

NOTE

THE ALIEN TORT STATUTE AND PRUDENTIAL EXHAUSTION

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INTRODUCTION

The Alien Tort Statute (ATS or Statute) provides victims of human rights abuses with a powerful tool—it permits foreign plaintiffs to bring claims of violations of the law of nations against foreign defendants in the U.S. district courts.¹ Although Congress originally passed the ATS in 1789, the first successful *modern* use of the Statute did not occur until 1961.² Application of the ATS remains in its in-

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¹ See 28 U.S.C. § 1350 (2006).

² See *Adra v. Clift*, 195 F. Supp. 857, 865, 867 (D. Md. 1961) (sustaining jurisdiction under the ATS but dismissing the claim on other grounds); PETER HENNER, HUMAN RIGHTS

fancy, with the district courts determining what constitutes a viable claim.³

The Statute's expansive jurisdiction allows the district courts to reach decisions that impact the foreign policy of the United States. In fact, in 2004, the Supreme Court recommended that the district courts restrict the class of claims that a plaintiff could bring under the ATS;⁴ concerns about decisions' effects on foreign policy motivated the Court's reasoning.⁵ The Court's ultimate guidance, however, is vague and can be difficult to apply to actually produce the results that the Court stated it wanted—a limitation on the claims brought under the Statute.⁶ In the absence of further instruction, the scope of the ATS may continue to grow, and consequently courts may involve themselves in foreign policy or in the internal politics of other nations.

This possibility raises the question of how to limit the ATS properly so that victims of violations of human rights have access to redress while ensuring that the district courts do not overstep their bounds by issuing decisions that affect foreign policy. In other words, what is the best method to guarantee that the district courts abide by the Supreme Court's ruling and remain a civil forum for certain violations of human rights?

In this Note, I will address this question. Ultimately, I recommend that the circuit courts implement a limitation that the Ninth Circuit adopted in 2008: prudential exhaustion.⁷ This approach requires that plaintiffs in ATS cases in which there is a weak nexus to the United States exhaust all claims of violations of norms that are not peremptory.⁸ Adopting this rule could greatly reduce the number of claims available to plaintiffs under the ATS. Thus, prudential exhaus-

AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS 43 (2009) (“[J]urisdiction was sustained in only two cases [prior to *Filartiga v. Pena-Irala* in 1980]: *Bolchos v. Darrell* in 1795 and *Adra v. Clift* in 1961.” (footnotes omitted)).

³ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (noting that the ATS “has rarely been the basis for jurisdiction during its long history”).

⁴ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[W]e think 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.”).

⁵ See *id.* at 727 (“It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments . . . and to hold that a foreign government or its agent has transgressed those limits.”).

⁶ See *id.* at 731–32.

⁷ See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion).

⁸ See *infra* Part II.B and note 117.

tion is consistent with principles of comity.⁹ It would lead to further legitimacy of decisions under the ATS and yet afford victims of violations of human rights a forum for their claims.

Part I of this Note provides background on the ATS, including an analysis of the Supreme Court's decision in *Sosa v. Alvarez-Machain*. Part II introduces prudential exhaustion by providing the history of *Sarei v. Rio Tinto*, the case in which the Ninth Circuit held that claims under the ATS require prudential exhaustion. Part III analyzes prudential exhaustion by explaining the benefits of such an approach as compared to two other approaches. In addition, this Part provides a definition of preemptory norms and argues that the prudential exhaustion framework should operate to require exhaustion for claims of violations of nonpreemptory norms where the claim has a weak nexus to the United States. Part IV discusses the potential limitations of prudential exhaustion.

I

THE ALIEN TORT STATUTE

A. Brief History of the Alien Tort Statute

In its entirety, the Alien Tort Statute reads: "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."¹⁰ Congress passed the Statute as part of the Judiciary Act of 1789, but for almost two hundred years, plaintiffs rarely brought claims under the Statute.¹¹

In 1980, the Second Circuit breathed new life into the Statute when it allowed a plaintiff to bring an ATS claim in the U.S. District Court for the Eastern District of New York in *Filartiga v. Pena-Irala*.¹² In *Filartiga*, Dr. Joel Filartiga and his daughter brought a suit against Americo Norberto Pena-Irala, the Inspector General of Police in Asunción, Paraguay, for wrongfully causing the death of Filartiga's son, Joelito.¹³ Filartiga was an outspoken opponent of the government of Paraguay, and he contended that Pena-Irala kidnapped, tortured, and killed Joelito in retaliation for Filartiga's political opposition.¹⁴ The Second Circuit held that torture violated the law of nations as understood under the ATS¹⁵ and remanded the case to the

⁹ See *Sarei*, 550 F.3d at 828–29.

¹⁰ 28 U.S.C. § 1350 (2006).

