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# Exhaustion: A Solution to the Chief Concerns Posed by Alien Tort Statute Litigation

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# EXHAUSTION: A SOLUTION TO THE CHIEF CONCERNS POSED BY ALIEN TORT STATUTE LITIGATION

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## Introduction

The Alien Tort Statute (ATS) is a frighteningly powerful piece of legislation — but a necessary one. The ATS allows for foreign plaintiffs to bring litigation for violations of the law of nations against foreign defendants in U.S. District Courts. In an increasingly globalized world, the ATS serves as an important tool to hold defendants accountable for violations of fundamental human rights.

ATS claims by their very nature are international in scope. With the doors to the U.S. court system open to the world, the risk of abuse and adverse implication to foreign policy is a very real threat. These fears have been voiced by the many amicus briefs filed in connection with *Kiobel v. Royal Dutch Petroleum*, currently before the Supreme Court of the United States. In *Kiobel* the Court will be determining to what extent the ATS will apply.[1] The future of the ATS hinges on a balance of interests: the need of recourse for victims of human rights violations, and risk of subjecting the courts and defendants to a tsunami of foreign litigation.

[1] Kiobel v. Royal Dutch Petroleum, 621 F.3d. 111 (2d Cir, 2010), *cert granted*, 132 S. Ct. 472 (2011).

In a sense, the ATS can transform a United States District Court, into a "United States Court of Human Rights." The ATS allows for courts to hear international claims from international plaintiffs against international defendants requiring an interpretation of international law. If the ATS is based off international norms then it must conform to international norms in dealing with such claims and require that alternate venues be exhausted or rendered futile, prior to bringing forth a civil claim for a violation of human rights.

A mandatory exhaustion requirement addresses the two main concerns present in ATS litigation; reduce the amount of claims brought in U.S. courts under the ATS, and ensure that foreign policy is not adversely affected. In this article, I will discuss how an exhaustion requirement serves to strike a balance between meeting the needs of victims of human rights violations, while at the same time avoiding opening up the floodgates to U.S. courts, as well as limiting adverse affects to foreign affairs. Mandatory exhaustion is not a new idea, but rather one that is well established in international and supranational human rights courts. The Supreme Court in ***Sosa v. Alvarez-Mahain*** has stated that mandatory exhaustion may be warranted in ATS claims, showing support for the European Commission's opinion.[2] While there have been various alternative solutions presented as a mechanism to fix the ATS, mandatory exhaustion provides the only option that meets international norms.

Part I of this article will provide a background and historical context in which the ATS has developed. Part II of this article will look at the current risks associated with ATS litigation. Part III will discuss the exhaustion requirement as an international norm

[2] Sosa v. Alvarez-Mahain, 542 U.S. 692, 733 note 21 (2004).

in the context of established international and supra-national human rights courts. Part IV concerns proposed alternatives to a mandatory exhaustion requirement, and their shortcomings. Part V discusses the implications an exhaustion requirement would have on ATS claims, and how it would serve as a solution to the concerns associated with the ATS.

## PART I

## A History of the Alien Tort Statute

### A. Foundation of the ATS and the State of the Union in 1789

In the 1980's a little known piece of legislation was unearthed from the catacombs of the congressional record that would transform the landscape of human rights litigation in the United States; the Alien Tort Statute.[3] The Founders wrote the Alien Tort Statute as part of the Judiciary Act of 1789.[4] It states:

> *"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."*[5]

For nearly 200 years the ATS remained untouched, until 1980 when it was applied in the landmark case *Filartiga v. Pena-Irala.*

Little legislative history exists regarding the development of the ATS in 1789.[6] While the lack of record does pose problems for historical analysis of the statute, the

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[3] See Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).
[4] Alien Tort Statute, 28 U.S.C §1350; *see also* Judiciary Act of 1789, 1 Stat. 73, §9.
[5] 28 U.S.C §1350.
[6] See Carolyn A. D'Amore, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?,* 39 AKRON L. REV. 593, 596 note 25 (2006).

development of the ATS does not start and stop at that first congress. The creation of the ATS must be viewed in the context of a global political atmosphere that was very much changing at the time.

As the United States emerged as a sovereign nation, they were required to address the proverbial elephant in the room — the many foreign nationals that existed within the new republic or had business with it. The first congress needed to ensure that the safety of these foreign individuals in compliance with the law of nations, or risk possible reprisal and war.[7] In response to the pressure of the surrounding foreign superpowers, the Alien Tort Statute was born.[8] The ATS addressed these concerns by allowing foreign plaintiffs to bring tort claims against defendants who violated the law of nations, so long as personal jurisdiction existed in the United States.[9] With the nerves of the international community quelled, the ATS essentially fell into obscurity.

**B. Evolution of the ATS by *Filartiga***

Two hundred years after its initial inception, the ATS became needed again. As the landscape of international and domestic law changed, the components that required the ATS evolved. Foreign plaintiffs are no longer simply British, French, Dutch, and Spanish individuals or businesses of the 'civilized world,' but have expanded with the advancement of other new and developing countries. The law of nations is no longer the 1789 state of the world, but has likewise expanded in response to the needs of the

[7] *See Filartiga*, 630 F.2d at 877.
[8] *See id.*
[9] *Filartiga*, 630 F.2d at 855.

international community, such as the need to protect human rights.[10] Additionally, as the concept of personal jurisdiction has evolved in federal courts, so too has the class of defendants who could be held liable for violations of the law of nations in the United States. With these advancements, so too evolved the ATS.

