO EXHAUST LOCAL REMEDIES BEFORE SUING IN THE UNITED STATES UNDER THE ALIEN TORT STATUTE

INTRODUCTION

Human rights atrocities are too often committed in foreign nations against their own citizens. With the Alien Tort Statute, the United States has provided these foreign tort victims a forum in U.S. federal courts. However, implicit in the availability of a U.S. forum is the requirement that victims exhaust remedies available within the judicial systems of their native countries.

In Part I of this Note, I explore the text of the Alien Tort Statute and similar statutes to glean Congress's intent in offering U.S. federal courts as a potential forum for foreign tort victims. In Part II, I investigate the case law which has shaped and defined the Alien Tort Statute to determine how courts should interpret its text. In Part III, I look to case law which has required exhaustion. In Part IV, I examine the current controlling case evaluating an exhaustion requirement. Finally, in Part V, I discuss whether an exhaustion element should be required based on Parts I-IV of this Note. I conclude that exhaustion should be read into the text of the Alien Tort Statute.

I. ALIEN TORT STATUTE AND RELATED STATUTES

A. *Alien Tort Statute*

The Alien Tort Statute (ATS) states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹ The ATS, therefore, grants jurisdiction² to district courts to

1. Alien's Action for Tort (“Alien Tort Statute” or “ATS”), 28 U.S.C. § 1350 (2000).

2. The Supreme Court held that the ATS did not create substantive law, but was a mere grant of jurisdiction. The Court looked to the placement of the ATS in Section 9 of the Judiciary Act of 1789, which was “exclusively concerned with Federal-court jurisdiction” and to the common law at the time, which recognized alien tort claims. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14 (2004). Though the Court was inconclusive as to Congressional intent, it stated that the ATS was to take practical effect immediately, as opposed to waiting for a future statute to expressly authorize the cause of action, citing the first Congress's anxiety regarding the laws of other nations. *Id.* at 714–20.

recognize claims by aliens for international law violations committed against them. The ATS was passed by the first Congress as part of the Judiciary Act of 1789.³ Although the ATS has been a part of American jurisprudence for centuries, little is known about Congress's intent in enacting it.⁴ In fact, until recently, relatively few cases were brought under the ATS.⁵ As I discuss in greater detail in Part II.C of this Note, in 2004, the Supreme Court was given the opportunity to examine the ATS.⁶ The Court narrowed the ATS to apply only to claims "based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms⁷ we have recognized."⁸ It is important to keep this in mind and to remain faithful to the text of the ATS and its general scope while exploring an exhaustion requirement.

B. *Other Similar Statutes*

Human rights violations committed in foreign nations are primarily addressed in U.S. federal courts under three statutes: the ATS (the focus of this Note), the Torture Victim Protection Act (TVPA), and the Foreign Sovereign Immunities Act (FSIA). Though there is virtually no evidence of Congress's intent in creating the ATS, examining the language of these other statutes and Congress's rationale for their enactment sheds some light on the purposes implicit in the ATS. The reasoning behind the creation of these other statutes also provides a better understanding of why an exhaustion element should be read into the text of the ATS.

3. The original text of the ATS stated that the "new federal 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.'" *Sosa*, 542 U.S. at 712–13 (quoting Judiciary Act § 9, 1 Stat. 73, 77 (1789)).

4. *IIT v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The court stated that "[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came." *Id.*

5. *See id.* (discussing the scarce number of cases finding jurisdiction under the ATS). *See infra* Part II, discussing major cases in the history of the ATS.

6. *See Sosa*, 542 U.S. at 712–18 (examining the text and history of the ATS).

7. These paradigms include "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724.

8. *Id.* at 725.

I. Torture Victim Protection Act

In 1991, Congress enacted the TVPA⁹ to create an “unambiguous cause of action” for torture victims in foreign nations.¹⁰ Notably, the TVPA was codified in the historical notes section of the ATS and was not set apart as a separate statute.¹¹ Thus, the TVPA could be construed as a portion of the ATS. The TVPA provides a remedy for aliens and U.S. citizens alike who were tortured in foreign nations.¹² The TVPA contains both a statute of limitations and a requirement for the exhaustion of local remedies before an alien can sue in U.S. courts.¹³

Congress enacted the TVPA to ensure victims of torture in foreign nations a cause of action in U.S. courts.¹⁴ However, Congress limited the recognition of such claims by requiring the exhaustion of local remedies.¹⁵ A U.S. House of Representatives legislative report stated that, “[t]his requirement ensures that U.S. courts will not intrude in cases more

9. Torture Victim Protection Act of 1991 (“TVPA”), Pub. L. No. 102-256 (1992) (codified at 28 U.S.C. § 1350 (2000), historical and statutory notes). The TVPA states:

Sec. 2. Establishment of civil action.

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

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

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

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

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

Id.

10. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1091 (9th Cir. 2006). The court stated that “[t]he TVPA created an ‘unambiguous’ cause of action for official torture and extrajudicial killing—both violations of customary international law—committed outside the United States.” *Id.*

11. *See TVPA*, *supra* note 9.

12. *See id.* (using the term “individual” rather than limiting the availability of the statute only to foreign nationals). *See also Sarei*, 456 F.3d at 1092 (discussing the enactment of the TVPA). The *Sarei* Court stated that, “[u]nlike the AT[S], the TVPA is available to aliens *and* U.S. citizens.” *Id.* (“While the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.” (citing H.R. REP. NO. 102-367 at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86)).

13. *See TVPA*, *supra* note 9 (establishing the exhaustion and time limitations in sections (b) and (c) of the Act).

14. *See Sarei*, 456 F.3d at 1091–92 (discussing Congress’s rationale in creating the TVPA).

15. *See TVPA*, *supra* note 9 (stating expressly that TVPA claims cannot be brought before a U.S. court if the plaintiff has “not exhausted adequate and available remedies” in the country where the claim arose).

appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.”¹⁶ These Congressional concerns apply equally to the ATS and strongly support implying exhaustion in the ATS.

2. *Foreign Sovereign Immunities Act*

The FSIA¹⁷ also addresses human rights violations in foreign nations. For example, the FSIA provides that a foreign state is not immune from trials in U.S. courts when the foreign state has allowed or participated in terrorist acts.¹⁸ Congress included an exhaustion element in the text of the FSIA by requiring plaintiffs to afford the sovereign a “reasonable opportunity” to arbitrate the claim.¹⁹

With little legislative history to reference regarding Congress’s intent in enacting the ATS, the analysis of these other, more recent statutes is revealing. While Congress did not expressly include an exhaustion element in the ATS, the requirement in the TVPA and other similar statutes suggests that an exhaustion element should be required when torts committed in other countries are tried in U.S. courts. Congressional concerns such as intrusion on adequate foreign forums, unnecessary burdens on U.S. courts, and development of remedies in foreign nations are equally relevant to ATS claims and support an exhaustion requirement.

II. CASE HISTORY DEFINING THE ATS

This section examines the case law that has shaped the contours of the ATS. Although the ATS was enacted in 1789, cases upholding jurisdiction

16. *Sarei*, 456 F.3d at 1092 (quoting H.R. REP. NO. 102-367 at 5, *reprinted in* 1992 U.S.C.C.A.N. at 87–88).

17. Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602 *et. seq.* (2000).