¹¹ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (referring to the ATS as a "rarely-invoked provision"); HENNER, *supra* note 2, at 58 (noting that *Filartiga* "open[ed] the door to modern ATS litigation").

¹² 630 F.2d at 889.

¹³ See *id.* at 878.

¹⁴ *Id.*

¹⁵ See *id.* at 884.

district court for further proceedings consistent with its holding that federal jurisdiction existed for claims of torture under the ATS.¹⁶

In another well-known case, *Doe I v. Unocal Corp.*,¹⁷ the Ninth Circuit held that citizens of Myanmar could bring claims of forced labor, rape, and murder under the ATS against Unocal Corporation.¹⁸ Although the Myanmar military committed the acts, the court found that the corporate defendant could be held liable under the ATS for aiding and abetting.¹⁹ The Ninth Circuit granted this ruling an en banc review, thus negating the ruling's precedential effect.²⁰ An en banc panel of the Ninth Circuit, however, never heard the case because the parties agreed to settle and dismissed all claims.²¹

Whether aiding-and-abetting liability exists under the ATS remains an open question. The possibility of seeking redress against corporations under such liability means that plaintiffs can bring a suit against a corporation for actions taken in connection with that corporation's business in a foreign country. If the plaintiffs win, they can seek to enforce their judgment against that company's assets within the United States.²² Since 2004, roughly half of the cases involving the ATS have included claims against corporations.²³

In the fall of 2010, the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.* that corporations could not be held liable under the ATS because customary international law does not recognize corporate liability.²⁴ This ruling will obviously have a significant impact on ATS litigation. There are, however, several facts to bear in mind. The majority in *Kiobel* made clear that the ruling does not affect a plaintiff's ability to bring a suit against an *individual*, which includes a corporate employee, manager, officer, or director.²⁵ Additionally, because the majority based its opinion on the norms of customary international law, which are subject to adaptation, it is possible that in a future case the Second Circuit will determine that corporate liability has become a norm under customary international law. Additionally, no other cir-

¹⁶ *Id.* at 889.

¹⁷ 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g granted*, 395 F.3d 978, 979 (9th Cir. 2003).

¹⁸ *Id.* at 956, 962–63.

¹⁹ *See id.* at 947.

²⁰ *See Doe I v. Unocal Corp.*, 395 F.3d 978, 979 (9th Cir. 2003) (“The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.”).

²¹ Unocal reportedly settled for approximately thirty million dollars. HENNER, *supra* note 2, at 76.

²² Several well-known corporations have faced litigation under the ATS, including Texaco, Chevron, Exxon-Mobil, and Coca-Cola. *See* HENNER, *supra* note 2, at 73 & n.188.

²³ *See* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 6 (2009).

²⁴ *See* 621 F.3d 111, 145 (2d Cir. 2010).

²⁵ *Id.* at 149.

cuits have ruled that customary international law does not recognize corporate liability. Lastly, an en banc panel of the Second Circuit may hear *Kiobel*, leaving open the possibility of the court reaching a different outcome.²⁶

Courts have generally limited what claims a plaintiff can bring under the ATS. As of 2006, there have been approximately only 150 cases involving the ATS, and courts have dismissed most of these cases.²⁷ The actions that courts have allowed under the Statute include, amongst others, “genocide, torture, summary execution, disappearance, war crimes, crimes against humanity, slavery, arbitrary detention, and cruel, inhuman, or degrading treatment.”²⁸

The relatively small quantity of claims, however, is not a reason to believe that an analysis of the future of the ATS is unimportant. Since plaintiffs first used the Statute successfully only fifty years ago, courts are slowly determining its boundaries. In the process, every case involves questions of foreign relations because each includes accusations against foreign corporations, against individuals acting in another country, or against foreign states themselves.²⁹ In addition, the frequency with which plaintiffs bring claims is increasing as plaintiffs learn how to use the Statute as an effective tool to prosecute human rights violations.³⁰ Nongovernmental organizations are a driving force behind ATS litigation,³¹ and they have pressured courts to expand what claims the ATS can recognize.³² Courts have thus far limited the types of claims that constitute violations of the law of nations, but there is no guarantee that such self-regulation will continue with equal vehemence as courts hear more and more claims. The ATS places power in the hands of lower-court judges to determine what constitutes a violation of the law of nations, a concept that is evolving

²⁶ Although *Kiobel* could dramatically reduce the number of cases brought under the ATS, its holding does not alter the question being addressed in this Note: how to define and limit the scope of claims brought under the ATS.

²⁷ BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12 (2d ed. 2008).

²⁸ *Id.* at 63; see also HENNER, *supra* note 2, at 133–77 (providing examples of when courts have recognized murder or extrajudicial killing, racial discrimination, nonconsensual medical experimentation, and arbitrary denationalization).

²⁹ *Cf.* HENNER, *supra* note 2, at 245 (“ATS cases have involved governmental policies in more than 30 countries since . . . *Filartiga*.”).