In 1980, *Filartiga v. Pena-Irala* came before the Second Circuit, where the Court would recognize the changing nature of international law and the need for a revived use of the ATS.[11] In Filartiga, the defendant Americo Norberto Pena-Irala was personally served and sued in the Eastern District of New York under the ATS for the kidnapping, torture, and killing of Joelito Filartiga in Asuncion, Paraguay.[12] Joelito's father, Dr. Joel Filartiga, and his sister, Dolly Filartiga, brought the suit after immigrating to the United States upon grant of asylum.[13] Pena-Irala was the Inspector General of Police in Asunción responsible with the politically motivated killing of Joelito, and had been detained at the Brooklyn Navy Yard, after attempting to enter the country.[14]

After the district court dismissed the case for lack of subject matter jurisdiction, the Second Circuit at appeal reversed and remanded the lower court's decision.[15] In an opinion written by Circuit Judge Irving Kaufman, the Second Circuit stressed the important place the ATS had in forming "a more perfect Union," stating "upon ratification of the Constitution, the thirteen former colonies, were fused into a single nation, on which, in relations with foreign states, is bound both to observe and construe

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[10] *See Filartiga*, 630 F.2d at 890; *See also* Brief for European Commission as Amici Curia Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), (Nos. 03–339, 03–485), 2004 WLK 177036.
[11] *See Filartiga*, 630 F.2d 876.
[12] Id. at 878.
[13] Id.
[14] Id. at 879.
[15] Id.

the accepted norms on international law, formerly known a the law of nations."[16] The ATS was the method in which "the constitutional mandate for national control over foreign relations" was met. [17] The Second Circuit recognized the changing face of the law of nations, which incorporated the evolving norms of the international community, norms that in the 20th century prohibited the violation of human rights. So long as personal jurisdiction could be asserted over an alleged violator of human rights, the ATS provided for federal jurisdiction.[18]

*Filartiga* presented the prototypical ATS claim, highlighting the importance and need for the legislation. While *Filartiga* breathed new life into the ATS, it did not bring light to its problems; for example, corporate defendants were not involved and the futility of local remedies was not at issue.[19] *Filartiga* was just one small, early sample of ATS litigation; in the wake of *Filartiga* ATS cases became more common. As the ATS saw more frequent use, the risks and problems involved become more prevalent, reaching a tipping point in the beginning of the 21st century. In 2004, the Supreme Court decided to hear its first ATS case and address arguments regarding the risks associated with the ATS.[20]

## PART II

## Risks Associated with the Alien Tort Statute

[16] *Filartiga*, 630 F.2d at 877.
[17] Id.
[18] *See id.* at 889.
[19] *See id.* at 880.
[20] See *Sosa* 542 U.S. 692.

In the wake of *Filartiga*, the door of the ATS swung open.[21] In a 2006 survey, it was found that roughly 150 cases had been brought under the ATS.[22] With the growth of ATS claims, so too has grown the potential for abuse and disparity in discretion.[23] While the use of the ATS has become accepted, questions remain over what constitutes international norms, what exactly is an ATS claim, and who could be considered plaintiffs or defendants. With a lack of jurisprudence and guidance from above, lower courts have dismissed most of the claims.[24] The frequency with which plaintiffs have brought forth ATS claims has increased as plaintiffs learn how to use the statute as an effective tool to prosecute human rights violations.[25] The increasing number of ATS claims has not come without its fair share of criticism; concerns have emerged from all fronts and across borders. To fully understand the current state of ATS litigation and the need for an exhaustion requirement, it is important to look at the Supreme Court's prior inquiry on the ATS beginning with its 2004 decision in *Sosa v. Alvarez-Machain*, leading up to *Kiobel v. Royal Dutch Petroleum*, currently before the Court.

**A. *Sosa v. Alvarez-Machain***

[21] See *Sosa* 542 U.S. at 729.
[22] Ron Ghatan. *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1277 (2011).
[23] Id.
[24] *See supra* note 22 at 1277, Note 27; *see also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12 (2d ed. 2008).
[25] *See supra* note 30 at 1277; *see also* JEFFREY DAVIS, JUSTICE ACROSS BORDERS, 55–56, 61–64 (2008) ("Since the Filartiga decision, human rights NGOs have worked to pursue innovative claims through the ATS. . . . NGO advocates . . . expanded the targets of ATS litigation by seeking to hold private actors, corporations, and commanders responsible for human rights violations.").

In 2004, the Supreme Court agreed to hear arguments on the ATS for the first time in *Sosa v. Alvarez-Machain.*[26] The Court in *Sosa,* made their first attempt to provide lower courts with guidance on the ATS. The Supreme Court recognized that there was a serious problem in the administration of justice, in ATS litigation, by lower court judges. Their main concern was with regards to district court judges' determinations on what exactly constituted "the law of nations," or international norms.[27] The Court's decision in *Sosa* highlighted several concerns with ATS litigation and sought to remedy those concerns with their instructions to lower court judges. The decision in *Sosa* provides an important backdrop in which mandatory exhaustion must be considered, as an exhaustion requirement would meet and address the Court's concerns.