18. *See* 28 U.S.C. § 1605(a)(7) (2000). This section of the FSIA states that:

not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, support or resources (as defined in section 2339A of title 18) for such an act is such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency

Id.

19. 28 U.S.C. § 1605(a)(7)(B)(i) (2000). This provision of FSIA states that:

the court shall decline to hear a claim under this paragraph . . . [if] (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration. *Id.*

under the ATS before 1960 are scarce.²⁰ Historically, many courts did not take jurisdiction under the ATS because the defendant's violations did not fall squarely within the "law of nations" language of the statute.²¹ Prior to 1960, only one case upheld jurisdiction under the ATS.²² *Blonchos v. Darrel*,²³ a case from 1795, involved a treaty violation, which allowed it to fit clearly into the text of the ATS. After *Blonchos*, cases have carefully evaluated the scope of the "law of nations" language in the ATS. This eventually led to the creation of the TVPA, which expressly requires exhaustion. The caution courts have historically taken to maintain the narrow scope of the ATS supports requiring exhaustion in ATS claims.

A. *IIT v. Vencamp, Ltd.*

In 1975, the Second Circuit Court of Appeals addressed the scope of the "law of nations" language of the ATS. In *IIT v. Vencamp, Ltd.*,²⁴ the plaintiff, a Luxembourg investment trust, sued a Bahamian corporation for fraud, conversion, and corporate waste.²⁵ Although the court admitted that virtually no legislative history existed regarding the ATS,²⁶ it refused to assume that the "Eighth Commandment 'Thou shalt not steal' is part of the law of nations."²⁷ The court began narrowing and formulating a test to determine whether a claim violated the "law of nations" under the statute.²⁸ The court stated that

a violation of the law of nations arises only when there has been a "violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."²⁹

20. *IIT v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (discussing the line of ATS cases leading up to this case).

21. *See id.*

22. *See id.* (listing the only case that the court could find prior to the current case upholding jurisdiction as *Khedivial Line, S.A.E. v. Seafarers' Union*, 278 F.2d 49 (2d Cir. 1960)).

23. *Blonchos v. Darrel*, 3 F.Cas. 810 (D.S.C. 1795).

24. *IIT*, 519 F.2d 1001.

25. *Id.* at 1003.

26. *See id.* at 1015 (discussing how the ATS is a "legal Lohengrin").

27. *Id.*

28. *Id.*

29. *Id.* (quoting *Lopez v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)) (emphasis in original).

B. *Filartiga v. Pena-Irala*

In 1980, the Second Circuit again addressed the ATS, this time holding that torture violated the “law of nations” regarding human rights.³⁰ This holding was codified in the TVPA in 1991. In *Filartiga v. Pena-Irala*,³¹ the plaintiff’s³² son was tortured to death by the defendant, the Inspector General of Police in Asuncion, Paraguay. The court looked to the U.S. Supreme Court for the “appropriate sources of international law.”³³ The court stated that, “there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.”³⁴

C. *Sosa v. Alvarez-Machain*

While these cases narrowed and defined the ATS, courts did not address whether an exhaustion requirement should be read into the ATS. In *Sosa v. Alvarez-Machain*,³⁵ the seminal case in ATS jurisprudence, the U.S. Supreme Court expressly chose not to address the exhaustion requirement.³⁶ The Court instead disposed of the case by limiting the availability of the ATS to violations that fall under customary international law.³⁷

30. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (upholding jurisdiction over a torture claim brought by plaintiffs against an official of the Republic of Paraguay).

31. *Filartiga*, 630 F.2d 876.

32. The appellants were citizens of the Republic of Paraguay who had applied for permanent political asylum in the United States. *Id.* at 878.

33. *Id.* at 880. The court listed these appropriate sources, quoting the Supreme Court: “The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’” *Id.* (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

34. *Filartiga*, 630 F.2d at 881.

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

36. See *id.* at 733 n.21 (2004). The *Sosa* Court stated that the

requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

Id. (citations omitted).

37. *Id.* at 733. The Court stated that the ATS claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have

The *Sosa* plaintiff was a Mexican national who was indicted by a federal grand jury for torture and murder.³⁸ Unable to apprehend the criminal, the Drug Enforcement Administration communicated with the Mexican government and hired Mexican nationals to seize the *Sosa* plaintiff and immediately bring him to the United States.³⁹ The Mexican nationals apprehended the *Sosa* plaintiff from his home and kept him in custody for one night. The next day a private plane brought the *Sosa* plaintiff to the United States where he was promptly arrested by U.S. officials.⁴⁰ The Supreme Court held that this did not constitute a violation of customary international law.⁴¹

Though it did not directly address an exhaustion requirement, the Supreme Court's ATS discussion is relevant to an exhaustion analysis. First, the Court held that the ATS is purely jurisdictional and does not create its own cause of action.⁴² However, the Court also held that at the time of its enactment, the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."⁴³

Second, the Supreme Court chose to set a "high bar to new private causes of action for violating international law. . . ."⁴⁴ In determining whether a plaintiff's claim violates the "law of nations," the Court advised

made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 733–34 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

38. *See Sosa*, 542 U.S. at 697 (stating that the *Sosa* plaintiff was a Mexican physician who had used his medical skills to prolong the life of a man who was tortured in Guadalajara over a two-day period before being murdered. The U.S. District Court for the Central District of California had issued a warrant for his arrest).

39. *See id.* at 698 (stating that the DEA entered into negotiations with the Mexican Government for assistance in the arrest, but when those failed, it hired Mexican nationals to bring the *Sosa* plaintiff into the United States).

40. *See id.* (stating that after being abducted, the *Sosa* plaintiff was merely held overnight in a motel before being flown to El Paso, Texas, where he was arrested by federal officers).

41. *See id.* at 738 (holding that a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy").

42. *See id.* at 712 (stating that "we agree the statute is in terms only jurisdictional"). The Court went on to hold that

although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

Id. at 724.

43. *Id.* at 712.

44. *Id.* at 727.

a “restrained conception of the discretion a federal court should exercise in considering a new cause of action” under the ATS.⁴⁵ The Court recommended that district courts use “judicial caution” when interpreting a plaintiff’s claim as violating customary international laws.⁴⁶ The Court’s rationale for these admonitions include changes in common law,⁴⁷ the role of federal courts in creating common law,⁴⁸ the preference for the legislature to create private rights of action,⁴⁹ current foreign relation implications,⁵⁰ and the lack of a congressional mandate for judicial creativity.⁵¹ The Court stated that the above reasons “argue for great caution in adapting the law of nations to private rights.”⁵²

Notably, the Court did not want to completely “close the door to further independent judicial recognition of actionable international norms”⁵³ The Court recognized that federal courts should be able to “properly identify some international norms as enforceable”⁵⁴ The Court went on to state that Congress affirmed judicial creation of

45. *Id.* at 725.

46. *Id.* at 729. The Court argued for “great caution in adapting the law of nations to private rights.” *Id.* at 728.

47. *See id.* at 725 (stating that courts now recognize that common law is “not so much found or discovered as it is either made or created.” This change “counsels restraint in judicially applying internationally generated norms.”).

48. *See id.* at 726 (stating that the *Erie* doctrine led to the “general practice” that courts should “look for legislative guidance before exercising innovative authority over substantive law”).

