COMMENTS

WHY PRIVATE REMEDIES FOR ENVIRONMENTAL TORTS UNDER THE ALIEN TORT STATUTE SHOULD NOT BE CONSTRAINED BY THE JUDICIALLY CREATED DOCTRINES OF *JUS COGENS* AND EXHAUSTION

BY

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The spread of multinational corporations with subsidiaries conducting operations in far-flung locales with reduced or nonexistent legal protections has been a continuing global trend. These entities may be headquartered in countries with well-developed legal standards and environmental protections, but many of the jurisdictions where they conduct activities with significant risk of environmental harm tend to have weak environmental standards, and may not have legal infrastructure to support local plaintiffs' claims within the jurisdiction. However, there may be avenues for these plaintiffs to find relief in federal courts, using an obscure provision of the Federal Judiciary Act of 1789: the Alien Tort Statute (ATS). This "rediscovered" statute has sparked significant levels of tort litigation in federal courts in the last thirty years and, with the recent case Sarei v. Rio Tinto, PLC, *is being applied to environmental torts alleged to violate developing customary international law standards. Opening federal courts for plaintiffs to seek relief for torts committed outside the United States seems fraught with peril, and to date courts applying the ATS have applied several prudential judicial doctrines to avoid or limit ATS litigation. This Comment argues that the fine line between judicial prudence and allowing plaintiffs to proceed within the zone of jurisdiction granted by the Statute can be realized without applying* jus

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cogens *and exhaustion, since other doctrines, such as the act of the state, forum non conveniens, and the political question doctrine, can still achieve substantially the same goals.*

I. INTRODUCTION

Rapid developments in international law regarding human rights and in domestic law regarding protection of the environment have taken place over the last sixty years. While clear international norms for human rights have developed that all persons and nations clearly must follow, customary international standards for protection of the *environment* have not. Environmental protections in many developing countries remain weak, and citizens of those countries often lack effective enforcement mechanisms, especially civil remedies against private individuals and corporations, despite the severe harms that can and have been inflicted. Some environmental norms regarding chlorofluorocarbon (CFC) and carbon dioxide emissions—under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[1] and Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)[2]—may have already reached the status of customary international law. A little-known U.S. statute may provide an avenue for alien plaintiffs abroad to enforce international environmental norms against U.S. corporations in the federal courts, obtaining relief they are unable to acquire at home.

The Alien Tort Statute (ATS),[3] a provision of the Federal Judiciary Act of 1789 (Judiciary Act),[4] rested nearly dormant for almost 200 years until it materialized again in a series of modern cases, starting in 1980 with *Filartiga v. Pena-Irala*.[5] These cases rested on succinct language which grants federal courts jurisdiction "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."[6] Most modern cases have involved torts against the person, such as torture, kidnapping, and the like.[7] Few attempts have

[1] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. No. 11,097 (entered into force Jan. 1, 1989).

[2] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 32 [hereinafter Kyoto Protocol] (entered into force Feb. 16, 2005).

[3] The Alien Tort Statute (ATS) is synonymous with Alien Tort Claims Act (ATCA); both terms refer to the statute now codified at 28 U.S.C. § 1350. Commentators who use the term "ATS" appear to take a more conservative approach than those using the term "ATCA." The more conservative approach construes the scope of the ATS to be jurisdiction-granting only. The United States Supreme Court uses the terminology "Alien Tort Statute." *See* LINDA A. WILLETT ET AL., THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS 1 n.2 (2003).

[4] 1 Stat. 73 (codified as amended at 18 U.S.C. § 1350 (2006)).

[5] 630 F.2d 876 (2d Cir. 1980).

[6] Federal Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 18 U.S.C. § 1350 (2006)).

[7] *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 26–27 (2004) (listing types of actions that "attract ATCA liability").

been made to apply the statute to environmental tort claims to date, and none have been successful. Generally, private actors, unlike states, do not have access to international tribunals for adjudicating violations of international law.[8] Ongoing litigation involving a London-based mining company operating in Papua New Guinea, *Sarei v. Rio Tinto, PLC*,[9] has had some success in the Ninth Circuit Court of Appeals, although after granting a rehearing en banc in August 2007,[10] the court decided to remand to the District Court to more fully develop the exhaustion issue.[11] The *Sarei* plaintiffs alleged human rights and environmental violations resulting from a British company dumping mine wastes upstream, destroying fishing and agriculture, and causing severe health problems.[12] Along with the human rights violations, the Ninth Circuit has allowed some of the environmental claims to proceed as customary international law violations under the ATS.[13]

This Comment will examine some hurdles to applying the Alien Tort Statute, with a specific focus on environmental tort applications. These issues include: 1) determining what constitutes "a tort" under the ATS, utilizing both historical and more recent legislative history, 2) determining what environmental torts rise to the level of actionable "law of nations" violations under customary international law, 3) refuting the proposition that *jus cogens* violations are required for the ATS to apply against private defendants, 4) applying the history and intent of the ATS, along with the current state of international law, to examine some possible environmental violations that could apply under the ATS currently and in the future, and 5) proposing an exhaustion standard which addresses concerns regarding international comity and overburdening of the federal courts.

This Comment will argue that modern courts should apply the ATS phrase "law of nations" to include not just universal torts of international law that existed in 1789, but to all torts currently recognized under customary international law as well. While legislative history which illuminates the congressional intent in passing the ATS is, to say the least, extremely sparse, Congress has shown through both the legislative reports and statutory structure of the Torture Victims Protection Act of 1991[14] that the ATS was meant not merely as a jurisdictional statute, but as a statute that incorporates customary international law in cases brought by alien plaintiffs involving torts recognized under international law. While this Comment concludes that very few environmental ATS torts can currently be successfully litigated, it continues to investigate possible future developments in customary international law that could lead to broader application of the ATS in an environmental context.

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8 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 906 cmt. a (1987).

9 Sarei v. Rio Tinto, PLC (*Sarei II*), 487 F.3d 1193, 1223–24 (9th Cir. 2007) (reversing dismissal of some of the plaintiffs' claims).

10 Sarei v. Rio Tinto, PLC (*Sarei III*), 499 F.3d 923, 924 (9th Cir. 2007) (ordering en banc rehearing).

11 Sarei v. Rio Tinto, PLC (*Sarei IV*), 550 F.3d 822, 832 (9th Cir. 2008); *see also infra* notes 167–180 and accompanying text.

12 *Sarei IV*, 550 F.3d at 825–26.

13 *Id.* at 826.

14 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

II. THE ALIEN TORT STATUTE: OVERVIEW & CONGRESSIONAL INTENT

This Part examines the limited legislative history of the Alien Tort Statute and briefly discusses the reasoning of several modern era ATS cases. Understanding the legislative history is key to addressing whether the ATS was intended to be substantive or merely jurisdictional in nature, what the statute's term "law of nations" means in a modern international law context, and whether the scope of torts actionable under the ATS might be expanded beyond eighteenth century torts such as piracy to apply to modern environmental torts committed abroad.

A. ATS History & Recent Developments

The legislative history of the Alien Tort Statue is extremely limited; it does not appear to have been addressed during congressional deliberations on the Judiciary Act. Judge Friendly called it "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."[15]

The ATS is codified, with only minor grammatical changes, at 28 U.S.C. § 1350: "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."[16] There are a few differences versus the original provisions of the Judiciary Act of 1789: "[T]he district courts shall 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."[17]

Except for piracy cases, the ATS rested mostly dormant through the 1970s,[18] but occasionally was invoked in nonpiracy cases. For example, in *Adra v. Clift*,[19] a child custody case brought by an alien father, the District Court of Maryland found a violation of the law of nations when the mother failed to honor a custody award from the Religious Court of Beirut.[20] Because the defendant mother had concealed the child's identity and nationality, a violation of safe conduct (a "law of nations"

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15 Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (citation omitted). Lohengrin was a mysterious knight in the Wagner opera of the same name. *See* LOHENGRIN, ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/346514/Lohengrin (last visited Apr. 19, 2009).

16 28 U.S.C. § 1350 (2006).

17 Federal Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. The current wording of the ATS was created in 1911 by "An Act To codify, revise, and amend the laws relating to the judiciary." Federal Judiciary Act of 1911, ch. 231, 36 Stat. 1087, 1087. There appears to be no specific debate regarding the ATS provisions in the Congressional Record. While these changes do not appear to modify the federal jurisdiction, they do appear to have removed concurrent jurisdiction over ATS cases from the states. This issue *was* debated in Congress. *See infra* note 32.

18 For an extensive listing of several early district and circuit court ATS cases, *see* Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249, 250 n.3 (2004). Most of the nineteenth century cases involve admiralty-related claims. Another law review article cites 21 invocations of the ATS from 1789 until the *Filartiga* decision. Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 4–5 (2003).

19 195 F. Supp. 857 (D. Md. 1961).

20 *Id.* at 865.

tort specifically mentioned by Blackstone[21]), the court found this behavior to be sufficient to give rise to an ATS cause of action.[22] The court cited with approval United States Supreme Court Chief Justice Waite in finding that explicit statutory authority creating a cause of action for violation of the law of nations is not needed beyond the ATS: "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress."[23] The *Adra* case illustrates the ATS working almost as supplemental or ancillary jurisdiction; the safe conduct tort creates ancillary jurisdiction over the foreign custody award. This issue is discussed further below at Part V.C.