Since *Filartiga* and the modern use of the ATS, district courts have been required to interpret international law, which is likely to be very much foreign to them. The Court stressed that district court judges must tread cautiously when interperting the law of nations for the purposes of ATS claims. In arriving at their decision, the Court established five reasons warranting judicial caution in ATS claims.[28] In an opinion that reads like instructions to district judges, the Court first indicates that the concept of common law has evolved drastically since 1789, when the ATS was first written, in a way that requires restraint when applying international laws.[29] Next the Court states that the scope of federal common law has been limited since *Erie Railroad Co. v. Tompkins* and its progeny.[30] Third the Court recognized that interpretation of international norms and the

[26] *Sosa* 542 U.S. 692.
[27] *See Sosa* 542 U.S. at 725.
[28] *See id.*
[29] *See Sosa* 542 U.S. at 726.
[30] *See id.*

creation of ATS causes of actions is a job best reserved for Congress.[31] The Fourth concern voiced is the fear that claims brought under the ATS could have wide-reaching implications on U.S. foreign policy, and that courts, especially lower courts, should be cautious in impinging upon powers and discretion granted to the Executive and Legislative Branches.[32] Lastly is the Courts concern that the Judiciary Branch lacks the power from Congress to define violations of the law of nations or international norms.[33]

Rather than "close the door" to future ATS claims for violations of international norms, the Court decided that the door should remain open but subject to "vigilant doorkeeping."[34] The Court's idea of "vigilant doorkeeping" was to make an effort to only hear a narrow class of international norms. To the Court's fault, however, they failed to provide a clear standard for who and what would be on the guest list at the door for ATS claims. In attempting to establish a standard, the Court asserted its belief that lower courts "should require any claim based on the present-day law of nations to 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 have recognized."[35]

In their attempt to narrow the class of ATS claims brought before the lower courts, the Court, while not providing any specifics, did stress the importance that well-defined international norms should play in the governing of ATS claims. Regardless of its perceive vagueness, *Sosa* does make it clear that in order to act as a "vigilant doorkeeper," and limit the five risks, district court judges should look to what the norms

[31] *See Sosa* 542 U.S. at 727.
[32] *See Sosa* 542 U.S. at 727.
[33] *See id.* at 728.
[34] *Sosa* 542 U.S. at 729.
[35] Id. at 725.

are in the international community in dealing with such a claim. International norms not only provide for what substantive claims violate the law of nations, but under what circumstances such substantive claims are ripe for addressing. [36]

*Sosa* also provides the first mention of exhaustion in the context of ATS litigation. The Court stated that they would certainly consider an exhaustion requirement in the appropriate case[37], citing the argument raised by the European Commission as *amicus curiae*.[38] The Court mentions that an exhaustion requirement may be one of the many principles that should be considered in limiting the availability of ATS relief in federal courts.[39] The European Commission submitted that it is a basic principle of international law to require a claimant to exhaust "any remedies in the domestic legal system, and perhaps other forums such as international claims tribunals," prior to bringing a claim in a foreign court.[40]

**B. *Kiobel v. Royal Dutch Petroleum***

It is no secret that *Sosa* left many questions unanswered, and perhaps even spawned new ones. Currently before the court is the ATS case of *Kiobel v. Royal Dutch Petroleum*, which provides the Court with opportunity to readdress the issues raised in *Sosa*. *Kiobel* is an ATS case brought on behalf of the late Dr. Barinem Kiobel against Royal Dutch Petroleum for alleged human rights violations carried out in Nigeria through

[36] *See* Brief for European Commission as Amici Curia Supporting Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), (Nos. 03–339, 03–485), 2004 WLK 177036.
[37] *Sosa* 542 U.S. at 733.
[38] *See supra* note 36.
[39] *Sosa* 542 U.S at 733, note 21.
[40] Id.

their subsidiaries and its agents.[41] Dr. Kiobel was an outspoken Nigerian leader of an Ogoni group.[42] Dr. Kiobel and eleven other leaders of the Movement for the Survival of the Ogoni People (MOSOP), were illegally detained, tortured, and executed with the alleged assistance of Royal Dutch Petroleum.[43] Royal Dutch Petroleum, also know as "Shell," is a Dutch and British company.[44]

On October 17, 2011, the Supreme Court granted certiorari for Kiobel v. Royal Dutch Petroleum Co.[45] Oral arguments were heard in February of 2012, at which time Justice Alito posed the question, "[w]hat business does a case like this have in the courts of the United States?"[46] Shortly thereafter the Court ordered that the case be reargued with the sides addressing "[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[47] The second round of oral arguments occurred in early October of 2012, with a final opinion slated to be delivered in the beginning of 2013.[48]

*Kiobel* provides the perfect circumstances to highlight the issues with the ATS and the need for a mandatory exhaustion requirement. The alleged injuries in *Kiobel* occurred in the African nation of Nigeria, by a corporation based out of the Netherlands

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[41] *See generally Kiobel v. Royal Dutch Petroleum*, 621 F.3d. 111 (2d Cir, 2010), *cert granted,* 132 S. Ct. 472 (2011).
[42] *Kiobel* 621 F.3d. at 123.
[43] *Kiobel* 621 F.3d. at 123.
[44] Id.
[45] Transcript of Oral Argument Kiobel v. Royal Dutch Petroleum, 132 S. Ct. 472 (Feb, 28, 2012) (No. 10-1491).
[46] Id. at 11-22.
[47] Transcript of Oral Argument Kiobel v. Royal Dutch Petroleum, 132 S. Ct. 472 (Oct. 1, 2012) (No. 10-1491).
[48] Id.

and the United Kingdom.[49] The plaintiffs in *Kiobel* brought civil suit under the ATS in the United States, rather than other possible appropriate jurisdictions including the Netherlands, the United Kingdom, the European Court of Human Rights, or Nigeria. Even though Royal Dutch Petroleum is a Dutch company, Dutch courts were never given the opportunity to hear the case, and weigh in on how they want Dutch entities to conduct themselves extraterritorially.[50] The Netherlands was an appropriate venue for the case and could provide redress for the *Kiobel* plaintiffs, however, due to the lack of an exhaustion requirement the plaintiffs never had to file there.