³⁰ *Cf.* 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.”).

³¹ See *id.* at 50–88 (chronicling the role of nongovernmental organizations in ATS litigation and arguing that a plaintiff is more likely to win if represented by such an organization).

³² See *id.* at 51.

over time.³³ For example, in 2009, in a case brought under the ATS, the Second Circuit determined that medical experimentation without consent could constitute a violation of the law of nations.³⁴ This determination was the first of its kind.³⁵ In years to come, district courts will continue to play the role of arbiters of what constitutes a violation of the law of nations. What ATS jurisprudence lacks, though, is guidance for the district court judges who make such determinations.

B. *Sosa v. Alvarez-Machain*

Perhaps in response to the growing use of the ATS, in 2004 the Supreme Court decided to hear its first—and so far only—ATS case.³⁶ In *Sosa*, the Court sought to provide limits on the claims plaintiffs could bring under the ATS.³⁷ Before doing so, the Court placed the Statute in context by discussing the origins of the ATS, the intentions of the drafters, and the claims recognized under the Statute in 1789.³⁸ The Court stated that when Congress passed the Statute, it had, at most, three specific violations of the law of nations in mind: offenses against ambassadors, violations of safe conduct, and piracy.³⁹

The Court then turned its focus to the modern use of the ATS. The majority stressed that district courts should act cautiously in determining what claims a plaintiff can bring under the ATS.⁴⁰ It offered five arguments to support this conclusion. First, the Court stated that the prevailing interpretation of the common law has changed since the enactment of the ATS.⁴¹ Second, *Erie Railroad Co. v. Tompkins*⁴² and its progeny have greatly limited the scope of federal common law.⁴³ Third, it is best to leave the creation of private rights

³³ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–21 (2004) (acknowledging the role of the common law in determining actionable offenses under the ATS).

³⁴ See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

³⁵ Cf. HENNER, *supra* note 2, at 175–76 (“The [*Abdullahi*] court’s opinion is a useful model of how a new tort claim may be recognized as a violation of international law and thus be actionable under the ATS.”); KOEBELE, *supra* note 23, at 115 (noting the pre-*Abdullahi* “uncertain[ty] as to the actionability of the right to informed consent to medical experimentation” under the ATS).

³⁶ See *Sosa*, 542 U.S. 692; KOEBELE, *supra* note 23, at 6.

³⁷ See *Sosa*, 542 U.S. at 725 (“[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action [under the ATS].”).

³⁸ *Id.* at 712–24.

³⁹ *Id.* at 720.

⁴⁰ See *id.* at 725.

⁴¹ *Id.* (“[Today], . . . in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.”).

⁴² 304 U.S. 64 (1938).

⁴³ See *Sosa*, 542 U.S. at 726 (“*Erie* . . . was the watershed in which we denied the existence of any federal ‘general’ common law, which largely withdrew to havens of speciality” (citations omitted)).

of action to the legislature.⁴⁴ Fourth, ATS litigation can possibly affect U.S. foreign relations. The Court stressed that lower courts should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁴⁵ Fifth, the courts lack a congressional mandate to define violations of the law of nations.⁴⁶

Despite its explicit reasoning, the Court did not provide clear guidance on what specific claims a plaintiff can bring under the ATS. On the one hand, it determined that “judicial power should be exercised on the understanding that the door [of the ATS] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”⁴⁷ The term “narrow class” provides the impression that the Court did not want the ATS to be a basis for claims of violations of any and all customary international laws. District courts are to act as doorkeepers, ensuring that certain claims cannot be brought under the ATS.

On the other hand, instead of defining exactly what claims a plaintiff can bring, the Court provided a vague standard for district courts to use in fulfilling their doorkeeping function: “[C]ourts 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.”⁴⁸ The Supreme Court did not clarify how to compare the present-day law of nations to the eighteenth-century paradigms—i.e., offenses against ambassadors, violations of safe conduct, and piracy.⁴⁹ In other words, while stating that the ATS is not a basis for claims of violations of all customary international laws, the Court did not specify which particular claims comprise the “narrow class.”

C. The Alien Tort Statute After *Sosa*

The directive to district courts to exercise “vigilant doorkeeping,” combined with a lack of specific guidance, generates room for debate over what claims are and are not cognizable under the ATS.⁵⁰ From

⁴⁴ *Id.* at 727.

⁴⁵ *Id.*

⁴⁶ *Id.* at 728.

⁴⁷ *Id.* at 729.

⁴⁸ *Id.* at 725.

⁴⁹ *See id.* at 720.