The case that sparked the explosion in modern ATS litigation was the Second Circuit's decision in *Filartiga v. Pena-Irala*.[24] This case appears to be the first decision that held that alien plaintiffs could sue not only for torts as they existed in 1789, but also for those torts arising under developing customary international law. The *Filartiga* decision provoked academic controversy over what some saw as a greatly expanded scope of the ATS.[25] Although it appears the majority of nineteenth century ATS invocations involved admiralty-related claims, at least one district court noted that the ATS involved a completely separate jurisdictional basis from admiralty jurisdiction.[26] Additionally, the federal courts must still have *personal jurisdiction* over the defendants, not just the subject matter jurisdiction granted by the ATS[27]—ATS defendants still must have some sort of connection to the United States to be sued.

In *Filartiga*, the family of a seventeen year old Paraguay citizen who had been kidnapped and tortured to death by a police officer learned that the officer was now living in New York, and filed a civil action for wrongful death under the ATS.[28] Joelito Filartiga's family alleged that he had been kidnapped and tortured to death by the officer, and questioned the findings of a four-year criminal investigation by Paraguay.[29] Since *Filartiga*, there have been a significant number of ATS cases

21 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

22 *Adra*, 195 F. Supp. at 864–65.

23 *Id.* at 864 (citing United States v. Arjona, 120 U.S. 479, 488 (1887)).

24 630 F.2d 876 (2d Cir. 1980).

25 *See* Ralph G. Steinhardt, *The Internationalization of Domestic Law*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTIC ANTHOLOGY 3, 3–5 (Steinhardt & D'Amato eds., 1999) [hereinafter ATCA ANTHOLOGY].

26 Wilson v. Pierce, 30 F. Cas. 150, 154 (N.D. Cal. 1852) ("If the admiralty jurisdiction of the district court be excluded from its operation, the only cases cognizable by the district courts to which it can apply, are suits against foreign consuls, and where an alien sues for a tort only in violation of the laws of nations or of a treaty of the United States.").

27 Federal Rule of Civil Procedure 4(k)(1)(A) instructs federal courts to borrow the local personal jurisdiction rule of the state court in which the court sits. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94–95 (2d Cir. 2000) (applying New York personal jurisdiction law to the corporate defendant in an ATS case).

28 *Filartiga*, 630 F.2d at 878–79.

29 *Id.* at 878. Another man confessed, yet was never punished for the crime. *Id.* The plaintiffs claim the confessor could not have tortured Filartiga so professionally. *Id.* The District Court of New York eventually awarded over $10 million to the plaintiffs, including punitive damages. Filartiga v. Pena-Irala, 577 F. Supp. 860, 866–67 (E.D.N.Y. 1984).

filed, mostly for human rights violations, but with limited success.[30] Since ATS jurisprudence holds natural persons and corporations liable, the business community is concerned with liability under the ATS.[31]

1. Discerning the Intent of the First Congress

Given the lack of positive legislative history regarding the Alien Tort Statute, it is difficult to assess what was the First Congress's intent in passing the provision. Reviewing the congressional debates fails to yield mention of the statute or the issues it addresses.[32] Linda A. Willett et al., suggest at least three possible motivations for passing the statute. One possibility is that the Congress wanted to encourage commerce and investment in the fledgling nation by assuring foreigners that they had a judicial forum to air grievances.[33] A second is that passing a law protecting foreigners, especially dignitaries such as ambassadors, would help prevent diplomatic incidents by granting them a remedy.[34] A third possibility is that the fledgling nation perceived a duty to enforce international legal standards upon individuals.[35]

The first two possibilities suggest only that Congress, in passing the ATS, merely sought to fill jurisdictional gaps caused by foreigners being without remedy for tortious behavior occurring within the United States. The third, a perceived duty to uphold international legal standards, however, suggests an intent to allow foreigners to obtain justice in domestic courts based on international norms. Again, legislative history is not very helpful. For instance, in *Sosa v. Alvarez-Machain*,[36] the most recent ATS case to reach the Supreme Court, the Continental Congress is described as being "hamstrung" by its inability to punish for infractions of treaties or the law of nations, and urged states to create private causes of actions for plaintiffs harmed by violations of safe conduct, hostility against foreigners from allied countries traveling within the United States, and interference with

30 *See, e.g.*, Belhas v. Ya'Alon, 515 F.3d 1279, 1281 (D.C. Cir. 2008) (dismissing ATS war crimes claim for lack of jurisdiction); Flores v. S. Peru Copper Corp., 414 F.3d 233, 266 (2d Cir. 2003) (dismissing ATS pollution claim for lack of jurisdiction and failure to state a claim).

31 For a nearly apoplectic opinion on the potential effect of ATS litigation on large multinationals, see GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003).

32 *See, e.g.*, 1 THE DEBATES AND PROCEEDINGS OF THE UNITED STATES 796–97 (Gales & Seaton eds., 1851) (illustrating the debate over the necessity of federal courts of admiralty, and whether they would have concurrent jurisdiction with existing state courts). Congressman Samuel Livermore mentioned that maritime affairs are "dependent on the law of nations," and at least implied a distinction between admiralty cases and torts occurring abroad: "[L]et me ask the gentleman whether a Court of Admiralty and a court for the trial of offences on the high seas [will require duplicate judicial resources.] There can be no doubt of it." *Id.* at 797, 800. At least one nineteenth century district court case also recognized the distinction between admiralty and alien torts. *See* Wilson v. Pierce, 30 F. Cas. 150, 154 (N.D. Cal. 1852). Legal researchers have not had more success divining congressional intent in the ATS from primary sources. *See generally, e.g.*, WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 (1990) (discussing the history of the Judiciary Act, apparently without mention of the Alien Tort Statute).

33 WILLETT ET AL., *supra* note 3, at 3.

34 *Id.*

35 *Id.*

36 542 U.S. 692 (2004).

ambassadors[37]—classic Blackstone international law torts. But while Congress clearly perceived a problem, it is not clear that there was any overarching policy intent behind the ATS beyond granting individual plaintiffs a remedy.

B. The Meaning of "a Tort"

1. Tort History

The drafting of the Judiciary Act was ahead of its time in the use of the term "a tort" to describe actionable offenses under the ATS. Most commentators appear to ignore the development of American tort law before circa 1850,[38] and a definition contemporary with the Judiciary Act is hard to find.[39] But most sources appear to define "tort" in the negative; all those civil wrongs not arising from contract law can be considered torts.[40] Therefore, it is conceivable that environmental torts (which stem from the then-known classical torts of trespass and nuisance[41]) could be considered torts within the scope of the ATS.

C. What Violated the "Law of Nations" in 1789?

1. Preconstitutional Evidence

Looking back at historical sources can give us some idea of why nations historically recognized a law of nations, as well as what sort of actions violated these international norms. Blackstone's treatise describes the law of nations as "a fyftem of rules, deducible by natural reafon, and eftablished by univerfal confent among the civilized inhabitants of the world; in order to decide all difputes . . . [arising from international intercourse] which muft frequently occur between two or more independent ftates, and the individuals belonging to each."[42] Blackstone stated that the law of nations was adopted in "it's full extent by the common law, and is held to be a part of the law of the land."[43] Blackstone-era law also contemplated that individuals could be held accountable under the law of nations:

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37 *Id.* at 716.

38 *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY at xxiii (2003).

39 White traces the etymology: "A 'tort' is simply the Norman word for a 'wrong,' . . . . Tort law, then, is concerned with civil wrongs not arising from contracts." *Id.* at n.*. The district court in *Filartiga* looked to Sir Edward Coke: "The word 'tort' has historically meant simply 'wrong' or 'the opposite of right,' so-called, according to Lord Coke, because it is 'wrested' or 'crooked,' being contrary to that which is 'right' and 'straight.'" Filartiga, 577 F. Supp. 860, 862 (E.D.N.Y. 1984). The court went on to reason that there is no indication that Congress intended to distinguish domestic law torts from international ones. *Id.* at 862–63.

40 WHITE, *supra* note 38, at xxiii n.*; *see also, e.g.*, C.H.S. FIFOOT, HISTORY AND SOURCES OF COMMON LAW: TORT AND CONTRACT (1949) (generally discussing the development of the common law of torts, including trespass, negligence, and nuisance actions, from the sixteenth century onward. All of these causes of action would therefore have been well-known to a colonial lawyer or educated congressman in 1789.).

41 *See generally* FIFOOT, *supra* note 40.

42 BLACKSTONE, *supra* note 21, at *66. The original spelling from Blackstone's classic *Commentaries* was preserved in this and the following quotes.

43 *Id.* at *67.