In the Netherlands, both individuals and corporations may incur criminal liability and be brought to justice for human rights violations committed abroad.[51] In the context of civil remedy, the Netherlands will hear civil claims for extraterritorial violations of the law of nations and are actionable pursuant to the tort law provisions of the Dutch Civil Code. [52] The unlawfulness of the defendant's conduct may be directly based on the violation of an applicable provision of an international treaty, however, an unwritten rule may also serve as a basis for unlawfulness. [53] Whether the defendant was negligently or intentionally involved in a grave violation of international human rights law is immaterial; it is sufficient that the defendant act negligently, intent is not required. [54] The Brussels I regulation permits jurisdiction over Netherlands-based defendants and

[49] *Kiobel* 621 F.3d. at 123.
[50] *See Kiobel* 621 F.3d. at 123. (Procedural history indicates that this case was not brought in the Netherlands at any point).
[51] *See* Brief of Professor Alex-Geert Casterman et al. as Amici Curiae Supporting Petitioners at 4, *Kiobel v. Royal Dutch Petroleum*, 132 S. Ct. 472 (2012)(No.10-1491).
[52] *See id.* at 8 (Claims for violations of the law of nations are actionable under domestic tort law, particularly under Article 162 of Book 6 of the Dutch Civil Code).
[53] *See id.* at 11.
[54] *See id.* at 14.

defendants domiciled in one of the other EU member states, including the United Kingdom. [55] Dutch courts will under various circumstances have jurisdiction over civil claims against defendants that are based outside the Netherlands and outside the territory of the EU member states. [56]

The example of the Netherlands, is but only one viable alternative venue that may have been appropriate in the *Kiobel* case; a case so hotly contested that it is now before the Supreme Court. If an exhaustion requirement existed, it is safe to say that the ongoing debate may very well not have come to exist; the case would have been adjudicated in one of the various more appropriate jurisdictions connected with the facts of *Kiobel*, and not in US courts.

With *Kiobel*, the Court has been presented with the opportunity to refine their ruling in *Sosa* and establish a more clear precedent of "vigilant doorkeeping" in line with international norms — the norm of exhaustion of remedies.[57] In *Sosa*, the Court recognized that an exhaustion requirement could be considered if presented an appropriate case: *Kiobel* is that case, and the Court should adopt a mandatory exhaustion requirements inline with what the European Commission described as "a basic principle of international law."[58]

## PART III

## The Exhaustion Requirement as an International Norm

The European Commission's opinion on the mandatory exhaustion requirement is correct — mandatory exhaustion is a basic principle of international law and one that has

[55] *See supra* note 50 at 15.
[56] *See supra* note 50 at 18.
[57] *See supra* note 34.
[58] *See supra* note 36.

evolved over time. The exhaustion requirement's established place in the scheme of international norms is quite clear through analyzing the procedure of the various international and superregional human rights tribunals who address human rights violations in the civil context. The Inter-American Convention of Human Rights, the European Convention of Human Rights, the International Convention of Political and Civil Rights, and the International Criminal Court, all have some form of mandatory exhaustion, which will be discussed in the following section. The above bodies have been signed and ratified by the large majority of the civilized world, thus establishing a "norm of international character accepted by the civilized world and defined with specificity," precisely of the sort that *Sosa* sought to require.[59]

**A. The Changing Face of International Norms and the Law of Nations**

The law of nations has very much evolved since 1789. International norms constantly develop over time, as they did in the centuries prior to the drafting of the ATS and the time after it.[60] The law of nations adapts to meet the needs and consensus of the international community.[61] Much like piracy was globally shunned in 1789, so too have violations of human rights been treated in present day. As the world recognizes new wrongs, international norms have emerged to address those wrongs in the most effective manner possible.

In the wake of the atrocities committed by the Nazi's during World War II, the international community pledged, "never again."[62] Never again would the world allow for the wholesale violation of human rights to occur, without repercussion. What emerged

[59] *See supra* note 35.
[60] *See Filartiga* 630 F.2d at 890.
[61] *See id.*
[62] *See id.*

out of the cries of millions of innocent victims, was a new forum of justice; international justice for violations of human rights.

First came the Nuremburg Trials, then the Tokyo Tribunals. Eventually, more structured venues emerged, of the likes of the European Court of Human Rights, the Inter-American Court of Human Rights, and the International Criminal Court. As the world matured and pledged "never again," sovereign nations united to create international and supra-national bodies to adjudicate human rights violations. Many nations across the globe agreed to be bound by the rulings of these bodies and vet out justice accordingly.[63] The United States of America, however, were reluctant to sign on.

The American Convention of Human Rights, establishing the Inter-American Court of Human Rights, was signed but never ratified by the United States; thus rendering the United States unbound by the decisions there.[64] The Rome Statute, establishing the International Criminal Court, was likewise signed by never ratified by the United States; also rendering the United States unbound by the decisions there.[65] In the realm of international and supra-national courts for human rights violations, the United States has kept to themselves.