49. *See id.* at 727 (stating that “this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases”). The Court went on suggest that “[w]hile the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.” *Id.*

50. *See id.* at 728 (insisting that “new norms of international law would raise risks of adverse foreign policy consequences”). In addition, the Court stated that

[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.

Id. at 727.

51. *Id.* at 728 (understanding that “[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity”).

52. *Id.*

53. *Id.* at 729. The Court went on to state that “judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.” *Id.*

54. *Id.* at 730. The Court looked to the first Congress and the framers of the Constitution who used the ATS to show that the United States recognized the law of nations. The Court also stated that the ATS “was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations” *Id.* at 731 n.19.

international norms with the enactment of the TVPA.⁵⁵ Thus, the Supreme Court sought to allow district courts some discretion in determining whether an ATS claim should be sustained. However, the Court advised caution and warned that an enactment of Congress would alter judicial decisions.⁵⁶

The Court concluded by determining the test for assessing whether a claim violates the “law of nations.”⁵⁷ The Court held that ATS claims should only arise from torts that violate “historical paradigms” of international law.⁵⁸ Though the Supreme Court avoided examining an exhaustion requirement, their warning to lower courts to limit ATS claims, while not closing the door on judicial discretion, supports implying exhaustion into the ATS.

III. CASES REQUIRING EXHAUSTION

While the above cases began defining the ATS, none of them directly addressed whether the exhaustion of local remedies should be read into the text of the ATS. This section explores international human rights cases expressly requiring exhaustion, though not based on the text of the ATS. Most of the following cases based dismissal on *forum non conveniens*, which involves a similar analysis to exhaustion.

Courts dismiss actions on *forum non conveniens* grounds when an action would be more properly brought in another forum.⁵⁹ The analysis is virtually identical to what courts use when determining whether an exhaustion requirement has been satisfied. Therefore, these cases are useful in analyzing an ATS exhaustion requirement.

55. *See id.* at 731 (“Congress, however, has not only expressed no disagreement with our view of the proper exercise of judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.”).

56. *Id.* at 731–32 (“It is enough to say that Congress may . . . modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”).

57. *See id.* at 731 (setting forth the standard for assessing claims under the ATS).

58. *Id.* at 732. The Court held that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.” *Id.*

59. *See* BLACK’S LAW DICTIONARY (8th ed. 2004) (“The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.”). The *forum non conveniens* doctrine “permits a court to dismiss a claim, ‘even if the court is a permissible venue with proper jurisdiction over the claim’, in order to allow the action to be tried elsewhere for the convenience of litigants and witnesses.” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335 (S.D.N.Y. 2003) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000)).

A. *Abdullahi v. Pfizer, Inc.*

In *Abdullahi v. Pfizer, Inc.*,⁶⁰ the Second Circuit did not address the plaintiffs' ATS claims but remanded the case on *forum non conveniens* grounds for a determination of whether an "adequate alternative forum" exists.⁶¹ In this case, Nigerian parents claimed that the biotech firm, Pfizer, used experimental antibiotics on their children during a meningitis outbreak in Nigeria.⁶² The parents claimed that Pfizer failed to obtain informed consent before administering the experimental treatment and that as a result, their children were seriously injured or died.⁶³ The court analyzed the plaintiffs' ability to obtain justice in the foreign forum⁶⁴ and remanded the case to the district court to determine whether a Nigerian case dismissed by Nigerian courts precluded the plaintiffs from obtaining justice.⁶⁵ Although the court did not determine whether the plaintiffs' claims were cognizable under the ATS, the application of the *Abdullahi* alternative forum analysis ultimately led to dismissal on *forum non conveniens* grounds.⁶⁶

60. *Abdullahi v. Pfizer, Inc.*, 77 Fed. Appx. 48 (2d Cir. 2003).

61. *Id.* at 51–53. The Court considered the following three factors for *forum non conveniens* analysis: "(i) the level of deference owed to the plaintiffs; (ii) the availability of an adequate alternative forum; and (iii) whether the public and private interest factors weigh in favor of an adjudication in the plaintiffs' chosen forum or in the defendant's proposed alternative." *Id.* at 51 (citing *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 500 (2d Cir. 2002)).

62. *See id.* at 51 (stating that Pfizer, the world's largest pharmaceutical corporation, had established a treatment center in Nigeria during a meningitis epidemic where, plaintiff's claim, it was conducting biomedical research experiments by using a new antibiotic on Nigerian children).

63. *See id.* at 51 (claiming that Pfizer failed to notify the parents of more conventional free treatments and that, as a result of the treatment, many of the children suffered death or serious injuries including paralysis, deafness, and blindness).

64. The court stated that in most cases "an alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute." *Id.* at 52 (citations omitted). However, the court went on to describe that "[i]n rare cases . . . if the plaintiff shows that conditions in the foreign forum plainly demonstrate that plaintiffs are highly unlikely to obtain basic justice therein, a defendant's *forum non conveniens* motion must be denied." *Id.* (citations omitted).

65. *See id.* (examining the plaintiff's claim that the Nigerian court system was corrupt and that a parallel action was dismissed by Nigerian courts, and finding that there was insufficient specific information to make a determination). When evaluating the plaintiff's claims of corruption in the Nigerian court system, the court stated that "conclusory allegations of corruption or bias on the part of the foreign forum will not prevent a dismissal on *forum non conveniens* grounds." *Id.* (citations omitted).

66. The court ultimately granted Pfizer's motion to dismiss, holding that the claim did not implicate sufficient international law violations to fall within the ATS. Additionally, the court held that Nigeria was an adequate forum for the case and therefore the case was dismissed on *forum non conveniens* grounds. *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 506 (S.D.N.Y. 2005).

B. Adamu v. Pfizer, Inc.

Adamu v. Pfizer, Inc.,⁶⁷ a companion case to *Abdullahi*,⁶⁸ is based on the same facts as and similar claims to those in *Abdullahi*.⁶⁹ As it did with the *Abdullahi* decision,⁷⁰ the court dismissed the plaintiffs' claims on *forum non conveniens* grounds, as well as under the ATS, and held that choice of law favors Nigerian law.⁷¹

The court first looked at the ATS to determine whether it had jurisdiction over the plaintiff's claim. In holding that it did not, the court analyzed whether the plaintiff's claim "adequately plead[ed] a violation of international law."⁷² The court determined that the law of nations does not "prescribe a remedy" and therefore, medical experimentation does not violate the "law of nations."⁷³ The court went on to declare that, "[w]hether and how the United States reacts to violations of international law are domestic questions that determine if a cause of action exists."⁷⁴ Therefore, in determining international law norms, courts look to whether the local nation provides a remedy.

The court also determined that the case could be dismissed on *forum non conveniens* grounds.⁷⁵ The court stated that "[d]ismissal is appropriate where 'the balance of convenience tilts strongly in favor of trial in the

67. *Adamu*, 399 F. Supp. 2d 495.

68. *See id.* at 497 n.1 (stating that *Abdullahi* was a "related action involving the same underlying facts").