"For in vain would nations in their collective capacity obferve thefe univerfal rules, if private fubjects were at liberty to break them at their own difcretion, and involve the two ftates in a war."[44] He goes on to recite three principal offenses: violation of safe conduct, interference with ambassadors, and piracy on the high seas.[45]

Alexander Hamilton's writings also support domestic adjudication of disputes involving aliens in *The Federalist*. In discussing the proposed division of jurisdiction between the states and the federal courts, Hamilton stated that justice, "preservation of the public faith," and "public tranquility" were essential, and that cases arising under treaties or "the laws of nations" should clearly have federal judiciary "cognizance."[46] Hamilton went on to opine: "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."[47]

2. Early U.S. Sources

The Framers were well aware of international law and envisioned a role for the federal government in developing that law. The Constitution grants Congress the power to "define and punish . . . Offences against the Law of Nations."[48] The term "law of nations" was used in more statutes than just the ATS, and early on, in *United States v. Smith*,[49] the Supreme Court found that it was permissible to prosecute piracy absent a statutory definition.[50] Instead, the Court used the customary standards of the law of nations to define the crime.[51] The statute in *Smith* recites that any person who "commit[ted] the crime of piracy, as defined by the law of nations . . . [shall] be punished with death."[52] The *Smith* Court found that piracy had been defined with reasonable certainty,[53] and, even though exact definitions of piracy may differ amongst different international legal writers, that the instant crime alleged, robbery on the high seas, was clearly piracy.[54] From these early cases, treatises, and writings, it is evident that Congress intended the Alien Tort Statute to act not merely as a jurisdiction-granting statute, but to at least import the universal, specific, and obligatory norms of the law of nations as it existed in 1789.

44 *Id.* at *68.

45 *Id.*

46 THE FEDERALIST NO. 80, 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

47 THE FEDERALIST NO. 82, 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton goes on to suggest an example, that "[the laws] of Japan, not less than of New York, may furnish the objects of legal discussion to our courts." *Id.* at 528.

48 U.S. CONST. art. I, § 8, cl. 10.

49 18 U.S. (5 Wheat.) 153 (1820).

50 *Id.* at 158–59.

51 *Id.* at 160–62.

52 Act of Mar. 3, 1819, ch. 77, § 5.

53 *Smith*, 18 U.S. at 161.

54 *Id.* The opinion includes a footnote spanning 17 pages, quoting sources in four different languages, to "show that piracy is defined by the law of nations." *Id.* at 163–80.

III. WHAT VIOLATES THE "LAW OF NATIONS" TODAY?

Modern courts should interpret the ATS phrase "law of nations" as including not just universal international law torts of 1789, but also those torts which have developed the specificity and universality of customary international law today. This Part will look at what the standard for customary international law is, how modern congressional action supports the notion that offenses under the ATS evolve with international law, and how international tribunals, and the courts of other nations, are applying customary international law to private actors.

A. Customary International Law

Generally speaking, customary international law is a "general practice accepted as law."[55] There are two components that must be present: first, actual patterns indicating generally accepted practice or behavior, and, second, patterns indicating actual legal expectation to be bound to that generally accepted practice, or *opinio juris*.[56] The standard of behavior must be universal. Whether this universality has to be standard in actual practice, or only in expectation, is debated.[57]

1. Modern Congressional Intent as Evidenced by the TVPA

Some indication of congressional intent regarding the ATS can be inferred from the legislative history of the Torture Victims Protection Act of 1991 (TVPA).[58] In passing the TVPA, Congress confirmed that the law of nations prohibits torture, citing approvingly the Second Circuit in *Filartiga v. Pena-Irala*: "Official torture and summary execution violate standards accepted by virtually every nation. [This consensus] . . . has assumed the status of customary international law. As the Second Circuit . . . held[,] 'official torture is now prohibited by the law of nations.'"[59] The court also acknowledged that torts, such as torture of one's own citizens, which were not violations of the law of nations in 1789, could ripen into an ATS claim by becoming part of customary international law.[60] The House report went on to address the notion that separate congressional authority beyond the ATS was needed for plaintiffs to bring ATS claims, as reasoned by Judge Bork in *Tel-Oren v. Libyan Arab Republic*.[61] In *Tel-Oren*, Bork concluded that the ATS merely grants jurisdiction in federal court to alien tort plaintiffs, but still requires that Congress create an additional, explicit, cause of action in order to form an actionable ATS claim.[62] The House report explicitly discounts the notion that separate legislation creating a cause of action under the

55 JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 3 (2d ed. 2003) (internal quotations omitted).

56 *Id.*

57 *Id.* at 4.

58 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

59 H.R. REP. NO. 102-376, at 2–3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

60 H.R. REP. NO. 102-376, at 3–4, *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

61 726 F.2d 774, 822 (D.C. Cir. 1984); *see* H.R. REP. NO. 102-376, at 4, *reprinted in* 1992 U.S.C.C.A.N. 86.

62 *Tel-Oren*, 726 F.2d at 822 (Bork, J., concurring).

ATS is required, and noted that while the TVPA provides an explicit cause of action, the ATS was left "intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[63]

Others, however, have read the legislative history of the TVPA as showing that the ATS is merely a jurisdictional statute. Judge Bybee, in his 2007 *Sarei* dissent, argued that because the TVPA includes an exhaustion requirement, it implies that all cases under the ATS likewise have an exhaustion requirement.[64] This reasoning does not appear to be sound, even based on a plain language reading of the two statutes, because provisions of each statute are broader or narrower than the other. First, while ATS plaintiffs must be aliens, TVPA plaintiffs are from a broader class, "individuals," which presumably includes U.S. citizens and residents tortured abroad. Second, ATS claims may be brought for a case involving "a tort only," but TVPA actions are limited to those involving torture or extrajudicial killings.[65] Third, the TVPA requires the torture or extrajudicial killing be conducted by a defendant individual "under actual or apparent authority, or color of law, of any foreign nation," a much easier standard to meet than the ATS's requirement that the action violate "the law of nations or a treaty of the United States."[66] The contour of actions that fit under ATS or TVPA jurisdiction is not an easily defined set: some actions would meet the standards of both statutes, some none, some only one or the other. Acts which would always be actionable under the ATS (e.g., torture in violation of customary international law) may or may not meet the TVPA requirements, based not on the nature of the tort, but based on the "apparent authority" of the actor in a foreign nation. Given the checkerboard layout of fact patterns actionable under each statute, it does not easily follow that either specific provisions of the TVPA regarding the exhaustion of remedies or a ten-year statute of limitations should be read into the ATS.

2. The North Sea Continental Shelf Cases

The *North Sea Continental Shelf Cases*,[67] an adjudication in the International Court of Justice (ICJ) regarding national oceanic boundaries, illustrates the speed with which customary international law can be found. The doctrine of the continental shelf, first proposed in the Truman Proclamation of 1945, became accepted customary international law in only thirteen years.[68] The court looked at four methods of drawing national oceanic boundaries,[69] and decided that at least Article 6 of the

63 H.R. REP. NO. 102-376, at 3–4, *reprinted in* 1992 U.S.C.C.A.N. 84, 86. The Report also notes that the TVPA is broader than the ATS, in that it extends relief beyond alien plaintiffs to U.S. citizens as well. H.R. REP. NO. 102-376, at 4, *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("The TVPA would . . . enhance the remedy already available under the [ATS] in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.").

64 *See Sarei II*, 487 F.3d 1193, 1227–30 (9th Cir. 2007) (Bybee, J., dissenting). See *infra* Part VI.B for more discussion on exhaustion in *Sarei*.

65 *Id.* at 1216, 1227.

66 *Id.* at 1230.

67 (F.R.G v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

68 *Id.* at 32–33.

69 *Id.* at 34.

Geneva Convention had become part of the body of customary international law—"binding even for countries which have never, and do not, become parties to the Convention."[70] The ICJ went on to state that two conditions must be met for customary acts (or omissions) to become part of customary international law. One is essentially an objective test requiring that the acts must "amount to a settled practice," and the other is a subjective test requiring that states must show conformance to the customary practice because they perceive the practice to be a legal obligation.[71] Conversely, acts subjectively motivated only by "courtesy, convenience or tradition" do not arise to the level of the law of nations.[72] The *North Sea Continental Shelf Cases* therefore illustrate that the International Court of Justice subscribes to the same principles as federal courts do in determining what practices amount to customary international law, as well as show that this development can occur in a relatively short period of time. Hence, environmental practices that do not have customary international law standards today could rise fairly quickly to the level of subjective and objective universality required.

B. Approaches Other Nations are Taking to Police Multinational Corporations

While the legal history leading to alien plaintiffs' ability to hold corporations civilly liable for extraterritorial international law violations in some ways seems to be a historical accident, other countries are taking steps to police multinationals as well. Given that the largest multinationals dwarf many countries—taken together, the 100 largest world economies consist of 51 multinationals corporations, and 49 sovereign nations[73]—looking at transnational causes of action to police egregious behavior should at least be considered. Australia, for one, passed provisions in 2002, which would allow for criminal prosecutions for certain international law violations such as genocide, crimes against humanity, and war crimes.[74] Australian legislators drafted division 268 of the criminal code in order to implement the Rome Statute against genocide.[75] The code pointedly specifies its applicability to "bodies corporate in the same way as it applies to individuals."[76] This legislation may be put to the test against a multinational corporation soon: Australian Federal Police are investigating an Australian-headquartered company, Anvil Mining, for human rights violations including rape, looting, arbitrary detention, and mass murder which allegedly took place using Anvil equipment in the Democratic Republic of Congo.[77] Australian law firm Slater & Gordon has been retained to investigate the possibility of a civil suit against the company.[78] While these criminal and civil actions are in the early stages, they could be an indication that the

[70] *Id.* at 41.