Although it is apparent that Congress does not wish to fully join these international bodies, Congress has repeatedly balked when presented with opportunities to amend the ATS or address it's effects.[66] Considering Congress' intent to maintain the

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[63] See *infra* notes 67-70.
[64] *See* AMERICAN CONVENTION ON HUMAN RIGHTS, Nov. 22, 1969, 1144 U.N.T.S. 123.
[65] *See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, 37 I.L.M. 1002, 1016.
[66] *See* Waugh, Regina. *Exhaustion of Remedies And the Alien Tort Statute*, 28 BERKELY J. INT'L L. 555, 566 (2010).

ATS as is, including its language on the law of nations, the Court must look toward the international norms accepted by the global community.

To determine what the international norm is regarding exhaustion, it is imperative to look at what the majority of the world has agreed upon. One hundred and twenty-one countries across the globe have signed and ratified the Rome Statute establishing the International Criminal Court.[67] The American Convention of Human Rights, establishing the Inter-American Court of Human Rights was ratified by 24 of the 35 members of the Organization of American States.[68] All 47 member states of the Council of Europe are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.[69] The International Convention of Political and Civil Rights has 74 signatories and 167 parties.[70] The majority of the international community and our own supra-national community have come to a consensus, and an exhaustion requirement is the norm.

**B. The Inter-American Convention of Human Rights**

Article 46 of the Inter-American Convention of Human Rights establishes the exhaustion requirement for cases brought before the Inter-American Court of Human Rights.[71] The Convention requires that prior to a case being considered before the Court "that the remedies under domestic law have been pursued and exhausted in accordance

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[67] *See supra* note 64.
[68] *See supra* note 63
[69] *See* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, 213 U.N.T.S. 221.
[70] *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, 999 U.N.T.S. 171.
[71] *See supra* note 63, at art. 46.

with generally recognized principles of international law." [72] The Convention also provides a futility exception to the mandatory exhaustion requirement when (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.[73]

**C. European Commission on Human Rights**

Article 35 § 1 of the European Convention of Human Rights requires, as a prerequisite for admissibility, that all possible domestic remedies be exhausted.[74] To meet the exhaustion requirement normal recourse should be had by an applicant to remedies, which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.[75] The judicial test to be applied under Article 35 § 1 is, first, whether domestic remedies were available to the applicant, and second, whether under all of the circumstances of the case the applicant did everything that could reasonably be expected to exhaust domestic remedies.[76] Where remedies are available and where there has been a total failure to

[72] *See supra* note 63, at art. 46.
[73] *See supra* note 63, at art. 46.
[74] *See supra* note 68, at art. 35 § 1.
[75] *See supra* note 68, at art. 35 § 1.
[76] *See supra* note 68, at art. 35 § 1.

exhaust those remedies, Article 35 § 1 dictates that the case be dismissed for failure to adhere to the procedural requirements of the Court.[77]

**D. The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights similarly requires exhaustion of remedies prior to bringing forth a claim. The Covenant, signed and ratified by the U.S. states that "[a]ll relevant domestic redress procedures must have been exhausted," before a claim is heard.[78] It refers to exhaustion as in conformity with the generally recognized principles of international law. [79] Additionally the ICCPR also recognizes the exception of futility waiving the exhaustion requirement if it can be shown that the pursuit of the local remedy would be ineffective. [80]

**E. The Rome Statute and the International Criminal Court**

The International Criminal Court has procedural safeguards in place that go even further than typical mandatory exhaustion. While the ICC does not hear civil claims, the court does preside over criminal prosecutions for violations of human rights. Due to the fact that the ICC is a permanent tribunal that deals with human rights cases, its procedures provide valuable insight into how the international community deals with such cases in a more broad sense. Unlike the Inter-American Court of Human Rights or the European Court of Human Rights, the International Criminal Court does not permit private parties to petition the court for remedy.[81] Instead, the ICC will only hear a case if a member country chooses to submit a perceived violation to the ICC, on behalf of that

[77] *See supra* note 68, at art. 35 § 1.
[78] *See supra* note 69 at art. 41.
[79] *See supra* note 69 at art. 41.
[80] *See supra* note 69 at art. 41.
[81] *See supra* not 61 at art. 13 & 14.

individual.[82] The ICC is a court that presides over universal crimes, meaning only the most severe and defined violations of human rights are heard, including genocide, crimes against humanity, and war crimes.

**i. Universal Criminal Jurisdiction v. Universal Civil Jurisdiction**

It is important to note that there is a distinction between private claims based on violations of international norms, in which the above-mentioned provisions apply, and proceedings for universal criminal violations, which do not require exhaustion. Prosecutions for universal crimes are brought by the state, not the private individuals who may have been affected by the wrongs. Universal criminal jurisdiction includes conduct "so heinous, such as genocide, that every State has a legitimate interest in its suppression and punishment."[83] Universal criminal jurisdiction grants any state the ability to criminally charge those who commit a fairly well established set of universal crimes, such as genocide, crimes against humanity, and war crimes.[84] The goal of the state in pursuing criminal punishment is to "vindicate important standards of conduct and deter future wrongdoing."[85] Universal criminal jurisdiction thus increases the likelihood that the perpetrators of these universal wrongs would be brought to justice.[86] In prosecuting universal crimes, States are not seeking civil remedy or judicial intervention, but rather the punishment of a criminal.[87] Universal civil jurisdiction is a separate entity, which