69. *Id.* at 498. The court explained more thoroughly the atrocities committed by Pfizer. The court explained how Pfizer, without the consent of the parents, separated the Nigerian children into two groups for medical experimentation of the drug Trovan. In order to enhance the results of Trovan, Pfizer administered the control group only one-third of the recommended dose of the control drug, Ceftriaxone. Once the drugs were administered, Pfizer failed to regularly analyze the patients' blood tests, a standard practice in drug testing, allowing the patients' side effects to become permanent before recording them. Furthermore, Pfizer left after two weeks of testing without any follow-up tests. Both children given the experimental drug and the intentionally underdosed control drug suffered death or serious injury. *Id.*

70. The court stated that it "incorporates the facts and rationales of the decisions in [*Abdullahi*]." *Id.* at 497 n.1.

71. *See id.* at 506 (discussing the alternative grounds for dismissing the plaintiff's claims).

72. *Id.* at 500.

73. *Id.* at 501. The court stated that the "law of nations does not itself create a right of action because it does not prescribe a remedy." *Id.*

74. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d. Cir. 1995)). In *Kadic*, the court stated that "[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations." *Id.*

75. *See Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 506 (S.D.N.Y. 2005) (granting Pfizer's motion to dismiss for *forum non conveniens*).

foreign forum.”⁷⁶ The court found that Nigeria was an adequate forum⁷⁷ and that both public and private interest factors weighed in favor of the trial taking place in Nigeria.⁷⁸ Public interest factors included congestion in the local courts, the unfairness of imposing jury duty on a forum with no relation to the action, the interest of the other country in having matters considered in its own forum, and the desire to avoid problems arising from the application of foreign law and conflict of laws rules.⁷⁹ Private interest factors included the forum’s access to evidence and witnesses,⁸⁰ the “availability of compulsory process,” and the costs and length of litigation.⁸¹ Not only did the court hold that, in this case, Nigeria was the more appropriate forum, but it also stated that, “[p]laintiffs’ choice of forum is not entitled to a greater deference because they have alleged international law violations.”⁸²

These *forum non conveniens* factors would be similar to those considered for exhaustion under the ATS. Furthermore, the understanding that plaintiffs are not given greater deference due to international law violations in their home country supports a finding that exhaustion should be required in ATS cases.

The court also determined that Nigerian law was proper under a conflict of laws analysis.⁸³ Though the conclusion that Nigerian law governs the litigation is insufficient to determine that an adequate forum

76. *Id.* at 504 (quoting *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991)). The court explained the test for *forum non conveniens*:

First, the defendant must demonstrate the existence of an adequate alternative forum. If an adequate forum is available, the court then considers the public and private interest factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947), and its progeny Based on those factors, a court examines whether a trial in the plaintiff’s chosen forum would create oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or whether the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems. After considering the private interest factors concerning the convenience of the litigants and public interest factors affecting the convenience of the forum, a court may, in the exercise of its sound discretion, dismiss the case.

Id. (citations omitted) (second alteration in original).

77. The court set the adequate forum standard at “rare circumstances where the potential difficulties of the foreign forum render the remedy offered by that forum clearly unsatisfactory.” *Id.* (citations omitted).

78. *See id.* at 504–06 (holding that the private and public interest factors weigh in favor of dismissing the action).

79. *Id.* at 504 (listing the *Gilbert* public interest factors).

80. Notably, much of the evidence and witnesses were located at Pfizer’s headquarters in Connecticut. *Id.* at 505–06.

81. *Id.* at 505 (listing the *Gilbert* private interest factors).

82. *Id.* at 505 n.6.

83. *See id.* at 503 (stating that “Nigerian—not Connecticut—substantive law governs”).

exists in Nigeria, it is probative. The Nigerian judges' expertise in the laws of Nigeria benefited the litigants. Here there was "no dispute that Nigerian law affords redress for Plaintiffs' claims."⁸⁴ The court looked to tort law doctrines⁸⁵ to find that the best forum "has the most significant relationship to the occurrence and the parties."⁸⁶ Factors relevant to the court's decision included the interests and reasonable expectations of the international judicial systems, policies relevant to the field of law, and difficulties in applying the law.⁸⁷ The court also examined factors relevant to contacts with the forum. These included where the injuries took place, where the improper actions of the defendant took place, where the plaintiffs and defendants reside, and where the parties' relationship was centered.⁸⁸ The court ultimately applied Nigerian law "because the Nigerian contacts to this litigation are stronger than Connecticut's."⁸⁹ Because ATS cases concern violations against foreign nationals in their home countries, the factors for determining choice of law are also useful in determining whether an exhaustion element should be satisfied in ATS claims.

84. *Id.* at 501.

85. The court first examined the *lex loci delicti* doctrine, which states that the "substantive rights and obligations arising out of a tort controversy are determined by the law of the place of injury." *Id.* at 502 (quoting *O'Connor v. O'Connor*, 519 A.2d 13, 15 (Conn. 1986)). However, the court also stated that it would not apply the doctrine where the "strict application of *lex loci delicti* would frustrate 'the legitimate expectations of the parties' or undermine 'an important policy of this state . . .'" *Id.*

86. *Id.* (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(1) (1969)).

87. The court relied on the Restatement, which provides the "factors relevant to the choice of the applicable rule of law . . ." *Id.* (quoting RESTATEMENT (SECOND), CONFLICT OF LAWS § 6). These factors include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Id.

88. *Id.* at 503.

89. *Id.*

C. Presbyterian Church of Sudan v. Talisman Energy, Inc.

In *Presbyterian Church of Sudan v. Talisman Energy*,⁹⁰ the district court held that the foreign forum was inadequate under *forum non conveniens* and determined that the case would remain in U.S. federal courts under the ATS.⁹¹ Here, an energy company⁹² “collaborated with Sudan in ‘ethnically cleansing’⁹³ civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities.”⁹⁴ The court found all of the plaintiffs’ claims valid under the ATS⁹⁵ before turning to a *forum non conveniens* analysis.

The court proceeded to conclude that Sudan was not a viable alternative forum for the plaintiffs’ claims.⁹⁶ The court looked at whether an adequate alternative forum existed.⁹⁷ The court considered the opinions of experts on Sudanese law⁹⁸ and the “self-evident fact that, if plaintiffs’

90. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

91. The court also analyzed whether a corporation’s activities in a foreign forum could be brought under an ATS claim. *Id.* at 308. The court held that “a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law, particularly when their actions constitute *jus cogens* violations.” *Id.*

92. Talisman was the “largest independent Canadian oil producer” with “operations in Canada, the United States, the North Sea, Indonesia, Algeria, Trinidad, Colombia, and Sudan.” *Id.* at 299–300.

93. “This policy of ‘ethnic cleansing’ was aimed at non-Muslim, African residents of southern Sudan, and entailed extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians.” *Id.* at 296.

94. *Id.*

95. After determining that a private corporation could be held liable under the ATS, the court examined whether the plaintiffs’ claims fell under the “law of nations.” The court held that conspiracy and aiding and abetting were actionable. *Id.* at 320. The court held that torture was also actionable provided the “plaintiffs can show that these acts were committed for any reason based on discrimination and with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.* at 326. Slavery, war crimes, and (in this case) treatment of ethnic and religious minorities, were all held to be violations of the laws of nations. *Id.* at 326–27. The court went on to address the plaintiffs’ standing as individuals and as a class to assert the ATS claims. *Id.* at 331–35.

96. *See id.* at 336 (finding that “Sudan is not an appropriate forum under *forum non conveniens* analysis”).