[71] *Id.* at 44.

[72] *Id.*

[73] WILLETT ET AL., *supra* note 3, at 40 n.144.

[74] *See* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT'L CRIM. JUST. 809, 809 (2007).

[75] *See id.* at 814.

[76] *Id.* at 815 (quoting Part 2.5, section 12.1 of the Australian Criminal Code).

[77] *See id.* at 812–13. While headquartered in Australia, the company is incorporated in Canada, and Canadian authorities are also investigating. *Id.*

[78] *Id.* at 813.

United States is not alone in considering applying customary international law to foreign torts in order to police multinationals.[79]

IV. WHAT CONSTITUTES THE "LAW OF NATIONS" UNDER THE ATS

Defining the "law of nations" under the ATS is essential to determine whether it could apply to private defendants for environmental torts. This Part first examines whether any violation of customary international law may be brought under the ATS, or if only *jus cogens* violations are actionable. Next this Part looks at the U.S. Supreme Court's avoidance of the issue in *Sosa v. Alvarez-Machain*. The *jus cogens* distinction is essential to evaluating environmental applicability, because most environmental torts committed by private parties will not rise to the *jus cogens* level without state involvement; but if states are involved in the environmental torts, the actions will likely be dismissed by federal courts under the act of the state and comity doctrines. Environmental torts actionable under the ATS against private defendants will most likely be non-*jus cogens* violations of customary international law—if the Supreme Court adopted a *jus cogens* requirement, it would be nearly impossible to bring a valid ATS environmental claim.

A. "Law of Nations" and Jus Cogens *as Defined by International Law Practice*

Much jurisprudence on international law makes a distinction between mere customary international law and acts that violate *jus cogens*—actions for which no derogation is permissible. *The Restatement (Third) of Foreign Relations Law* defines *jus cogens* as "peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them."[80] While the *Restatement* does not explicitly classify specific customary international law violations as *jus cogens*, *Restatement* section 702 on human rights is illustrative. In the area of human rights, the *Restatement* lists genocide, slavery, murder or causing the disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination as examples of *jus cogens* violations of international law.[81] Examples of violations of customary international human rights law that do not rise to the level of *jus cogens* include violations of internationally recognized human rights such as arbitrary deprivation of private property, gender discrimination, denial of the right to leave the country, and perhaps systematic religious discrimination.[82]

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[79] *But see* Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2007] 1 A.C. 270 (H.L.), *available at* 2006 WL 1546647. Lord Bingham reasons that although ATS cases may serve to help guard international values, these cases are "contrary to customary international law . . . and not in accordance with the law of England." *Id.* at 305. The *Jones* case, however, was an action against a state, Saudi Arabia, not a private actor, and most of the opinion deals with sovereign immunity for extraterritorial actions.

[80] 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1987).

[81] 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987).

[82] *Id.* §§ 701 reporters note 6, 702 cmts. j–l, n. Religious discrimination could be a *jus cogens* violation because the United Nations Charter and many states legally treat racial and religious discrimination alike. *Id.* § 702 cmt. j.

The Supreme Court avoided the issue of whether the "law of nations" under the ATS must be a *jus cogens*, or merely a customary international law violation, in *Sosa*. The Court referred only to "the law of nations" when discussing what international claims are actionable under the ATS,[83] although both sides submitted briefs on the issue of whether a *jus cogens* violation was necessary under the ATS.[84] The Second Circuit *has* addressed the issue, and held that an ATS "law of nations" tort requires only a violation of customary international law.[85] One commentator, noting that the Supreme Court "punted" the issue to lower courts, urges requiring a *jus cogens* standard.[86]

The duration of the practice needed to create customary international law may be relatively short.[87] The International Court of Justice described the doctrine of the continental shelf as an example of "instant customary law."[88] While not exactly "instant"—the doctrine took about thirteen years to develop from the Truman Proclamation of 1945 until its adoption as customary international law, as evidenced by the 1958 Convention on the Continental Shelf[89]—it illustrates that customary norms can develop and have the force of international law in a relatively short period of time. Another possible example would be the elimination of ozone-damaging CFCs by the international community under the Montreal Protocol, as well as its acceleration under subsequent agreements. By 2007, "the 191 Parties to the Montreal Protocol had together phased out over 95 percent of ozone depleting substances" only twenty years after the signing of the agreement.[90] This represents a very rapid pace for the development of international environmental law. From

83 *Sosa*, 542 U.S. 692, 724–25 (2004) (concluding that "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 a specificity comparable to the features of the 18th-century paradigms we have recognized").

84 Brief for the Respondent at 45–46, *Sosa*, 542 U.S. 692 (2004) (No. 03-339), *available at* 2004 WL 419421. Alvarez-Machain argued that international customary norms need not qualify as *jus cogens* in order to be justiciable under the ATS. *Id.* at 46; Brief for the Petitioner at 45–47, *Sosa*, 542 U.S. 692 (2004) (No. 03-339), *available at* 2004 WL 162761. While Sosa did not argue that norms had to be *jus cogens* to be actionable, he did object to the application of customary international law inferred from treaties the United States had not signed or ratified. *Id.*

85 *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2, 247 (2d Cir. 2003) (defining "law of nations" as synonymous with "customary international law"). The court cites other Second Circuit cases, as well as an early U.S. Supreme court case, *The Estrella*, 17 U.S. (4 Wheat.) 298 (1819), in coming to its conclusion, but does not specifically use the term "*jus cogens*" in its analysis. *Id.* For another analysis of whether *jus cogens* should be required in ATS claims see David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After* Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219, 1245–49 (2005) (concluding that *jus cogens* norms should apply to ATS claims).

86 Christensen, *supra* note 85, at 1247.

87 *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 n.22. (1987) (citing *North Sea Continental Shelf Cases*, 1969 I.C.J. Rep. 3, 44).

88 *Id.*; *see also* discussion *supra* Part III.A.2.

89 *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

90 THE UNITED NATIONS OZONE SECRETARIAT, UNITED NATIONS ENVIRONMENT PROGRAMME, ACHIEVEMENTS IN STRATOSPHERIC OZONE PROTECTION: PROGRESS REPORT 1987–2007, at 12 (2007), *available at* http://ozone.unep.org/Publications/MP_Acheivements-E.pdf. *See generally* AFEAS: Montreal Protocol, http://www.afeas.org/montreal_protocol.html (last visited Apr. 19, 2009) (summarizing the Montreal Protocol and subsequent CFC limiting treaties). While some uses are excepted, such as the health and safety of society or where no technical substitute exists, creation or emission of CFCs outside these narrow, specific exceptions could be an example of a law of nations violation under the ATS (developing countries currently have until 2040 to eliminate CFC use).

these examples of rapid development of customary international law, it can be inferred that future environmental harms could develop into customary international law torts, enforceable under the ATS.

B. U.S. Supreme Court: Jus Cogens*, Not Defined, but Ducked*

The U.S. Supreme Court explicitly accepts the notion that development of customary international law since the initial passage of the Judiciary Act can lead to new causes of action beyond the "Blackstone trio" of piracy, interference with ambassadors, and violations of safe conduct:[91] "[C]laim[s] based on the present-day law of nations [are required to rest on norms] of international character accepted by the civilized world" and must be "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[92] Although the *Sosa* majority stated that "great caution" should be used in applying the law of nations to private rights, it dismissed Justice Scalia's concurring opinion claiming that the famous *Erie Railroad Co. v. Tompkins* (*Erie*)[93] decision somehow disposes of nonstatutory claims under the ATS.[94] The majority explained "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[95] Justice Scalia's concurrence relied on the distinction between general common law, applied by federal courts before *Erie*, and federal common law, which borrows heavily from the law of the state where the federal court sits, and is created only when "necessary to protect uniquely federal interests" and in areas "in which Congress has given the courts the power to develop substantive law."[96] It is not immediately clear why *Erie*, a state law case, should limit the scope of ATS claims cognizable in interpreting customary international law (the *Sosa* majority agreed that *Erie* should not preclude such an analysis).[97]

Although the Supreme Court may try to apply a higher standard than customary law in defining the "law of nations" if an appropriate ATS case arises, requiring *jus cogens* would be, in effect, a judicial modification of the Alien Tort Statute. While the concept of *jus cogens* existed in Roman law, the term was first introduced in municipal legal systems for the proposition that certain rules can not

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91 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). See *supra* Part II.C for a discussion of Blackstone's definition of the law of nations.

92 *Sosa*, 542 U.S. at 725.

93 304 U.S. 64 (1938). For a thorough examination of the *Erie* issues raised by *Sosa*, see Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007).

94 *Sosa*, 542 U.S. at 728–29.

95 *Id.* at 729–30.