[82] *See supra* not 61 at art. 13 & 14.
[83] *See supra* note 38.
[84] *See supra* note 38 at 15.
[85] *See supra* note 38 at 15.
[86] *See supra* note 38 at 15.
[87] *See supra* note 38 at 15.

includes claims brought by private individuals requiring an exhaustion requirement under international norms.[88]

***ii. Complementarity***

The ICC adheres to the principle of "complementarity" in order to limit the claims brought before the tribunal.[89] The ICC can only initiate investigations into possible violations of human rights if a state is unwilling or unable to do so through its own domestic legal system.[90] It thus follows that complementarity not only requires that other possible forums be exhausted or proven futile, but requires for a state to make the independent determination that they believe the case is grave enough to warrant them petitioning the ICC.

Article 17 (2) of the Rome Statute establishes the criteria of complementarity as the following: (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[91]

In coming to its decision, the ICC evaluates whether the inability of justice in a different forum is a result of a total or substantial collapse or unavailability of its national

[88] *See supra* note 38 at 17.
[89] *See supra* note 38 at 25.
[90] *See supra* note 38 at 25.
[91] *See supra* note 65 at art. 17.

judicial system.[92] In such circumstances states may be unable to obtain the accused, the evidence, or the testimony necessary to carry out the proceedings, requiring the ICC to intervene.[93]

Even if complementarity is established, defendants are still provided with an opportunity to challenge the jurisdictional admissibility of the case if the facts surrounding the case have been or currently are being addressed at the national level.[94] Defendants are permitted to challenge the hearing on complementarity grounds until the ICC reaches a verdict on the case.[95]

One hundred and twenty-one countries across the globe have recognized that this 'exhaustion/futility plus' model, best suits addressing prosecutions of gross human rights violations. While this may be an extreme or a slightly ineffective approach, what is important to deduce from this example is the desire of the international community for such cases to be adjudicated in international or foreign courts on a very limited basis. Although not explicitly an "exhaustion requirement" in the traditional sense of the term, the ICC's policy of complementarity has a similar, if not the same effect. Implicit in the complementarity principle used by the ICC, is a consensus that cases based on violations of human rights should be heard in a forum as close to the locus of the offense as possible, and in a limited basis.

## PART IV

## Suggested Alternatives to an Exhaustion Requirement

[92] *See supra* note 65 at art. 17(3).
[93] *See supra* note 65 at art. 17(3).
[94] *See supra* note 65 at art. 19.
[95] *See supra* note 65 at art. 19.

Out of the confusion that resulted post-*Sosa*, various alternatives emerged as solutions for the problems posed by the ATS. Besides mandatory exhaustion, other solutions have been proposed including a modified exhaustion requirement known as prudential exhaustion, or reliance on pre-existing safeguards like personal jurisdiction. While these alternatives would somewhat address the concerns laid out in *Sosa*, none sufficiently prevent all the problems associated with ATS litigation, nor do they conform with international norms.

**A. Prudential Exhaustion**

The current state requiring no exhaustion is not consistent with the trend of international law previously discussed above. Some courts have attempted to strike a middle ground between mandatory exhaustion and none at all, by exploring the concept of prudential exhaustion.[96] Prudential exhaustion contains important distinctions from mandatory exhaustion, which fail to meet the well-established international norm discussed in Part III and fails to remedy the concerns lied out in Sosa.

Prudential exhaustion is a modified version of the typical exhaustion requirement.[97] Prudential exhaustion would require district court judges to interpret international law prior to accepting a case, by making a determination as to what a preemptory norm of international law is, then subsequently ruling on whether or not to require exhaustion. [98] Prudential exhaustion would have district court judges interpret international law in every case to decide whether the claim was of the sort requiring exhaustion or not. While the argument for prudential exhaustion attempts to limit the

[96] *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 754 (9th Cir. 2011).
[97] *See supra* note 66 at 567.
[98] *See* Sarei, 671 F.3d at 754.

potential number of cases by screening for a need for exhaustion, it fails to curb district court discretion in interpreting international norms, nor does it lessen the chance for the judiciary to overstep their bounds into the realm of foreign policy.[99]

**B. Personal Jurisdiction**

In its current post-*Sosa* state, the ATS merely require personal jurisdiction and a claim that a district court judge perceives to be a violation of the law of nations. Without an exhaustion requirement, the door for ATS claims is as wide open as personal jurisdiction and the vague categories allowed per *Sosa*. The Court made it clear in *Sosa* of its desire to narrow the class of ATS claims brought before the lower courts. A class that includes any defendant with personal jurisdiction in the U.S. is much broader than the "narrow class" referred to in *Sosa*, and is much broader than what the international norm is.