97. *See id.* at 336 (stating that a *forum non conveniens* assessment requires a two-step test). For this test, “the court must [first] determine whether an adequate alternative forum exists. Second, if such a forum exists, the court must undertake a balancing test and weigh several factors involving the private interests of the parties and the public interests at stake.” *Id.* The court stated that “the burden is on the defendant to show that the factors tilt ‘strongly’ in favor of trial in a foreign forum.” *Id.* (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000)).

98. The energy company’s expert outlined the “detail[ed] procedures and jurisprudence of the Sudanese judicial system,” but failed to indicate whether “the Sudanese judicial system is fair and free from corruption.” *Id.* The plaintiffs’ expert stated that “plaintiffs, who are non-Muslims, enjoy greatly reduced rights in Sudan under the system of Islamic law” and concluded that “the trial of this case in Sudan will result in a total failure of justice.” *Id.* at 335–36 (citations omitted).

allegations are true, plaintiffs would be unable to obtain justice in Sudan and might well expose themselves to great danger in trying to do so”⁹⁹ Thus, in determining whether the plaintiffs should sue in the foreign forum, the court used the plaintiffs’ allegations of governmental atrocities to support its finding that the foreign forum was inadequate.

D. Ehanhoro v. Abubakar

In *Ehanhoro v. Abubakar*,¹⁰⁰ the Seventh Circuit remanded the plaintiffs’ ATS action, commanding that the suit instead be brought under the TVPA and that the exhaustion requirement be met.¹⁰¹ In this case, Nigerians sued the former head of state of Nigeria for human rights violations including murder and torture.¹⁰² The court began its analysis by deciding it had jurisdiction over the claim¹⁰³ and then turned to examine the ATS.¹⁰⁴ The court held that the plaintiffs’ claims should be brought

99. *Id.* at 336. The court stated that it would be “rather surprising if the government of Sudan conducted a war of ‘ethnic cleansing’ against plaintiffs and at the same time granted them a fair judicial process to remedy those injuries.” *Id.* The court also surmised that “it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them.” *Id.* The court then quoted a prior case, stating that:

[o]ne of the difficulties that confront victims of torture under color of a nation’s law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as ‘not our business.’

Id. (quoting *Wiwa*, 226 F.3d at 106).

100. *Ehanhoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005).

101. *See id.* at 886 (stating that “[w]e will remand this case to the district court for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state [a TVPA] claim and, if they do, whether, in fact, the exhaustion requirement in the [TVPA] defeats their claim”).

102. *Id.* at 878–79. The plaintiffs alleged that during a period of civil unrest ranging from 1983 until 1999, one of the highest ranking military and political officials in Nigeria murdered or tortured the plaintiffs’ political activist family members. *Id.* at 879–80. The plaintiffs’ complaint stated “seven claims: torture; arbitrary detention; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and wrongful death.” *Id.* at 880.

103. *See id.* (“The preliminary issue is whether we have appellate jurisdiction over the appeal. We conclude that we do.”).

104. The court provided a broad post-*Sosa* analysis of the ATS, discussing *Sosa* and whether the plaintiffs’ claims fell under the “law of nations” language of the ATS. *Id.* at 883–84.

under the TVPA because Congress created an express cause of action under that statute.¹⁰⁵

Before concluding that the claim was more properly brought under the TVPA, the court addressed whether a plaintiff had a choice of suing under it or the ATS.¹⁰⁶ The court held that a plaintiff could not simply plead under the ATS rather than the TVPA to avoid the exhaustion requirement.¹⁰⁷ Allowing the plaintiff to make this choice would render the TVPA “meaningless.”¹⁰⁸ The court went on to state that exhaustion might be a “basic principle of international law”¹⁰⁹ and held that the plaintiffs made no showing that they exhausted their remedies in Nigeria.¹¹⁰ Therefore, the case was ultimately remanded to the district courts,¹¹¹ which placed the exhaustion burden firmly on the plaintiffs.¹¹²

IV. *SAREI V. RIO TINTO, PLC*: EXPRESSLY ADDRESSING WHETHER AN EXHAUSTION ELEMENT SHOULD BE REQUIRED

In early August of 2006, in *Sarei v. Rio Tinto, PLC*,¹¹³ the Ninth Circuit directly addressed whether federal courts should require exhaustion in ATS claims. The court held that the ATS’s legislative history, the language of the ATS, the Supreme Court’s statements in *Sosa*, and overall

105. *See id.* at 886. (“It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed. As relevant to this case, then, the ATS would provide jurisdiction over a suit . . . for violations of the [TVPA].”).

106. *See id.* at 884 (“The issue, then, becomes whether both [the TVPA and the ATS] can simultaneously exist to provide content to the ATS. In other words, does the [TVPA] occupy the field or could a plaintiff plead under the Act and/or under the common law?”).

107. *See id.* at 884–85.

108. *Id.* at 885 (“No one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law.”). The court quoted the Supreme Court, which stated that “legislative history says that § 1350 should ‘remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law,’ but the Court said Congress had done nothing to promote other such suits.” *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 697, 728 (2004)).

109. *Id.* at 886.

110. *See id.* (noting that “nothing in the record indicates that they have exhausted their remedies”).

111. There has currently been no ruling in the District Court.

112. It is also interesting to note that the court began its discussion of the case with the following:

A courtroom in Chicago, one would think, is an unlikely place for considering a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria. It sounds like the sort of fare that would be heard in a courtroom on the African continent. But this case ended up in Chicago, and that leads us to consider the claims of seven Nigerian citizens against a Nigerian general over alleged torture and murder in Nigeria. The path the plaintiffs are pursuing is, as we shall see, quite thorny.

Id. at 878–79.

113. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006).

policy concerns weighed in favor of not requiring an exhaustion element.¹¹⁴ Instead of reading an exhaustion element into the ATS, the majority preferred to “leav[e] it to Congress or the Supreme Court to take the next step, if warranted.”¹¹⁵ However, in a lengthy dissent, Circuit Judge Bybee also looked to the statutory language, the legislative history of the TVPA, international and domestic legal norms, and policy concerns to determine that an exhaustion element should be included.¹¹⁶ Although the arguments on both sides are formidable, I believe the majority got this close call wrong and that an exhaustion requirement should be read into the text of the ATS. Congressional intent, the Supreme Court’s cautionary advice, *forum non conveniens* analysis, and the basic principles of international law support requiring exhaustion before bringing an ATS claim.

The *Sarei* plaintiffs were residents of Papua New Guinea.¹¹⁷ They claimed to be victims of international law violations¹¹⁸ that occurred during a civil conflict following an uprising at the defendant, Rio Tinto’s, mine.¹¹⁹ The court first held that the plaintiffs suffered violations of international legal norms sufficient to constitute an ATS claim.¹²⁰ The court then determined that the plaintiffs’ claims did not present “nonjusticiable political questions.”¹²¹ The third step in the court’s

114. *See id.* (discussing the rationale for not reading an exhaustion element into the ATS).

115. *Id.* at 1099.

116. *See id.* at 1100–22 (Bybee, J., dissenting) (discussing the rationale for including an exhaustion requirement).

117. *Id.* at 1073–74.

118. The plaintiffs’ claims included “racial discrimination, environmental devastation, war crimes and crimes against humanity, with severe repercussions for many citizens of PNG.” *Id.* at 1074.