96 *Id.* at 741–42 (Scalia, J., concurring) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (internal quotations omitted)). The general common law versus federal common law distinction is beyond the scope of this Comment, but is explored in depth in Bradley et al., *supra* note 93.

97 *Sosa* at 729–30.

be circumvented through private contract.[98] While the idea of universally nonderogable norms has been advocated in legal literature for some time, the actual application by international tribunals or in state practice is relatively new. The concept of codifying nonderogable rules of international conduct originated in 1953, in a report on the Vienna Convention on the Law of Treaties.[99] Even this relatively late reference did not use the term of art "*jus cogens*." While the body of the law of nations applicable under the ATS has expanded since 1789, later developments within that body of law, which created a nonderogable subset of law, should not automatically raise the standard required for ATS plaintiffs. As long as the customary international law standards of universality, specificity, and subjectivity are met, the ATS claim should be allowed to proceed. Many of the concerns of commentators, who advocated increasing the standard to *jus cogens*, can be addressed by procedural requirements, such as judicial concerns for international comity, exhaustion of local remedies, forum non conveniens, and interference with executive foreign policy.

V. WHAT IS THE SCOPE OF ENVIRONMENTAL TORTS ACTIONABLE UNDER THE ATS?

This Part will examine the policy rationales for using the ATS to police environmental torts committed by multinationals abroad, examine current torts that would violate customary international law, and examine possible environmental torts which could become actionable in the future. This Part will then go on to examine an ongoing environmental ATS case, *Sarei v. Rio Tinto*, to show how the Ninth Circuit is applying the ATS to environmental torts. The *Sarei* case is novel in two ways: 1) the court's application of the ATS to environmental torts not directly related to human rights violations, and 2) the court's decision to not absolutely require the plaintiffs to exhaust their local remedies before pursuing their claims in federal court.

A. Reasons for Using the ATS to Police Multinational Environmental Torts

At least three reasons for using the ATS against multinational environmental tortfeasors abroad have been identified: 1) the international good of environmental protection, 2) the lack of local remedies owing to the unequal bargaining power of multinationals in relation to weak developing states, and 3) the protection of human rights to life and health threatened by environmental harm.[100] Plaintiffs in the United States have litigated other global governance issues in federal courts to control other international harms propagated by multinationals when local regulation has proven ineffective.[101] Extending the causes of action under the ATS

98 Egon Schwelbe, *Some Aspects of International* Jus Cogens *as Formulated by the International Law Commission*, 61 AM. J. INT'L. L. 946, 948 (1967).

99 *Id.* at 949; 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 reporters n.6 (1987).

100 James Boeving, *Half Full . . . Or Completely Empty?: Environmental Tort Claims Post* Sosa v. Alvarez-Machain, 18 GEO. INT'L ENVTL. L. REV. 109, 112–13 (2005).

101 *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997). In *Unocal*, plaintiffs alleged that a consortium of oil companies, acting with the Burmese military, forced local peasants to work on an oil pipeline, and alleged human rights violations such as battery, murder, rape, and torture. *Id.* at 883.

to environmental claims is a natural step in improving corporate governance of those multinationals that exploit lax standards and corrupt or weak governance abroad. While this extraterritorial application of customary international law may seem unwise or unconstitutional, adjudication of foreign law in federal courts was apparently supported by Alexander Hamilton: "[The laws] of Japan, not less than of New York, may furnish the objects of legal discussion to our courts."[102]

B. Current Customary International Environmental Law

There are many areas of environmental law which already exhibit the status of customary international law, for example, activities in one state which cause environmental injuries in neighboring states: transboundary rivers, migratory birds, weather modification, overfishing, marine pollution, oil spills at sea, dumping of radioactive waste, and radioactive emissions.[103] Most successful ATS environmental litigation to date has involved not just environmental harm, but human rights violations, or other torts involving violations of human rights or other classic Blackstone "law of nations" torts. Commentators have suggested applying the ATS to such environmental harms as global warming.[104] Others take the approach of merging environmental harm with human rights violations, where the underlying violations include the right to life (for those cases where the environmental destruction also causes loss of life, such as the 1984 Bhopal chemical plant disaster),[105] the right to a healthy environment,[106] or harms to particular racial or ethnic groups.[107] In practice, however, enforcement of international environmental norms through international tribunals, such as the International Court of Justice or the United Nations system, has seen even less use and success than ATS claims.[108]

1. War-Related Environmental Harms

The environmental harms caused by war are well-documented. These include harm to endangered species, water and soil pollution, and deforestation.[109] Battle fields from World War I and World War II in France and Belgium remain unfit for

The district court ruled that the plaintiffs had stated a claim upon which the corporations involved could be held liable for their alleged abuses. *Id.* at 884.

102 THE FEDERALIST NO. 82, 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

103 *See generally* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. VI, introductory n. (1987).

104 *See, e.g.*, Rosemary Reed, Note, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399, 424 (2002) (arguing that islanders harmed by global warming could potentially seek relief under the ATS for violations of the "environmental human rights of indigenous peoples").

105 Richard L. Herz, *Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 574 (2000).

106 *Id.* at 580.

107 *Id.* at 600.

108 *See* Linda A. Malone & Scott Pasternak, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365, 411 (2002). Similar to the approach that most ATS cases have taken, policing environmental harm under United Nations procedures typically connects the environmental harm to violation of a human right. *Id.*

109 NADA AL-DUAIJ, ENVIRONMENTAL LAW OF ARMED CONFLICT 45 (2004).

agriculture today.[110] But these harms were created under the auspices of the laws of war; these actions do not rise to the level of violating customary international law, and therefore would not be actionable under the ATS. The aftermath of the 1990 Persian Gulf War included the intentional destruction of Kuwaiti oil fields, large amounts of sanitary waste, leftover barbed wire, depleted uranium, and mechanical debris.[111] For the first time, under Resolution 687, the United Nations explicitly recognized state liability for environmental claims stemming from the war.[112] But it is far from clear that a uniform state practice, sufficient to uphold peacetime environmental treaties in wartime, constitutes customary international law.[113] It is also likely that the doctrine of military necessity will keep many actions from rising to the level of a customary international law violation.[114] For example, Iraq could argue that the oil well destruction lent a military advantage by obscuring the retreating Iraqi army, and therefore did not violate the customary international law of war.[115]

2. Sarei v. Rio Tinto*: Environmental Damage under Color of Government Authority*

The facts in *Sarei v. Rio Tinto* illustrate the scope of environmental harm that could rise to the level of a violation of customary international law.[116] The *Sarei* plaintiffs alleged that Rio Tinto, a multinational corporation headquartered in London, committed war and environmental crimes against residents of the island of Bougainville, Papua New Guinea, as it attempted to reopen its copper mine on the island.[117] Along with human rights atrocities, the plaintiffs allege harm resulting from exposure to toxic chemicals and tailings that leached into local rivers.[118] The plaintiffs have documented several serious health issues, such as a lung removal (pneumonectomy) and mysterious deaths from unknown diseases, as well as serious damage to fishing and sacred tribal sites.[119] The district court considered several possible violations of international law beyond environmental harms, including war

110 *Id.*

111 *Id.* at 49.

112 *Id.*

113 *See* Silja Vöneky, *Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR 195, 195–96 (Jay E. Austin & Carl E. Bruch eds., 2000). One way to evidence that peacetime treaties constitute customary international law would be for various army field manuals to state that this is the case, as stated in the U.S. Army's *Operational Law Handbook*. *See id.* at 195. This handbook, however, appears to be the exception rather than the rule. *Id.* at 195–97.

114 Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR, *supra* note 113, at 101–02.

115 *See id.* (describing the "classic formulation" of military necessity as one where some reasonable connection exists between destroying property and overcoming the enemy); *id.* at 110–11 (examining the issues raised by the "reasonable connection" standard, including how direct and likely the advantage sought needs to be, and how necessary the operation must be to justify destruction of property).

116 Exhaustion of local remedies, the specific issue recently considered by the Ninth Circuit, is discussed *infra* in Part VI.

117 *See* Sarei v. Rio Tinto PLC (*Sarei I*), 221 F. Supp. 2d 1116, 1120–21 (C.D. Cal. 2002).

118 *See id.* at 1128–29 (listing specific allegations raised by the class representatives, including illnesses resulting from leached toxic chemicals, preventable deaths resulting from the blockade, and beatings resulting in death).

119 *See id.*

crimes, crimes against humanity, and racial discrimination.[120] It found that the plaintiffs had alleged torts sufficient to sustain a customary international law claim under the Federal Rule of Civil Procedure (FRCP) 12(b)(6) standard.[121]

The *Sarei* plaintiffs also alleged that defendants' actions caused harm specifically affecting their rights to life and health,[122] sustainable development, and the 1982 United Nations Convention of the Law of the Sea (UNCLOS).[123] The court found that the plaintiffs' pleadings regarding harm to their rights to life and health caused by environmental harm did not meet the requirements for specificity, universality, and obligitoriness required for a violation of a norm of international law.[124] The plaintiffs presented several treaties as evidence of customary international law, including the American Convention on Human Rights (Convention).[125] The court found these principles were not universal or specific enough to serve as evidence of an international norm on environmental harm, noting that the Convention included provisions barring the death penalty, a norm the United States does not subscribe to.[126] Further, the United States only signed, but never ratified, the Convention.[127] For these reasons, the court dismissed the environmental claims related to harms within the land boundaries of the island for not rising to the level of customary international law.[128] Similarly, the court also quickly dismissed the plaintiffs' claim to sustainable "'development that meets the needs of the present without compromising [future generations]'" as too broad a claim under the law of nations standard.[129]

One of the *Sarei* plaintiff's environmental claims was found to rise the level of an international law violation under the FRCP 12(b)(6) standard. These were

120 *See id.* at 1139 (alleged war crimes); *id.* at 1149–50 (alleged crimes against humanity); *id.* at 1151–52 (alleged racial discrimination).