⁵⁰ In addition to the Court’s vague standard, the fact that the majority’s opinion evades easy summation contributes to the lack of clarity. *See* Stephen Satterfield, Note, *Still Crying Out for Clarification: The Scope of Liability Under the Alien Tort Statute After Sosa*, 77 GEO. WASH. L. REV. 216, 234 (2008) (“[T]he Supreme Court’s guidance in *Sosa* about the nature of the ATS is dispersed throughout the Court’s opinion, and thus defies easy recitation.”).

the majority opinion, one can reach the conclusion that the Court meant to limit the ATS to violations of peremptory norms—norms by which all states are bound, regardless of the state’s consent.⁵¹ Although this conclusion is reasonable, the Supreme Court never used the term “peremptory norm” in *Sosa*.⁵² There is, also, no evidence to suggest that certain customary international law norms that do not rise to the level of “peremptory” would fail to meet the requirement of being “norm[s] of international character accepted by the civilized world.”⁵³

The lack of a clear standard for district courts to follow in deciding claims under the ATS has caused courts to reach varying conclusions. As commentators have argued, “By delegating ‘door keeping’ responsibility to a vast and diverse group of federal trial judges without meaningful guidance or standards, the *Sosa* Court set the stage for a mass of conflicting and confusing decisions that inevitably followed in its wake.”⁵⁴

Although the variations among district courts might be minimal now—only seven years removed from *Sosa*—the more pressing issue is that even if *Sosa* did not provide clear guidance, the Court certainly meant to set limits on what claims could be cognizable under the ATS.⁵⁵ In *Sosa*, the Court did not criticize the decisions that the lower courts had previously reached under the ATS.⁵⁶ In fact, the Court endorsed much of what several lower courts had determined about the appropriate scope of the ATS.⁵⁷ Yet, the Court repeatedly insisted that the lower courts act as vigilant doorkeepers and stressed the importance of doing so.⁵⁸ In *Sosa*’s wake, it is unclear if *Sosa* has really had its intended effect of limiting claims.⁵⁹

⁵¹ For a more detailed discussion of peremptory norms, see *infra* Part III.A.

⁵² Instead, the *Sosa* Court uses such terms as “norm[s] of international character” and “customary international law.” See *Sosa*, 542 U.S. at 725, 728.

⁵³ *Id.* at 725.

⁵⁴ Richard O. Faulk, *The Expanding Role of the Alien Torts Act in International Human Rights Enforcement*, 10 ANALYSIS & PERSP. 294, 296 (2009); see KOEBELE, *supra* note 23, at 37 (“Due to the immense rhetorical assertions of the majority on the standard’s narrowness, the test proposed by the Supreme Court appears straightforward, narrow, and clear-cut. Nevertheless, applying it may not be as simple as it looks.”).

⁵⁵ See *supra* notes 40–47 and accompanying text.

⁵⁶ See STEPHENS ET AL., *supra* note 27, at 57.

⁵⁷ See *Sosa*, 542 U.S. at 731 (“The position we take today has been assumed by some federal courts for 24 years . . .”).

⁵⁸ See *Sosa*, 542 U.S. at 729.

⁵⁹ See John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, Speech at Vanderbilt University Law School (Apr. 11, 2008), in 42 VAND. J. TRANSNAT’L L. 1, 2 (2009) (“ATS litigation continues largely unabated, despite the Supreme Court’s attempt in *Sosa* to rein it in.”).

A recent Second Circuit case, *Abdullahi v. Pfizer, Inc.*,⁶⁰ illustrates some of the difficulties that lower courts have faced in applying *Sosa*. In *Abdullahi*, the plaintiff sought to bring a claim under the ATS for nonconsensual medical experimentation on humans.⁶¹ The Second Circuit wrote at length about the required universality and specificity of a claim under the ATS post-*Sosa* and stated that ATS claims must meet three criteria: “Courts are obligated to examine how the specificity of the norm compares with 18th-century paradigms, whether the norm is accepted in the world community, and whether States universally abide by the norm out of a sense of mutual concern.”⁶²

Although this test presents the appearance that the Second Circuit is following *Sosa*’s directive of vigilant doorkeeping, in practice it does not seem to limit a plaintiff’s claim to any more narrow a category than the category of violations of customary international law. For a prohibition on conduct to be considered customary international law, the world community must accept the prohibition and abide by it out of a sense of mutual concern—*opinio juris*.⁶³ Taken together, these two requirements result in all customary international law norms automatically satisfying two of the three criteria set forth by the Second Circuit. Furthermore, when the Second Circuit compared the plaintiff’s claim to eighteenth-century paradigms, the first criterion of the *Abdullahi* test, it looked at international treaties and domestic law⁶⁴—some of the same bases for determining customary international law. As a result, some courts and commentators have concluded that all violations of customary international law are cognizable under the ATS.⁶⁵

⁶⁰ 562 F.3d 163 (2d Cir. 2009).

⁶¹ *Id.* at 168.

⁶² *Id.* at 176; *cf.* *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 381 (S.D.N.Y. 2009) (applying a similar standard); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 248 (S.D.N.Y. 2009) (same).