119. *Id.* Rio Tinto had a deal with the Papua New Guinea (PNG) government to provide 19.1% of the mine’s profits in exchange for the government’s assistance. *Id.* at 1075. The plaintiffs alleged that the waste products from Rio Tinto’s mining polluted waterways and undermined their physical and mental health. *Id.* The plaintiffs also claimed that they were paid lower wages because they were black and were forced to live in “slave-like” conditions. *Id.* When the citizens engaged in an uprising, Rio Tinto sought the aid of the PNG government, which led to an army attack and, subsequently, ten years of civil war ensued. *Id.* During this time of civil unrest, PNG at the request of Rio Tinto, burnt villages, raped citizens, and conducted aerial bombardments of civilian targets, among other atrocities. *Id.* These acts resulted in death and health problems and forced many to flee or live in refugee camps. *Id.*

120. *See id.* at 1077–78 (examining the claims under the ATS). The court stated that “We . . . agree with the district court’s conclusion that the plaintiffs’ claims for war crimes, violations of the laws of war, [and] racial discrimination . . . all implicate ‘specific, universal and obligatory norm[s] of international law’ that properly form the basis for [ATS] claims.” *Id.* at 1078 (quoting *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002)) (first alteration in original). The court also stated that “[a]ll of the plaintiff’s remaining claims . . . assert jus cogens violations that form the least controversial core of modern day [ATS] jurisdiction.” *Id.*

121. *Id.* at 1083. The court stated that the political question doctrine was a “function of the separation of powers, and set forth six factors that require the dismissal of a suit under the political

analysis examined the act-of-state doctrine.¹²² The court overturned the district court's judgment in part and remanded in part based only on the act-of-state doctrine.¹²³ Fourth, the court determined that the district court's international comity doctrine¹²⁴ ruling should be vacated.¹²⁵ Lastly, the court turned to the analysis of an exhaustion requirement in the ATS.¹²⁶

The court began its ATS exhaustion analysis by looking at judicial precedent, under which the exhaustion "question [was] far from settled."¹²⁷ Turning to Congressional intent,¹²⁸ the court stated that "[t]here is

question doctrine." *Id.* at 1079 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In holding that the political question doctrine was not violated, the court addressed whether the issue is constitutionally committed to another branch of government and if review of the issue interfered with a coordinate branch. *Id.* at 1079–84.

122. The act-of-state doctrine "prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory." *Id.* at 1084. The rationale for the doctrine seeks to avoid interference with "American foreign policy." *Id.* The court applies a two factor test for determining whether an action should be barred by the act-of-state doctrine. *Id.* This test determines: "(1) if there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act." *Id.* (citations omitted) (alterations in original). However, even when the two-step test is met, courts can still "choose not to apply the [doctrine] where the policies underlying the doctrine militate against its application." *Id.* These policies include (a) the "degree of codification" which makes it more appropriate for judiciary review; (b) the less important the issue is for U.S. foreign relations, the more appropriate it is for the courts; and (c) whether the "government which perpetrated the challenged act of state" no longer exists. *Id.*

123. *See id.* at 1084–86 (reviewing the district court's determinations based on the act-of-state doctrine). The court held that the alleged racial discrimination "cannot constitute official sovereign acts" because "[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act." *Id.* at 1085 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (Cal. 1992)). The court then looked to UNCLOS violations and remanded the issue to district court, stating that "[t]he district court's application of the [Act of State Doctrine] relied in part on the SOI's assertion regarding the potential impact of this case on United States foreign relations," which the circuit court has rejected. *Id.* at 1086.

124. "Under the international comity doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted." *Id.* Comity analysis turns on whether a true conflict of law exists between domestic and foreign law. *See id.* at 1087 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993)).

125. *See id.* at 1088–89 (stating that the district court's ruling to decline to hear the plaintiff's racial discrimination and UNCLOS claims on comity grounds should be vacated "for reconsideration in light of [the Circuit Court's] analysis of the SOI").

126. *Id.* at 1089.

127. *Id.* at 1090 (citing *Enahoro v. Abubakar*, 408 F.3d 877, 890 (7th Cir. 2005) (Cudahy, J., dissenting in part)). The court looked to the *Sosa* Court's punting of the issue to an "appropriate case." *Id.* at 1089 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)). The court stated that "even if exhaustion were to apply to the [ATS], local remedies would in those cases be futile and therefore need not be exhausted." *Id.* (citing *Presbyterian Church of Sudan v. Talisman Energy, Ltd.*, 244 F. Supp. 3d 289 (S.D.N.Y. 2003), and *Enahoro*, 408 F.3d 877).

128. The court stated that "[c]ongressional intent is of 'paramount importance' to any exhaustion inquiry." *Id.* at 1090 (quoting *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982)). However, courts have discretion to require exhaustion "[w]hen Congress has not clearly required" it and when policy

complete silence in the [ATS's] legislative history."¹²⁹ In contrast, the Jay Treaty,¹³⁰ passed five years after the ATS, incorporated a rule similar to exhaustion.¹³¹ The Ninth Circuit reasoned that because the first Congress was aware of and could have incorporated an exhaustion element into the ATS, but did not do so, the absence of an exhaustion requirement was intentional.¹³²

The court next looked to the TVPA for guidance.¹³³ Although Congress did not explicitly discuss the addition of exhaustion to the ATS when creating the TVPA, Congress did state that the ATS "should not be replaced" by the TVPA.¹³⁴ The court reasoned that Congress would not incorporate a "superfluous exhaustion provision [in]to the TVPA" if one already existed in the ATS.¹³⁵ Furthermore, Congress determined that torture victims would not have difficulty proving exhaustion.¹³⁶ The court concluded that legislative intent was "unclear" and did not support importing an exhaustion requirement into the ATS because Congressional intent was not "express" enough.¹³⁷

considerations are consistent with congressional intent. *Id.* (citations omitted).

129. *Id.* at 1091 (citing *ITF v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

130. Treaty of Amity, Commerce and Navigation, U.S.-U.K., art. IV, Nov. 19, 1794, 8 Stat. 116, 119 [hereinafter Jay Treaty].

131. *See Sarei*, 456 F.2d at 1091. (describing the Jay Treaty's arbitration procedure for pre-Revolutionary War debts claimed by British creditors against American debtors). The arbitration procedure could not be invoked unless "by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation." *Id.* (quoting Jay Treaty).

132. *See id.* (stating that the Jay Treaty incorporated an exhaustion-like requirement). The court further stated that "the explicit exhaustion requirement in the Jay Treaty may reveal that the First Congress did not view exhaustion as an automatic rule of customary international law . . ." *Id.*

133. *See id.* at 1091-94 (discussing Congress's intent in incorporating an exhaustion requirement into the TVPA and not the ATS).

134. *Id.* at 1092 (quoting H.R. REP. NO. 102-367, at 3 (1992), reprinted in 1992 U.S.C.C.A.N. 84, 86). Congress also stated that the ATS "should remain intact." *Id.* (quoting S. REP. NO. 102-249, at 5).

135. *Id.* at 1093.

136. *See id.* (discussing how Congress "tailor-made" the TVPA "with those substantive international law violations in mind . . ."). Congress stated that "in most instances the initiation of litigation under [the TVPA] will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred." *Id.* (quoting S. REP. NO. 102-249, at 9-10).