Generally, Federal Civil Procedure is a system slated to work for a plaintiff's advantage; the same applies for ATS litigation. Rather liberal notice pleading and discovery rules allow for plaintiffs to bring suits based off minimal facts with time to build support later.[100] In the discovery context, defendants are required to produce relevant evidence in their custody, and subsequently turn it over to the plaintiff to allow them to construct their case. [101]

Additionally, "the class action vehicle, generous punitive damages, and the use of jurors, who often sympathize with ordinary folks whom they view as helpless victims,"

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[99] *See supra* note 66 at 567.
[100] *See* Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 33 (2004).
[101] *See id.*

are attractive features of U.S. courts, particularly in cases again large corporations, such as modern ATS claims. [102]The US also has the attractive quality of a long tradition of using litigation to impact social reform, which has seen frequent use against corporate defendants, especially in ATS cases.[103] In many respects civil litigation in the U.S. can be viewed as a "plaintiff's paradise" due to the tactical advantages in favor of the plaintiff, that come with "saddling the defendant with enormous costs, financial and otherwise."[104]

Taking into consideration these harsh realities of civil litigation in the US, it thus comes as no surprise the backlash that the ATS has seen on the part of corporate defendants. By just looking at a list of entities that submitted *amicus briefs* in favor of Royal-Dutch Petroleum in *Kiobel,* it is quite clear that corporations fear the current state of the ATS — fears that may be quelled with an exhaustion requirement.

BP, Chevron, Coca-Cola, General Electric, IBM, Dole, Dow Chemical—these are just a few of the many corporations pleading to the Court that they find against the Plaintiffs in *Kiobel*.[105] Among the main concerns held by corporations, is their vulnerability to ATS claims may be without merit. In ATS claims against multi-national corporations, personal jurisdiction is often not much of a hurdle, or is even waived or uncontested as seen in *Kiobel.*[106] Since 2004, nearly half of all suits brought under the ATS are against corporate defendants.[107] The majority of claims brought under the ATS, including those against corporate defendants, are dismissed, but those claims are not

[102] *See supra* note 100 at 33.
[103] *See supra* note 100 at 33.
[104] *See supra* note 22 at 1273.
[105] See generally *Kiobel* 621 F.3d. 111 for a list of Amici Curiae in favor of Kiobel.
[106] *See e.g.* Brief for Chevron et al. as Amici Curia Supporting Respondent, *Kiobe v. Royal Dutch Petroleum*, 132 S. Ct. 472 (2012)(No.10-1491) (Nos. 03–339, 03–485), 2012 WL 3245485.
[107] *See supra* note 22 at 1273.

without their costs, both monetarily and reputation.[108] The current state of the ATS results in a financial drain on defendants in dealing with the litigation, as well as a waste of judicial resources. By requiring an exhaustion or futility, courts may lessen the vulnerability faced private litigants, including corporate defendants.

The Alternatives posed do not fix the issues raised in *Sosa* outright. To meet the needs of *Sosa*, a solution unique to the ATS and international human rights litigation is required — that solution is mandatory exhaustion.

## PART V

## Exhaustion as a Solution to ATS Concerns

Of the different variants of the exhaustion requirement and proposed alternatives, international norms and the law of nations indicate that mandatory exhaustion with a futility exception be adopted — and with good reason. The exhaustion requirement is not a rule or provision that was drafted at a specific point, but a principle of international norm which developed overtime to quell the concerns of sovereign nations.[109] Mandatory exhaustion for cases regarding violations of international norms is the international norm. Mandatory exhaustion of remedies or a showing of futility has developed alongside the establishment of substantive violations of the law of nations, including gross violations of human rights.[110] As such, mandatory exhaustion serves as an appropriate solution to issues evolving out of cases for civil violations of human rights, such as ATS litigation.

### A. Comity & Foreign Policy Implications

[108] *See supra* note 22 at 1273.
[109] *See supra* note 36 at 24.
[110] *See supra* note 36 at 24.

The ATS was created out of respect and fear for other sovereign nations. Sovereigns were wary that the new Republic would violate the rights of their citizens or their business enterprises; in 1789 safe-conducts of foreign subjects and the right to be free from piracy, were international norms.[111] In the event that either of these precursors for modern day human rights were violated, states feared that there would be no recourse available for retribution.[112] In 1789, a reasonable response was armed conflict, which was precisely the fear held by the First Congress and the motivating factor behind the creation of the ATS.[113]

The ATS was created as a way to meet those international norms, and quell the joint fears held by the U.S. and foreign nations. Today those same fears exist but in different form, with the common denominator of a sovereign nation's desire that the U.S respect their sovereignty. Civil litigation over international human rights violations is not as well defined and agreed upon as universal criminal jurisdiction, as discussed *supra,* and may result in countries impinging upon the rights, laws, and jurisdiction of another nation—a potential catalyst to adverse foreign policy consequences. By requiring mandatory exhaustion in the sphere of violations of the law of nations, adverse effects on U.S. foreign policy can be kept at a minimum or an acceptable level. If all other reasonable venues or remedies are exhausted, U.S. courts will have a smaller likelihood of stepping on the toes and impinging upon the sovereignty of other nations.

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[111] *See Sosa* 542 U.S. at 720.
[112] *See id.* at 719.
[113] *See id.*

*Sosa* guides lower courts to only accept claims that are in violation of norms sufficiently delineated and accepted by the "civilized world."[114] It places expectation in the "civilized world" whom accept those international norms, to uphold those norms when required to. The exhaustion requirement developed out of a need to respect other nations. By requiring exhaustion or futility, the international community can be rest assured that justice and the law of nations is upheld when a failure to do so exists.