121 *See id.* at 1162. The defendants moved to dismiss under both FRCP 12(b)(1), for lack of subject matter jurisdiction, and FRCP 12(b)(6), for failure to state a claim upon which relief can be granted. *Id.* at 1129, n.89. The court found that, because the statute invoked by the plaintiffs only allowed the court to exercise subject matter jurisdiction over the action if the complaint adequately alleged a violation of the law of nations, the FRCP 12(b)(1) and FRCP 12(b)(6) analyses merged. *Id.* Determining that, in regards to jurisdiction under the statute, "[t]he only dispute is whether . . . plaintiffs have adequately pleaded a violation of . . . the law of nations," *id.* at 1131, the court necessarily engaged in a FRCP 12(b)(6)-like analysis of the plaintiffs' allegations in answering the subject matter jurisdiction issue.

122 *See id.* at 1156 (describing allegations that defendants' environmental contamination deprived Bougainvilleans of their right to life, health, and security of the person).

123 *See id.* at 1160 (describing plaintiffs' assertion that allegations of environmental harm stated a claim under the principle of sustainable development and UNCLOS).

124 *See id.* at 1158–59 (stating that, because plaintiffs based their claims on the law of nations, they must show that defendants' conduct breached a universal norm of international law). Citing various case law, expert declarations, and authorities, the court concluded that "[t]he relevant inquiry in assessing jurisdiction is not how plaintiffs characterize the conduct alleged in the complaint (i.e., environmental harm or deprivation of the rights to life and health), but whether 'a specific, universal, and obligatory' norm prohibits the activity." *Id.* at 1159–60 (quoting *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). Because the plaintiffs failed to show that the alleged environmental torts violated any such norm of international law, the court granted the defendants' motion to dismiss the claims regarding rights to life and health for lack of jurisdiction. *Id.* at 1160.

125 *See id.* at 1156.

126 *See id.* at 1157–59.

127 *Id.* at 1158.

128 *Id.* at 1159–60.

129 *Id.* at 1160–61.

provisions of UNCLOS, which has been ratified by 166 countries, including Papua New Guinea.[130] Citing *Mayaguezanos por la Salud y el Ambiente v. United States*,[131] the court found that even though the United States signed, but has not ratified the treaty, that to the extent the treaty incorporated customary international law, the United States is bound, even for acts that would "defeat the object and purpose of the agreement."[132] The court specifically cited two UNCLOS provisions: that states take all measures "necessary to prevent, reduce, and control pollution of the marine environment . . . through the introduction of substances into the marine environment" and another requiring states to "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources."[133] The court found that the plaintiff's pleadings, which allege the dumping of billions of tons of toxic mine waste, including pollution of a major bay "dozens" of miles away and further into the Pacific Ocean, constituted an UNCLOS violation, and that therefore ATS subject matter jurisdiction existed.[134] The *Sarei* defendants also raised the exhaustion issue, discussed *infra* in Part VI.

C. ATS Jurisdiction for Torts under Human Rights Proxy vs. Standalone Jurisdiction

Most, if not all of the ATS environmental claims in litigation to date use either Blackstone "law of nations" torts or human rights torts as proxies for jurisdiction. What further requirements would be required for an environmental tort to satisfy ATS subject matter jurisdiction on its own, without this "supplemental jurisdiction" proxy? Even ATS cases such as *Adra v. Clift* appear to have a supplemental jurisdiction pattern to the plaintiffs' claims.[135] The court in *Adra* heard the family custody claim under the ATS because of the clear, underlying Blackstone tort: entry into the country under an invalid passport.[136] Similarly, the environmental torts alleged by the plaintiffs in previous ATS cases relied on underlying human rights violations which violated even *jus cogens* norms of customary international law such as torture or murder.

In a sense, these cases are analogous to common law ancillary jurisdiction, or supplemental jurisdiction under 28 U.S.C. § 1367—once a clear ATS tort is alleged, other aspects of the tortious behavior, which would normally not be cognizable by the court (e.g., child custody) suddenly are cognizable because of the ATS tort violation (e.g., violation of safe conduct by traveling under an invalid passport). The *Sarei* case represents an expansion in the range of cognizable claims allowable under the ATS because the customary international law violation which was allowed to proceed—pollution of international waters under UNCLOS—is an

130 *Id.* at 1161.

131 198 F.3d 297 (1st Cir. 1999).

132 *Sarei I*, 221 F. Supp. 2d at 1161 (quoting *Mayaguezanos*, 198 F.3d at 304 n.14) (citations and quotations omitted).

133 *Id.*

134 *Id.* at 1162.

135 *See supra* text accompanying notes 19–23.

136 *Adra*, 195 F. Supp. 857, 864–65 (D. Md. 1961).

environmental tort that lacks plaintiffs who have suffered a direct injury. Further, even though all other claims in *Sarei* were eventually dismissed from the case, the court remanded the sole remaining UNCLOS claim for pollution of international waters to the district court for further proceedings.[137] This case shows an environmental tort, lacking a "classic" human rights violation, such as torture, being considered outside of the quasi-supplementary jurisdiction fact pattern of earlier cases. This opens the door for similar environmental claims not dependent on human rights violations to be brought under the ATS upon demonstration that remedies abroad have been exhausted.[138]

D. Future Environmental Harms Which Could Evolve into Actionable ATS Torts

In the future, it is possible that certain environmental torts could rise to the level of violations of customary international law without direct harm to the ATS plaintiffs. Already, U.S. states have gone beyond attempts to force the United States Environmental Protection Agency (EPA) to regulate greenhouse gases directly,[139] and have initiated massive tort litigation directly against defendants such as utilities and automobile manufactures, not only for violations of regulatory statutes, such as the Clean Air Act,[140] but for classic nuisance claims as well.[141] Eight states brought suit against the five largest carbon dioxide emitters in the United States, and California has sought billions of dollars in damages from automakers for the greenhouse gases emitted from their products.[142] It is not difficult to envision this litigation trend continuing to the point that alien plaintiffs could sue individual defendants under the ATS.

Plaintiffs suing defendants for greenhouse gas emissions would still face an uphill climb. It is by no means certain that controlling greenhouse gas emissions will satisfy the customary international law requirements of being specific, universal, and obligatory. While the Kyoto Protocol could serve as evidence of customary international law, the United States has shown that it is unwilling to ratify it,[143] and developing countries that have are not bound to the same requirements;[144] thus universal obligation may be currently lacking. As with UNCLOS, however, 100 percent acceptance of the Kyoto treaty is not required for the creation of customary international law.[145] Specificity is probably lacking as

137 *Sarei II*, 487 F.3d 1193, 1213 (9th Cir. 2007).

138 *See Sarei IV*, 550 F.3d 822, 832 (9th Cir. 2008).

139 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

140 42 U.S.C. §§ 7401–7671q (2006).

141 Noel C. Paul, Comment, *The Price of Emission: Will Liability Insurance Cover Damages Resulting from Global Warming?*, 19 LOY. CONSUMER L. REV. 468, 478 (2007).

142 *Id.* at 478–79.

143 *World Briefing: Australia; Kyoto Ratification First Act of New Leader*, N.Y. TIMES, Dec. 4, 2007, at A8 (noting that the new Australian Prime Minister immediately ratified the Kyoto Protocol upon entering office, leaving the United States as the sole industrialized nation not to ratify the Protocol).

144 *See* Eric Shaffner, Note, *Repudiation & Regret: Is the United States Sitting out the Kyoto Protocol to its Economic Detriment?*, 37 ENVTL. L. 441, 447 n.35 (2007).

145 *See supra* notes 131–32 and accompanying text, regarding nonuniversality and UNCLOS. In *Sarei*, the Ninth Circuit has ruled that UNCLOS could be applied in an ATS claim, even though the United States never ratified the treaty.

well; the Kyoto Protocol does not set limits or emission rates for individual activities, but instead sets goals at the national level.[146] Further, compliance is achievable in part through a complex system of carbon trading.[147] It is difficult to see that applying these types of complex global standards to an individual corporation would ever be specific enough to constitute a customary international law violation.