⁶³ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”); STEPHENS ET AL., *supra* note 27, at 66–72 (defining and discussing “customary international law” in the context of the ATS).

⁶⁴ See *Abdullahi*, 562 F.3d at 184–85:

The Nuremberg Code, Article 7 of the [International Covenant on Civil and Political Rights], the Declaration of Helsinki, the Convention on Human Rights and Biomedicine, the Universal Declaration on Bioethics and Human Rights, the 2001 Clinical Trial Directive, and the domestic laws of at least eighty-four States all uniformly and unmistakably prohibit medical experiments on human beings without their consent, thereby providing concrete content for the norm.

⁶⁵ See generally HENNER, *supra* note 2, at 115–21 (discussing the implication that all violations of customary international law are cognizable under the ATS).

The ATS states that a plaintiff can bring claims “committed in violation of the law of nations.”⁶⁶ If all norms of customary international law are cognizable under the ATS, however, then the Supreme Court’s doorkeeping mandate to limit the ATS to a “narrow class of international norms”⁶⁷ means nothing; *Sosa* would serve no purpose. Most likely, the Second Circuit did not intentionally disregard the doorkeeping mandate in *Sosa*. In fact, the Second Circuit explicitly acknowledged the courts’ obligation to limit the category of claims acceptable under the ATS.⁶⁸ What the Second Circuit’s reasoning demonstrates, however, is that the Supreme Court’s mandate in *Sosa* is difficult to implement with precision.

The Court’s lack of guidance in *Sosa* has left district courts with just as much discretion as they had prior to *Sosa*. District courts lack standards for comparing modern-day claims to eighteenth-century paradigms. In *Abdullahi*, the Second Circuit relied on the very sources used to determine customary international law. Without clearer direction, the ATS could become a jurisdictional basis for any and all violations of customary international law that the lower courts choose to allow. If this is the case, the same concerns that the Supreme Court hoped to limit—overreaching by the courts and involvement in issues of foreign policy—will continue to exist despite the Court’s best efforts. This result raises the question of how best to limit the district courts so as to ensure they fulfill *Sosa*’s mandate of vigilant doorkeeping and to guarantee that they do not unnecessarily involve themselves in foreign policy.

II

SAREI V. RIO TINTO AND PRUDENTIAL EXHAUSTION

There have been various suggestions for how to assure that courts limit the types of claims that a plaintiff can bring under the ATS. Some advocate that a plaintiff should exhaust all other claims before he or she can file an ATS claim in the United States (a proposal referred to as “mandatory exhaustion”).⁶⁹ This rule would require the plaintiff to exhaust adequate and available remedies where the act occurred; only if such remedies did not exist could a plaintiff bring a

66 See 28 U.S.C. § 1350 (2006).

67 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

68 See *Abdullahi*, 562 F.3d. at 173–74.

69 See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1224–25 (9th Cir. 2007) (Bybee, J., dissenting), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion); Bellinger, *supra* note 59, at 12–13; 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, 519 (2007).

claim under the ATS.⁷⁰ This approach is identical to the exhaustion provision of the Torture Victim Protection Act of 1991 (TVPA), which provides a civil cause of action against those acting on behalf of a foreign nation who participated in torture or extrajudicial killings.⁷¹

The majority in *Sosa* briefly discussed exhaustion in its decision.⁷² The European Commission, as amicus curiae, argued that international law requires exhaustion before a plaintiff can bring a claim under the ATS.⁷³ In a footnote, the Court stated that it “would certainly consider [the exhaustion] requirement in an appropriate case.”⁷⁴ The Court subsequently made no further mention of the issue.

Another suggestion has been to limit the ATS to a list of specific claims that federal legislation designates.⁷⁵ The majority in *Sosa* states that it would welcome congressional guidance on what claims a plaintiff should be able to bring under the ATS.⁷⁶ In 2005, Senator Diane Feinstein proposed legislation to amend the ATS by limiting it to claims of torture, extrajudicial killing, genocide, piracy, slavery, and slave trading.⁷⁷ The bill, however, never made it out of the Senate Committee on the Judiciary.⁷⁸

Sitting en banc, the Ninth Circuit recently adopted a third approach to dealing with the ATS: prudential exhaustion.⁷⁹ Under this approach, district courts determine which claims require exhaustion before allowing those claims to proceed.⁸⁰ In Parts III and IV, I discuss prudential exhaustion and argue that it is the best approach to the ATS and that other circuits should adopt it. To fully demonstrate the advantages of prudential exhaustion, I examine the Ninth Circuit

⁷⁰ See Popova, *supra* note 69, at 528–29 (“[T]he [exhaustion] rule requires that before asserting a claim in a foreign judicial forum, the claimant gives its domestic legal system a fair chance to resolve the dispute by exhausting any remedies available in the claimant’s home state.”).