**B. Judicial Interpretation of International Norms**

Closely related to the concern of implications on foreign affairs, is the *Sosa* Courts' issue with lower courts interpreting international law and creating federal common law. By requiring exhaustion, lower courts are provided with less opportunity to hear ATS claims requiring interpretation of the law of nations or creation of federal common law. The current state of the ATS places district court judges in more scenarios that require them to interpret international norms, a situation the Court in *Sosa* sought to restrict. Take for example the Southern District of New York's decision in *Abdullahi v. Pfizer*.[115] The case involved allegations that Pfizer conducted nonconsensual testing of Trovan, an experimental drug, during a meningitis outbreak in Nigeria in 1996. The Second Circuit held that plaintiffs could properly bring claims against Pfizer under the ATS for "violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent."[116] In that decision, the Second Circuit found that the international law norm prohibiting nonconsensual medical testing

[114] *Sosa* 542 U.S. at 723.
[115] Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).
[116] Id. at 187.

is sufficiently "universal, specific, and obligatory" so as to meet the standard for subject matter jurisdiction under the ATS. [117]

In a sense the ultimate ruling in *Abdullahi* is irrelevant, the key tremains that the District Court Judge was forced into the position to make a decision with potentially wide-reaching international implications. The court in *Abdullahi* may very well have gotten the decision right, however *Sosa* indicates the Courts reluctance to put these cases, with potential foreign policy implications, in lower courts' hands if not necessary. An exhaustion requirement would limit the frequency of *Abdullahi*-like decisions.

**F. Local Effect of Judicial Remedy**

Not only will exhaustion meet the concerns laid out by the Court in *Sosa,* but it also aids to bolster the very function that human rights litigation was meant to have, to ensure "never again." The exhaustion requirement places the judicial authority in the place in which it may have the greatest effect, which is important particularly in the realm of human rights violations. When the determination of guilt for a violation of human rights occurs in the country in which those atrocities take place, it allows for that community to heal, establishes policy to prevent it, and can implement a more efficient, effective, and tangible remedy.[118]

Take for example the prosecution for the atrocities of the Holocaust, executed by Nazi Germany. After World War II, the true nature of the destruction carried out by Nazi Germany came to light. The Allied powers sought to prosecute prominent members of the political, military, and economic leadership of the Nazi Party for these evils. The location

[117] Abdullahi 562 F.3d at 174.
[118] BETH VAN SCHAACK AND RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT, 2nd Ed..; *see also supra* note 66 at 567.

of the tribunals played an important role in its effectiveness and the message that it broadcasted to the rest of the world. While Leipzig and Luxembourg were initially considered as possible locations for the trials, the Allied powers eventually determined that they should be adjudicated in Nuremburg, Germany, within the state of Bavaria.[119] The reasoning behind hosting the tribunal in Nuremburg was twofold, the first of which being the practical reason that the Palace of Justice had remained largely intact and was a suitable venue.[120] The other reason behind choosing Nuremburg was to have the greatest impact possible. Nuremberg was considered the ceremonial birthplace of the Nazi Party, and hosted annual propaganda rallies.[121] The city was also the place in which the oppressive Nuremberg Laws came to be. By prosecuting the leaders of this evil regime in the place of its creation, it was considered a fitting place to mark its symbolic demise, and to highest pedestal to proclaim "never again."

**G. Arguments Against a Mandatory Exhaustion Requirement**

Some have argued that if an exhaustion requirement is read into the ATS, it would have a similar effect to that of Trafficking Victims Protection Act (TVPA)[122] cases, and would thus be essentially pointless.[123] The TVPA requires plaintiff's exhaust other remedies prior to bringing a case in federal court.[124] Due to the nature of TVPA claims, the other places where remedy would be appropriate are often rendered futile, ineffective, or impossible; as a result courts waive the exhaustion requirement, so few cases are

[119] RICHARD OVERY, INTERROGATIONS: THE NAZI ELITE IN ALLIED HANDS, 15. (London: Allen Lane, 2001).
[120] Id. at 15.
[121] Id. at 19-20.
[122] Torture Victim Protection Act of 1991, 28 U.S.C. § 1250 (2006).
[123] *See supra* note 66 at 569.
[124] *See supra* note 66 at 569.

dismissed on such grounds.[125] It is argued that reading in a similar exhaustion requirement would have the same effect on civil human rights claims brought under the ATS, thus rendering the requirement a moot point.

Comparing the TVPA to the ATS fails to consider the wide array of possible human rights claims that can be brought under the ATS, including a larger class of defendants and plaintiffs. The limit on ATS causes of action is connected with ever evolving international norms, evident in the fact that the ATS is used today for claims that are very much different than those initially cognized in 1789. While it is true that many plaintiff's alternate venues may eventually be ruled futile, the absence of an exhaustion requirement with a futility exception would not mandate that lower court judges even consider it. Additionally, with no established exhaustion requirement and futility exception, cases where alternate venues are not at all futile may still be brought before US courts, as was the case in *Kiobel.*

## Conclusion

Mandatory exhaustion has an established role in the context of civil claims for violations of international human rights. Mandatory exhaustion is "a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized." The Court's wish in *Sosa* to limit that amount of ATS claims and act as vigilant doorkeepers, can be met by requiring exhaustion of local remedies, a principle that the Court said it would consider if presented with the appropriate case. The appropriate case is currently

[125] *See supra* note 66 at 569.

before the Court in *Kiobel.* The Court has the opportunity to further define the ATS to remedy the concerns initially laid out in *Sosa*, and may do so by requiring exhaustion. Mandatory exhaustion is the vigilant doorkeeper that the Court sought out, and by requiring exhaustion in the context of ATS litigation, the Court can ensure that the ATS can see life for another 200 years.