It is possible that cheaper new technology could create a situation in which failure to control carbon dioxide emissions had the specificity and universality of customary international law. For example, if economical carbon sequestration technology is developed for fossil fuel-based utility plants,[148] the harms created by carbon emissions might constitute a classic tort of nuisance. Similar to how most CFC emissions have come close to if not rising to the level of customary international law,[149] utilities which fail to implement future economical sequestration technology in the future could be similarly liable. Ratification of the Kyoto Protocol by the United States would not be necessary to hold U.S. defendants accountable; the UNCLOS treaty violations in *Sarei* were held by the court to be evidence of customary international law, and therefore applicable, even though the United States has not signed the treaty.[150]

VI. EXHAUSTION

In 2007, the issue on appeal in *Sarei v. Rio Tinto* (*Sarei II*) was whether the ATS requires exhaustion,[151] a question of first impression in the Ninth Circuit.[152] The U.S. Supreme Court had discussed, but left to consider another day, the exhaustion question in *Sosa v. Alvarez-Machain*.[153] The Ninth Circuit upheld the district court's ruling, which did not require exhaustion in ATS cases, based on three arguments. First, the court compared the TVPA, which expressly requires exhaustion, to the

146 MICHAEL GRUBB ET AL., THE KYOTO PROTOCOL: A GUIDE AND ASSESSMENT, at xxxiv (1999).

147 Shaffner, *supra* note 144, at 453–54.

148 Carbon sequestration comes in two forms: 1) capture and storage, which prevents release of carbon dioxide emissions at sources such as power plants; 2) and increasing the capture rate of existing dioxide from the atmosphere through natural processes such as forestation. Carbon Capture & Sequestration Technologies MIT Energy Initiative, Technology Overview, http://sequestration.mit.edu/technology_overview/index.html (last visited Apr. 19, 2009). The Sleipner project in Norway's North Sea sequesters about one million metric tons of carbon dioxide each year. *Id.* For further discussion of the science and law behind various methods of carbon sequestration, see also Elizabeth C. Brodeen, *Sequestration, Science, and the Law: An Analysis of the Sequestration Component of the California and Northeastern States' Plans to Curb Global Warming*, 37 ENVTL. L. 1217 (2007).

149 *See supra* note 90 and accompanying text.

150 *See supra* note 132 and accompanying text.

151 *Sarei II*, 487 F.3d 1193, 1197 (9th Cir. 2007). For an extensive review and argument against the Ninth Circuit's approach to exhaustion, see Rosica (Rose) Popova, Sarei v. Rio Tinto *and The Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, But at What Cost?*, 28 HAMLINE J. PUB. L. & POL'Y 517 (2007).

152 *Sarei II*, 487 F.3d at 1224 n.1 (Bybee, J., dissenting).

153 Addressing the European Commission's amicus curiae brief asking the Court to rule that plaintiffs must exhaust any remedies in both domestic, and perhaps international tribunals, the Court simply stated "[w]e would certainly consider this requirement in an appropriate case." *Sosa*, 542 U.S. 692, 733 n.21 (2004).

ATS, which does not.[154] The court found that this omission, as well as Congress's failure to amend the ATS to explicitly include an exhaustion requirement when passing the TVPA in 1992[155] creates a presumption that Congress intentionally declined to add an exhaustion requirement to the ATS.[156] The court argued the obverse as well: if the ATS already included an exhaustion requirement, then adding a requirement to the TVPA would be superfluous.[157] Second, the court argued that exhaustion is not part of customary international law, and therefore does not apply.[158] It first reasoned that exhaustion is a limit placed on international tribunals, not domestic ones, and then also stated that international exhaustion is procedural, not substantive law.[159] Third, the court made a plain language argument that because the ATS contains no exhaustion provision, none exists.[160]

A. Squaring the TVPA and ATS Legislative History

The reasoning of the Ninth Circuit panel in 2007 on exhaustion strains the limits of statutory construction and legislative history, but ultimately the majority came to the correct result by not requiring exhaustion. The majority's own opinion sums up the legislative history approach to interpreting the ATS best: "[G]iven . . . the lack of express . . . congressional intent . . . we cannot conclude that legislative intent *supports* importing an exhaustion requirement into the [Alien Tort Claims Act]."[161] While the House Report touches on the ATS, where the report specifically discusses TVPA exhaustion and statute of limitations provisions, the context is limited to the TVPA.[162] While expressing concerns for other policy implications of TVPA, such as comity and overburdening federal courts, George H.W. Bush did not mention exhaustion in his TVPA signing statement.[163] The Congresses of 1789, 1911, and 1992 did not create legislative history supporting either argument, or even the *notion* that including or adding an exhaustion requirement was contemplated.

B. International Exhaustion Requirement of Customary International Law

1. Exhaustion Only Applies to International Tribunals

The *Sarei II* opinion concluded that international "norms" of exhaustion only apply in international tribunals, not in sovereign national courts which adjudicate

154 *Sarei II*, 487 F.3d at 1213.
155 *Id.* at 1216–17.
156 *Id.* at 1217.
157 *Id.*
158 *Id.* at 1220.
159 *Id.* at 1220–21.
160 *Id.* at 1222–23.
161 *Id.* at 1218.
162 *See* H.R. REP. NO. 102–367, at 5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 87–88.
163 Statement by President George Bush upon Signing H.R. 2092, 28 Weekly Comp. of Pres. Doc. 465 (1992), *reprinted in* 1992 U.S.C.C.A.N. 91, 91. President Bush went on to suggest that the TVPA did not do enough to protect torture victims, because it does not fully implement the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. *Id.*

suits arising under customary international law.[164] The majority cited the *Restatement (Third) of Foreign Relations Law*, which establishes that local remedies must be exhausted before beginning international proceedings.[165] This reasoning is clearly not on point when the tribunal is not an international one.

2. Exhaustion is Procedural, Not Substantive

The *Sarei II* majority also argued that exhaustion is a procedural doctrine, not a substantive one.[166] After all, if the court is adjudicating customary international law norms, then theoretically a finding in one nation's tribunal should be the same as that of any other nation applying the same universal norm—the underlying substantive law should not depend on which country hears the case.

However, in the Ninth Circuit's recent 2008 en banc decision,[167] the court tread lightly towards creating a new exhaustion standard. The majority opinion took a cue from the Supreme Court—which declined to address exhaustion in *Sosa*—and stated that it would review the issue in "an appropriate case."[168] The Ninth Circuit echoed that language in stating *Sarei* "is an appropriate case."[169]

> Although we decline to impose an absolute requirement of exhaustion in ATS cases, we conclude that, as a threshold matter, certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. Where the "nexus" to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of "universal concern."[170]

The majority argued that the statutory analysis examining the TVPA was unnecessary,[171] based on considerations of prudential exhaustion and comity, citing precedent involving habeas corpus and domestic tribal courts.[172] The majority further distinguished ATS claims as being a civil matter, versus historical ATS claims, which were based on piracy, a criminal matter.[173] Reasoning that the district court erred by finding the ATS did not impose an exhaustion requirement,[174] the Ninth Circuit concluded that defendants bear the burden "to plead and justify an exhaustion requirement," and remanded the case to the district court so that it could consider "whether to impose an exhaustion requirement on plaintiffs."[175]

Judge Bea's concurrence highlighted some of the issues with using a prudential exhaustion standard.[176] He noted that because prudential exhaustion

164 *Sarei II*, 487 F.3d at 1220.
165 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 reporters n.5 (1987).
166 *Sarei II*, 487 F.3d at 1221.
167 *Sarei IV*, 550 F.3d 822, 822 (9th Cir. 2008).
168 *Sosa*, 542 U.S. 692, 733 n.21 (2004).
169 *Sarei IV*, 550 F.3d at 827.
170 *Id.* at 824 (footnote omitted).
171 *Id.* at 827–28.
172 *Id.* at 828–29.
173 *Id.* at 831.
174 *Id.* at 827.
175 *Id.* at 832.
176 *Id.* at 833–38 (Bea, J., concurring).

gives a district court judge discretion to proceed with a case, that any one judge can "interject the judiciary into ongoing international disputes and crises of foreign affairs."[177] Instead of applying a discretionary standard, Judge Bea advocated for a two-part test to allow some plaintiffs to avoid having to show that their remedies were first exhausted abroad.[178] The first part analyzes whether local remedies are available where the tort occurred, while the second part evaluates whether plaintiffs can prove local remedies will be "ineffective, unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue."[179] Judge Bea concluded that this two-part test allows federal courts to be prudent in hearing cases, while still allowing federal courts to serve the "role the ATS intended them to play: an ultimate venue for claimed violations of the law of nations when those claimed violations cannot or will not be cured by the courts of the country in which the injury occurred," while at the same time avoid courts taking the role of "roving sheriff" that Hamilton warned about in *The Federalist*.[180]

Interestingly, district courts in the Ninth Circuit have applied exhaustion as a substantive doctrine instead of a procedural one. For example, in *Bowoto v. Chevron Corp.*,[181] defendants raised the exhaustion issue, and the district court considered staying a final decision until *Sarei* was decided. Ultimately, the district court found this unnecessary, reasoning that exhaustion was an affirmative defense, and the "defendants have failed to prove that Nigerian remedies are adequate and available."[182] Further, "plaintiffs have offered some evidence that these remedies are 'ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'"[183]

C. Plain Language & Case Law History

The ATS is a simple statute, which contains no explicit exhaustion provision. And, as the district court noted in *Sarei*, no court has interpreted the ATS to include local exhaustion as a prerequisite for bringing a claim in the United States.[184] The requirement was not discussed at all in the nineteenth century cases researched above,[185] was the exhaustion discussed in the 1961 *Adra v. Clift* case.[186] The exhaustion principle is an unnecessarily applied judicial self-restraint that blocks plaintiffs' access to federal courts. The judicial concerns that exhaustion addresses often overlap with the doctrines of political question, comity, and forum non conveniens.