⁷¹ Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in a note to 28 U.S.C. § 1350 (2006)).

⁷² See *Sosa*, 542 U.S. at 733 n.21.

⁷³ Brief of Amicus Curiae the European Commission in Support of Neither Party at 24, *Sosa*, 542 U.S. 692 (No. 03-339).

⁷⁴ *Sosa*, 542 U.S. at 733 n.21.

⁷⁵ This suggestion is also similar to the TVPA. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in a note to 28 U.S.C. § 1350 (2006)) (limiting claims under the TVPA to claims of torture and extrajudicial killing).

⁷⁶ See *Sosa*, 542 U.S. at 731.

⁷⁷ See S. 1874, 109th Cong. § 2(a) (2005).

⁷⁸ *Bill Summary & Status, 109th Congress (2005–2006): S. 1874*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.01874>: (reporting as the latest major action of S. 1874 that it was referred to the Senate Committee on the Judiciary on October 17, 2005) (last visited Apr. 9, 2011).

⁷⁹ See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008) (en banc) (plurality opinion).

⁸⁰ See *id.* at 831–32.

case adopting it. Doing so will help illuminate the types of claims that a plaintiff could potentially bring under the ATS and how prudential exhaustion would limit such claims.

A. The History of *Sarei v. Rio Tinto*

In 2000, Alexis Holyweek Sarei and twenty-one other residents of Papua New Guinea filed a class-action lawsuit against Rio Tinto, PLC, and Rio Tinto Limited (collectively, Rio Tinto).⁸¹ The plaintiffs alleged seven separate violations of the ATS that stemmed from actions taken by Rio Tinto and the Papua New Guinea army while Rio Tinto operated copper mines on the island of Bougainville.⁸² The allegations stated that Rio Tinto had committed “crimes against humanity; war crimes/murder; violation of the rights to life, health, and security of the person; racial discrimination; cruel, inhuman, and degrading treatment; violation of international environmental rights; and a consistent pattern of gross violations of human rights.”⁸³

In 1967, Rio Tinto secured the rights to operate mines on Bougainville and established Bougainville Copper Limited (BCL).⁸⁴ While constructing the mine, Rio Tinto allegedly paid workers from the local population, who were black, lower wages than the nonlocal workers that Rio Tinto brought to the island.⁸⁵ According to the plaintiffs in *Sarei*, after visiting the mine in 1969 the Australian Minister of Labor “purportedly accused Rio Tinto of paying black workers ‘slave wages.’”⁸⁶

Operations at the Panguna Mine began in 1972.⁸⁷ The mining operation produced a large quantity of waste rock and tailings, which, allegedly, were dumped into the local Kawerong-Jaba river system.⁸⁸ The dumping purportedly decimated both vegetation in the River Valley and the fish population in the Empress Augusta Bay.⁸⁹ The mine allegedly produced air pollution that resulted in an increase of respir-

⁸¹ *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1127 (C.D. Cal. 2002), *aff'd in part, rev'd in part, and vacated in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh'g*, 487 F.3d 1193, 1208 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion).

⁸² *See id.* at 1127–28.

⁸³ *Id.* at 1127.

⁸⁴ *See id.* at 1121–22.

⁸⁵ *Id.* at 1124.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1122. For an aerial image of the mine, see GOOGLE MAPS, <http://maps.google.com> (search “Panguna, Bougainville, Papua New Guinea”; then click “Satellite” button) (last visited Apr. 9, 2011). Also visible from this photograph is the devegetation along the Kawerong-Jaba River Valley allegedly caused by the dumping of rock and tailings into the river.

⁸⁸ *Sarei*, 221 F. Supp. 2d at 1123.

⁸⁹ *Id.*

atory infections and asthma amongst the local population.⁹⁰ The pollution also allegedly “changed the island’s climate, damaged its crops, caused fish to develop ulcerations and die, and forced many animals out of their habitats.”⁹¹

In 1988, the mine was closed in response to violent protests by some Bougainvilleans.⁹² At that time, the head of BCL allegedly told the government of Papua New Guinea that Rio Tinto would “reconsider future investment in [the country] in light of . . . the acts of terrorism.”⁹³ The plaintiffs alleged that this threat caused the government to use military force to quell the uprising and that Rio Tinto assisted the army by transporting troops.⁹⁴ The army’s actions included the killing of many Bougainvilleans on February 14, 1990.⁹⁵

The killings triggered a consolidation of the Bougainville Revolutionary Army (BRA).⁹⁶ Over the next ten years, the BRA fought a civil war for independence against the Papua New Guinea army.⁹⁷ A blockade—allegedly supported by Rio Tinto—was imposed on the island in 1990.⁹⁸ The blockade prevented medical and other essential supplies from reaching the island, and the Red Cross estimated that it led to the death of over 2,000 children between 1990 and 1992.⁹⁹ The plaintiffs alleged that the army committed human rights violations, including attacks on civilian populations, throughout the conflict.¹⁰⁰ An estimated 15,000 civilians were killed during the war.¹⁰¹ The plaintiffs argued that Rio Tinto caused the government to use military force and that this made it responsible for the army’s actions.¹⁰²

When the plaintiffs brought the suit in the U.S. District Court for the Central District of California, the defendants sought to dismiss the claims for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.¹⁰³ The district court held that only the plaintiffs’ claims of the violation of the rights to life, health, and security of the person; cruel, inhuman, and degrading treatment; and a consistent pattern of gross violations of human rights

90 *Id.* at 1123–24.