137. *Id.* at 1094. The Court stated that

given (i) the lack of express historical or contemporary congressional intent regarding exhaustion under the [ATS], (ii) Congress' recent pronouncement that the [ATS] should remain 'intact' and 'unchanged' and (iii) Congress' specific focus in the TVPA on torture and extrajudicial killing, we cannot conclude that legislative intent *supports* importing an exhaustion requirement into the [ATS].

Id.

The court then held that judges should not have discretion to import an exhaustion requirement into the ATS.¹³⁸ The court stated that although exhaustion is a “norm within international human rights law,” it does “not *compel* a U.S. court to apply it in an [ATS] cause of action.”¹³⁹ The court reasoned that exhaustion is only a norm “developed specifically within the context of international tribunals”¹⁴⁰ The court held that norms of international tribunals did not apply when, as in the ATS, a domestic court adjudicates international law violations in a civil suit.¹⁴¹

The court also examined the language of the ATS to determine that the “law of nations” does not require exhaustion because it is “procedural rather than substantive.”¹⁴² The court relied on *Sosa*, stating that because the ATS does not create a cause of action, courts must look to common law for substantive international law violations.¹⁴³ The court went on to conclude that exhaustion, a procedural norm, should not be applied to the ATS because “[t]he Supreme Court has not addressed whether the methodology it employed in *Sosa* to identify some substantive international norms as falling within the [ATS’s] jurisdictional grant is applicable to procedural and other nonsubstantive customary law norms.”¹⁴⁴

Finally, the court examined policy rationales for excluding an exhaustion requirement from the ATS.¹⁴⁵ Initially, the court determined that requiring plaintiffs to exhaust local remedies was unlikely to improve human rights by improving local legal systems.¹⁴⁶ The court cited a lack of empirical evidence of such improvements.¹⁴⁷ Conversely, not requiring

138. *Id.* (emphasis in original). *See also id.* at 1095–99 (analyzing international law norms, the language of the ATS, and policy rationales for and against requiring exhaustion and determining that the “balance tips against judicially engrafting an exhaustion requirement onto a statute where Congress has declined to do so . . .”).

139. *Id.* at 1096 (emphasis in original).

140. *Id.*

141. *See id.* (stating that “the exhaustion limitation imposed on and accepted by *international* tribunals as a requirement of international law is not dispositive as to a United States court’s discretion to impose exhaustion as part of the [ATS]”) (emphasis in original).

142. *Id.* at 1096–97.

143. *See id.* at 1097 (discussing the *Sosa* Court’s holding that the ATS is purely a jurisdictional statute and that “[t]he exhaustion rule is not like any . . . modern substantive equivalents such as torture, extrajudicial killing, genocide, slavery, prolonged arbitrary detention and systematic racial discrimination”).

144. *Id.* at 1097. The court also states that “[a]lthough importing exhaustion may serve the cautious ends advocated in *Sosa*, opening the door through the [ATS] to other, nonsubstantive customary international law norms—such as universal jurisdiction—may be more problematic.” *Id.*

145. *See id.* at 1097–99 (discussing policy rationales for and against an exhaustion requirement).

146. *See id.* at 1098 (discussing whether local remedies would be improved by an exhaustion requirement).

147. *See id.* (stating that the improvement of local remedies remained “fairly speculative” and

exhaustion would put more pressure on foreign legal systems to improve because more international courts would pass judgment on rights-abusing defendants.¹⁴⁸ The court concluded that policy rationales did not support implying an exhaustion element into the ATS without express direction from Congress or the U.S. Supreme Court.¹⁴⁹

The dissent declared that an exhaustion requirement should be read into the ATS.¹⁵⁰ First, Judge Bybee stated that exhaustion, historically, was a judge-made rule used to provide autonomy to state courts or other branches of government.¹⁵¹ After concluding that exhaustion is a “‘rule of judicial administration’ . . . unless Congress directs otherwise,”¹⁵² Bybee determined that an exhaustion requirement best comported with Congressional intent.¹⁵³

The second portion of Bybee’s dissent discussed the legislative history of the TVPA, initially reasoning that “it makes little sense” for Congress to place heavier burdens on torture victims than those claiming relief under the ATS.¹⁵⁴ With respect to the TVPA’s exhaustion requirement, Congress explained that exhaustion alleviated burdens on U.S. courts while ensuring that U.S. courts would not intrude on local remedies and that exhaustion “encourage[d] the development of meaningful remedies in other countries.”¹⁵⁵ Absent any statement to the contrary, Bybee suggested that Congress did not intend to place greater demands on torture victims.¹⁵⁶ Further, because the TVPA was created to clarify the ATS, the exhaustion requirement in the TVPA should be construed to clarify the

“often lacks any empirical data . . .”).

148. *See id.* (discussing the theory that pressure would be put on local legal systems to protect human rights by foreign court rulings against defendants).

149. *See id.* at 1097–99 (discussing the dissent’s policy rationales and determining that courts should not import a “blanket exhaustion requirement” without “clear congressional guidance”).

150. *Id.* at 1100–22 (Bybee, J., dissenting) (discussing why exhaustion should be required).

151. *See id.* at 1101 (discussing the historical context of exhaustion requirements). The dissent stated that “[e]xhaustion was originally a judge-made rule . . . to prevent premature and unjustified interference in state proceedings.” *Id.* (citations omitted). Judge Bybee went on to explain that exhaustion was also required in order to “respect the processes afforded by a separate sovereign” and as “an expression of executive and administrative autonomy.” *Id.* at 1101–02 (citation omitted).

152. *Id.* at 1103 (quoting *Patsy v. Bd. of Regents*, 457 U.S. 496, 518 (1982) (White, J., concurring in part) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938))). Bybee also stated that “when Congress has not clearly required exhaustion, sound judicial discretion governs.” *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

153. *Id.* at 1103–06 (discussing the legislative history of the ATS and the TVPA).

154. *Id.* at 1103–04 (examining the TVPA’s legislative history due to the ATS’s lack of legislative history).

155. *Id.* at 1104 (quoting H.R. REP. NO. 102-367, pt. 1, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87–88).

156. *See id.* (stating that the court would have “expected Congress to comment on the new requirement”).

need for an exhaustion requirement within the ATS.¹⁵⁷ Lastly, Bybee explained that the TVPA and ATS can best be harmonized by understanding that the ATS creates jurisdiction for substantive causes of action recognized by international law, and the TVPA is one of those substantive causes of action.¹⁵⁸ Therefore, an element of the substantive causes of action recognized by the ATS is exhaustion.¹⁵⁹

Third, Bybee explained that U.S. and international law require exhaustion.¹⁶⁰ Exhaustion “is a well-established principle of international law, recognized by courts and scholars both here and abroad.”¹⁶¹ Bybee cited examples, including the Jay Treaty, of when the United States recognized exhaustion as a principle of international law. He argued that these examples demonstrated that the United States expects exhaustion in other international contexts.¹⁶² Bybee also noted that international tribunals have “recognized and applied exhaustion, regardless of whether the principle has been called for in a formal agreement.”¹⁶³

Bybee then argued that legal minds are far from certain that exhaustion is procedural as opposed to substantive.¹⁶⁴ He described three schools of thought: (1) international injury only occurs after exhausting the local legal system which affords no remedy, (2) exhaustion is a procedural bar to an international law claim, and (3) the procedural/substantive question depends on the facts of each case.¹⁶⁵ Bybee concluded that regardless of the school of thought, exhaustion should be required because it is an established and settled norm of international law.¹⁶⁶

157. *See id.* at 1105–06 (examining the rationale for creating the TVPA and determining that it “makes more sense to think that Congress codified the exhaustion requirement because it believed it was consistent with international law . . .”).