Because all three of those doctrinal areas are much more well-developed in federal common law, it makes more sense to apply only those doctrines, instead of developing a fourth procedural doctrine to apply in ATS cases. Alternatively, if an exhaustion rule must be applied, a "quick look" at the legal climate in the

177 *Id.* at 835.
178 *Id.* at 833 n.1.
179 *Id.* at 833.
180 *Id.* at 836–37.
181 557 F. Supp. 2d 1080 (N.D. Cal. 2008).
182 *Id.* at 1096.
183 *Id.* at 1097 (quoting S. REP. NO. 102-24, *10).
184 *Sarei I*, 221 F. Supp. 2d 1116, 1133 n.100 (C.D. Cal. 2002).
185 *See supra* notes 18, 32, and 54.
186 *Adra*, 195 F.Supp. 857 (D. Md. 1961).

jurisdiction where the tort occurred could be applied to quickly test whether the case should be heard in another forum, without unduly burdening plaintiffs and defendants.[187] The *Sarei* parties have been litigating for over six years, and still have not resolved the preliminary issue of exhaustion, despite the issuance of three Ninth Circuit opinions. The plaintiffs have not received swift justice, nor have federal judicial resources been conserved. This litigation has dragged on although plaintiffs' complaint, alleging that Papua New Guinea agents acted in concert with the defendants, inflicting harm on the plaintiffs, seems highly unlikely to obtain a remedy in the local forum to even a superficial legal observer.

D. A Modified Exhaustion Standard: Preserving Plaintiffs' Cause of Action as Well as Conserving Judicial Resources

1. Do the Plaintiffs Show a Prima Facie Case That They Will Not Achieve Redress in the Country Where the Tort Occurred?

The *Restatement (Third) of Foreign Relations Law* already notes that while states acting on behalf of individuals seeking remedies for human rights violations before international tribunals are required to exhaust local remedies first, exhaustion is satisfied if "[no remedy] is available or . . . it would be futile to pursue [it]."[188] Similarly, it makes sense to apply a similar standard of futility when evaluating exhaustion for individual plaintiffs acting on their own behalf. In cases where the defendant has acted in concert with, or under color of law of the local government, this should create a presumption in favor of futility for the plaintiff. For cases with no local government involvement, if the plaintiff can show some evidence that standard practice in the local area does not recognize the customary international law standard, or alternatively, does not provide a remedy, that should be sufficient make a prima facie showing of nonredressability in the foreign jurisdiction. Requiring plaintiffs to show that they will not likely achieve redress in the country where the tort occurred will avoid federal courts providing an alternative forum when the action could have been pursued locally.

2. Will the Defendant Receive at Least as Fair, If Not a More *Fair Trial, in the United States?*

The court should look at whether the defendant is likely to receive as fair of treatment in a U.S. federal court as it would in the location where the tort occurred. In most cases, this should not be an issue.

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[187] Here, "quick look" refers to the phrase coined by Judge Posner in referring to the modified Rule of Reason applied in antitrust cases. *See* Stephen Calkins, *California Dental Association: Not the Full Look but Not the Full Monty*, 67 ANTITRUST L.J. 495, 528 (2000). In antitrust cases, which often involve complicated and expensive analysis of market power, the court short-circuits the complex analysis needed to determine if a defendant has market power and instead looks at "whether [the action] has clear anticompetitive consequences and lacks any redeeming competitive virtues." *Id.*

[188] 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. d (1987).

3. Is There a Local Policy Which Supports Local Exhaustion, While Still Upholding Norms of Customary International Law?

A key problem is addressing the circumstance where alien plaintiffs have valid ATS claims under international law, but the state where the injury occurred has created a policy which may limit the plaintiff's remedies in the interest of a contrary policy aimed at achieving justice. Probably the best example of this would be South Africa in the post-apartheid years. South Africa is taking a unique approach in dealing with the severe and frequent human rights abuses which took place during the apartheid years.[189] South Africa is managing its transition to a multiracial state by applying the principles of "ubuntu." Under this concept, justice is sought not by revenge and retribution, but through reparations for the victims and rehabilitation of the oppressors.[190] This route is contrary to traditional Western notions of justice, and arguably abrogated the victims' rights to due process.[191] While the objectives of the Truth and Reconciliation Commission (TRC) were laudable and received significant international attention, Richard Wilson concludes that in practice they were not effective in "creating a new culture of human rights or greater respect for the rule of law."[192] Because of this "equating" of human rights with amnesty, Wilson argues that this led to delegitimization of the TRC.[193] He also points to Eastern Europe, and the greater responsibility imposed after the fall of the authoritarian regimes there, as having more success.[194] Wilson blames the lack of accountability under ubuntu for the continuing crime problems that plague South Africa.[195]

James Gibson's book covers extensive data on the perceptions of the fairness and results achieved through the TRC process. He observes that "complaints and condemnations of the truth and reconciliation process seem to far outnumber laudatory assessments."[196] Gibson concludes that members of four different racial groups reported feeling at least somewhat reconciled, in percentages ranging from 33% to 59%.[197] Given the limited success of South Africa's alternative to Western norms of justice, it is not clear when, or even if, any ATS claims should be rejected because of local policies. Given that ATS defendants must have some connection to the United States to establish personal jurisdiction, it is not clear that claims satisfying personal jurisdiction should be denied adjudication because of concerns about interference with conflicting local policy, such as ubuntu in South Africa.

189 *See generally* JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? (2004); RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001); REPUBLIC OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMITTEE REPORT (1999).

190 WILSON, *supra* note 189, at 9–10.

191 *Id.* at 11.

192 *Id.* at 227.

193 *Id.* at 228.

194 *Id.*

195 *Id.*

196 GIBSON, *supra* note 189, at 2. Gibson conducted an extensive statistical analysis based on several different racial categories using surveys polling the perceptions of TRC participants on their perceived level of success of the TRC. *See id.* at 28–257.

197 *Id.* at 332–34.

Further policy reasons have been identified for not encouraging extraterritorial ATS claims. International comity and respect for the courts of other sovereign nations is an obviously significant one. Two other arguments are that allowing ATS claims diminishes the opportunity for foreign courts to develop expertise and jurisprudence by adjudicating ATS cases in the country of origin,[198] and that even if the claims are eventually heard in federal court, development of the issues and factual record first in the country of origin would help decision making in U.S. courts.[199] These arguments have a certain logic to them, but should be dismissed. Bringing ATS suits against multinationals, on their "home turf," or at least where personal jurisdiction is present, will provide broader public awareness than lawsuits in developing countries with developing legal systems.

4. Judicial Discretion Can Still be Applied Through Comity, Forum Non Conveniens, and the Political Question Doctrine

If the first three prongs of this new test: futility in the local forum, fairness to defendants, and noninterference with an overriding local public policy are met, plaintiffs still have further hurdles to clear that are beyond the scope of this Comment, such as the act of the state doctrine, the doctrine of forum non conveniens,[200] and the political question doctrine.[201] While many of the same considerations are involved as with the exhaustion doctrine, these doctrines are aimed directly at the conservation of judicial resources, fairness to defendants, and noninterference with the political branches.

A more liberal exhaustion standard, on the other hand, allows plaintiffs their day in court—for internationally recognized norms of environmental behavior—while offering the justice intended by Congress in passing and upholding the ATS. Adopting the "quick look" exhaustion standard proposed here prevents the unnecessary extension of a judicial doctrine devised for international tribunals to the courts of sovereign nations.

VII. CONCLUSION

The Alien Tort Statute has a curious legal history, but the statute presents an opportunity for foreign plaintiffs to receive justice for the most heinous environmental crimes, which, if judicial doctrines are carefully crafted to avoid international policy conflicts and conserve domestic judicial resources, can be a tool for effective policing of multinational corporations with sufficient contacts to the United States. Because of the high barriers for current and future environmental torts to be considered against the law of nations, only those actions contrary in universal norms embodied in customary international law should see success, and this high standard should alleviate justifiable concerns regarding international comity. These ATS suits represent an effective tool for policing multinationals,

198 Popova, *supra* note 151, at 551.

199 *Id.*

200 *See* Ralph G. Steinhardt, *Fulfilling the Promise of* Filartiga, *in* ATCA ANTHOLOGY, *supra* note 25, at 301, 314–16.

201 *Id.* at 305–10.

which otherwise may simply profit from inflicting environmental harms as they wait for the often glacial pace of environmental treaty formation to regulate their activities. Modification of the exhaustion doctrine as applied by the Ninth Circuit will conserve judicial resources, while at the same time allow plaintiffs a fair day in court as envisioned by the original drafters of the Alien Tort Statute.