91 *Id.* at 1123.

92 *See id.* at 1125; DAVIS, *supra* note 30, at 108.

93 *Sarei*, 221 F. Supp. 2d at 1125 (alteration in original) (internal quotation marks omitted).

94 *Id.* at 1125–26.

95 *Id.* at 1126.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 1127.

101 *Id.*

102 *Id.* at 1128.

103 *Id.* at 1120.

should be dismissed on these grounds.¹⁰⁴ However, it also determined that all of the plaintiffs' claims should be dismissed as nonjusticiable under the political question doctrine and that the claim of racial discrimination and the claim of environmental torts each should be dismissed on act-of-state and international comity grounds.¹⁰⁵ In response to the defendant's argument that the ATS required exhaustion, the court stated that it did not.¹⁰⁶

On appeal, the Ninth Circuit reversed the district court's ruling that the plaintiff's claims constituted nonjusticiable political questions.¹⁰⁷ It also vacated the district court's ruling regarding racial discrimination and violations of international environmental rights.¹⁰⁸ Lastly, the court affirmed the district court's finding that the ATS does not require exhaustion of claims.¹⁰⁹ The court spoke at length about exhaustion because Rio Tinto cross-appealed arguing for the requirement of exhaustion under the ATS.¹¹⁰ It concluded that, absent any guidance by Congress or the Supreme Court, lower courts should not read exhaustion into the ATS.¹¹¹

B. En Banc Panel Decides on Prudential Exhaustion

The following year, the Ninth Circuit, sitting en banc, reheard the case to address the issue of exhaustion.¹¹² In light of the Supreme Court's statement in *Sosa* that it would "consider [the exhaustion] requirement in an appropriate case,"¹¹³ the Ninth Circuit decided that *Sarei* was "an appropriate case for such consideration under both domestic prudential standards and core principles of international law."¹¹⁴ In a fractured decision, a three-judge plurality—joined by a three-judge concurrence¹¹⁵—held that the ATS should require a case-by-case determination regarding exhaustion (prudential exhaustion).¹¹⁶ Where nexus to the United States is weak, district courts "should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters

¹⁰⁴ See *id.* at 1208.

¹⁰⁵ *Id.* at 1208–09.

¹⁰⁶ *Id.* at 1139.

¹⁰⁷ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1208 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion).

¹⁰⁸ See *id.* at 1210.

¹⁰⁹ *Id.* at 1223.

¹¹⁰ See *id.* at 1213–23.

¹¹¹ See *id.* at 1223.

¹¹² *Sarei*, 550 F.3d at 824.

¹¹³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

¹¹⁴ *Sarei*, 550 F.3d at 827.

¹¹⁵ See *id.* at 833 (Bea, J., joined by Callahan, J., concurring); *id.* at 840 (Kleinfeld, J., concurring).

¹¹⁶ See *id.* at 824 (plurality opinion).

of ‘universal concern.’”¹¹⁷ The defendant bears the burden of proving that exhaustion is required.¹¹⁸ If the court finds that exhaustion is required, the plaintiff must obtain a final decision from the highest court in the country where the claim arose or demonstrate that seeking redress in that country would be futile.¹¹⁹ Only after the plaintiff has done so can the plaintiff bring a suit under the ATS in the Ninth Circuit.

The plurality defined claims of “universal concern” as including crimes against humanity, war crimes, and torture;¹²⁰ in other words, acts that are accepted as preemptory norms.¹²¹ By advising district courts to consider exhaustion particularly for claims that are not of “universal concern,” the Ninth Circuit suggested that the exhaustion requirement is appropriate both where the plaintiff does not allege a violation of a preemptory norm and where nexus to the United States is weak.¹²²

The Ninth Circuit remanded the case for the district court to determine which of the plaintiffs’ claims required exhaustion.¹²³ Given the nature of the claims and the parties involved, the district court held that nexus to the United States was weak.¹²⁴ The district court then analyzed each of the plaintiffs’ claims to determine whether or not they were of universal concern.¹²⁵ Relying mainly on decisions made in previous ATS cases about the universality of an act, the court determined that the claims of crimes against humanity, war crimes, and racial discrimination were of universal concern.¹²⁶ It also determined that the remaining claims—violations of the right to life, health, and security; violations of international environmental rights; cruel, inhuman, and degrading treatment; and a consistent pattern of gross violations of human rights—were not of universal concern.¹²⁷