158. *See id.* at 1106 (examining the TVPA and the ATS and determining how best to harmonize the two types of statutes).

159. *Id.*

160. *Id.* at 1107 (“There is strong evidence that international law . . . recognizes exhaustion of remedies as a condition precedent to seeking relief before foreign and international tribunals.”).

161. *Id.*

162. *Id.* at 1107–08 (discussing the Jay Treaty and other examples recognizing exhaustion as a principle of international law). Bybee also describes U.S. recognition in relation to Castro’s Cuba. *Id.* at 1108.

163. *Id.* Bybee states that the International Court of Justice “has recognized that the exhaustion requirement is so fundamental that, even where an international agreement fails to include the provision, it exists by default unless the agreement expressly states that exhaustion is *not* required.” *Id.* Bybee goes on to describe other examples of international tribunals that require exhaustion. *Id.*

164. *See id.* at 1109–10 (discussing the current debate on whether exhaustion is procedural or substantive).

165. *See id.* at 1110–11 (discussing the three schools of thought for the procedural/substantive question).

166. *See id.* at 1112 (concluding that though there is “no resolution to [the procedural/substantive] debate . . . [e]xhaustion . . . is an integral part of almost every claim in international law”).

Bybee further argued that exhaustion is a principle required by U.S. domestic law.¹⁶⁷ He explained that exhaustion is essentially a conflicts of law rule that recognizes the sovereignty of foreign nations and respects the “foreign government’s ability to administer justice.”¹⁶⁸ He next described how, like alternative dispute resolution, “exhaustion of remedies gives other countries the opportunity to address their own conflicts and craft their own solutions.”¹⁶⁹ Lastly, Bybee stated that domestic administrative law requires exhaustion because proximity of evidence and legal expertise results in more accurate decisions.¹⁷⁰

Bybee also argued that an exhaustion requirement would better promote separation of powers within the U.S. government.¹⁷¹ He noted the semblance between exhaustion and the political question, comity, and act-of-state doctrines, all of which respect the role of the executive and legislative branches in international affairs.¹⁷² He described how a case-by-case analysis that does not require exhaustion (i.e., an analysis in which courts instead look to the executive branch for a determination of whether the case interferes with foreign affairs) would disturb the separation of powers by requiring “the judiciary to receive the Executive’s permission before invoking its jurisdiction.”¹⁷³ Bybee concluded that an exhaustion requirement would help resolve separation of power issues in ATS cases by ensuring that litigants have not side-stepped their local judicial systems and by focusing the political issues in question.¹⁷⁴

V. ANALYSIS: EXHAUSTION SHOULD BE IMPORTED INTO THE ATS

Both the majority and dissent in *Sarei* set forth formidable arguments regarding the importation of an exhaustion requirement into the ATS. I disagree with the majority, believing instead that factors tip the scales in favor of requiring exhaustion.¹⁷⁵

167. *See id.* at 1114–22 (discussing exhaustion in U.S. domestic law).

168. *See id.* at 1115–16 (describing how exhaustion provides respect for foreign sovereigns).

169. *Id.* at 1116. Bybee described how exhaustion will promote “creation and refinement of local remedies,” including the creation of political solutions as opposed to litigation. *Id.*

170. *See id.* at 1118 (discussing the benefits of local tribunals adjudicating cases with injuries that took place within their borders).

171. *See id.* at 1118–19 (describing how exhaustion promotes the separation of power).

172. *See id.* at 1119 (discussing the doctrines which require respect for the political branches of government).

173. *Id.* at 1120 (quoting *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972)).

174. *See id.* at 1121 (describing the benefits of exhaustion on separation of power issues).

175. *See id.* at 1095 (stating that though the argument is close, the “balance tips against judicially engrafting an exhaustion requirement onto a statute where Congress has declined to do so . . .”).

First, Congress's intent in creating the TVPA supports requiring exhaustion in the ATS. As stated in the *Sarei* dissent, it seems illogical for Congress to require exhaustion for torture victims and not for plaintiffs alleging violation of other international norms.¹⁷⁶ Second, the TVPA is located within the historical notes of the ATS¹⁷⁷ and is therefore codified within the ATS. Congress enacted the TVPA to expressly create a cause of action for torture victims¹⁷⁸ and it seems unlikely that, as a clarifying addition to the ATS, the TVPA would restrict torture victims more than victims of other international torts actionable under the ATS.

Following the Supreme Court's cautionary advice in *Sosa*,¹⁷⁹ courts should be careful to allow only a limited number of alien tort cases into U.S. courts. Requiring exhaustion seems more closely aligned with the Supreme Court's high bar for allowing new causes of action under the ATS.¹⁸⁰ Furthermore, the Supreme Court expressly advocated judicial interpretation of the ATS.¹⁸¹ Courts should, therefore, be able to import an exhaustion requirement into the ATS where Congress has not explicitly stated otherwise.

The *forum non conveniens* cases also support placing an exhaustion requirement into the ATS. The analysis performed in these cases is very similar to that which would be performed if exhaustion were required by the ATS. Factors such as fairness to the foreign and domestic forums, and availability of evidence¹⁸² often weigh in favor of the victim exhausting local remedies before bringing suit in U.S. federal courts. Furthermore, the *Adamu* court's statement that foreign plaintiffs should not be allowed greater deference in their choice of forum than U.S. citizens provides additional support for an exhaustion requirement.

Finally, as discussed by the *Ehanhoro* Court and the *Sarei* dissent, exhaustion is a basic principle of international law.¹⁸³ American courts should respect international legal systems by requiring alien tort plaintiffs to exhaust local remedies before allowing jurisdiction in U.S. courts. This requirement does not need to be overly burdensome on the plaintiffs. Courts must determine what the proper test for exhaustion in ATS cases

176. See *supra* Part IV and accompanying notes.

177. See *supra* Part I.B.1 and accompanying notes, discussing the legislative history of the TVPA.

178. See *id.*

179. See *supra* Part II.C and accompanying notes, discussing judicial caution recommended by the *Sosa* court.

180. See *id.*

181. See *supra* notes 53–58 and accompanying text, analyzing the *Sosa* Court's express advocacy of judicial interpretation with respect to the ATS.

182. See *supra* notes 59–89 and accompanying text, discussing the *forum non conveniens* analysis.

183. See *supra* notes 109 and 161 and accompanying text.

should be. An exhaustion requirement is consistent with the political question, act-of-state, and comity doctrines. It should be read into the text of the ATS, even absent express action by Congress.

CONCLUSION

In conclusion, foreign plaintiffs should be required to prove exhaustion of local remedies before bringing an ATS claim in U.S. federal courts. Though Congressional intent regarding the ATS is sparse, bordering on non-existent, the TVPA's exhaustion requirement supports Congress's assumption that a similar requirement should be read into the ATS. Furthermore, the Supreme Court expressly limited causes of action falling under the ATS, a goal which is best served by requiring exhaustion. In addition, *forum non conveniens* analysis supports an exhaustion requirement. Lastly, basic principles of international law demand respect for international legal systems by requiring some exhaustion scrutiny before U.S. courts accept ATS cases.

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