¹¹⁷ *Id.* at 831. In determining whether the allegations have “significant” “nexus” to the United States, the Ninth Circuit considers “the traditional bases for exercising our sovereign jurisdiction to prescribe laws, namely nationality, territory, and effects within the United States.” *Id.*

¹¹⁸ *Id.* at 832. I take it as a given that a defendant would almost always plead exhaustion. There is little reason to believe that a defendant would not use it as an affirmative defense once the defendant realizes it is not automatic.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 831 (“Some of the claims—torture, crimes against humanity, and war crimes—may implicate matters of ‘universal concern,’ generally described as offenses ‘for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders.’” (quoting *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995))).

¹²¹ *See infra* Part III.A.

¹²² *See Sarei*, 550 F.3d at 831.

¹²³ *Id.* at 832.

¹²⁴ *See Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1018 (C.D. Cal. 2009).

¹²⁵ *Id.* at 1022–30.

¹²⁶ *Id.* at 1030–31.

¹²⁷ *Id.* at 1024–26, 1028–30.

After determining which claims were not matters of universal concern, the district court determined which of those claims would be subject to the exhaustion requirement. In balancing the factors of nexus and universal concern, the court held that only the claims that were not of universal concern required exhaustion.¹²⁸ In a status report to the district court, the plaintiffs decided to drop their claims that were not of universal concern so that the remaining claims could proceed.¹²⁹ After nearly a decade of litigation, the plaintiffs' case was finally able to move forward.

III

BENEFITS OF PRUDENTIAL EXHAUSTION

In Part II, I presented the history of *Sarei*. While discussing *Sarei*, I provided an overview of the concept of prudential exhaustion. In this Part, I will argue that prudential exhaustion is the best way to fulfill the Supreme Court's directives in *Sosa* and that other circuit courts should adopt the Ninth Circuit's prudential exhaustion framework for claims under the ATS. I will construct my argument by explaining why claims of violations of preemptory norms should generally not require exhaustion and why claims of violations of all other norms of customary international law should require exhaustion, particularly if the nexus to the United States is weak. First, though, to comprehend why courts should require prudential exhaustion under the ATS, it is necessary to understand the definition of preemptory norm.

A. Preemptory Norms

Preemptory norms, also referred to as *jus cogens*, constitute a subset of customary international law.¹³⁰ As opposed to general norms of customary international law, preemptory norms are binding on all states, regardless of whether the state has consented to the norm.¹³¹ The Vienna Convention on the Law of Treaties defines preemptory norms as norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of

¹²⁸ *Id.* at 1030–31.

¹²⁹ See Plaintiffs' Status Report at 2, *Sarei*, 650 F. Supp. 2d 1004 (No. 00-11695).

¹³⁰ See HENNER, *supra* note 2, at 126–27.

¹³¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) ("Some rules of international law are recognized by the international community of states as preemptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a preemptory norm is subject to modification only by a subsequent norm of international law having the same character."); *id.* § 702 cmt. n (stating that agreements that violate preemptory norms are void).

general international law having the same character.”¹³² These stringent characteristics restrict what norms qualify as peremptory.

There is no set category of peremptory norms, but the term is usually reserved for a limited set of actions. The Restatement (Third) of Foreign Relations Law of the United States lists the following actions as violations of peremptory norms: “(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination.”¹³³ In ATS cases, various federal courts have referred to acts of genocide, slavery, torture, crimes against humanity, and extrajudicial killing as violations of peremptory norms.¹³⁴ Although courts and commentators have different views of exactly what can constitute a violation of a peremptory norm, it is clear that the term encompasses only a few actions. Many, but not all, claims under the ATS are of violations of peremptory norms. For example, as noted in the previous Part, the Ninth Circuit in *Sarei* referred to torture, crimes against humanity, and war crimes as claims of universal concern;¹³⁵ and on remand, the district court determined that the plaintiffs’ claims of crimes against humanity, war crimes, and racial discrimination were of universal concern.¹³⁶ There is no requirement that claims under the ATS be claims of violations of peremptory norms;

¹³² Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹³³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(a)–(f); *id.* § 702 cmt. n (establishing that those human rights norms listed in clauses (a) through (f) are peremptory norms); *see also id.* § 102 reporters’ note 6 (“Although the concept of *jus cogens* is now accepted, its content is not agreed. . . . Such norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats.”).

¹³⁴ *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (“The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.” (citation omitted)); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (listing the acts prohibited by section 702 of Restatement (Third) of Foreign Relations Law of the United States); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 333 n.2 (S.D.N.Y. 2005) (“*Jus cogens* norms include the prohibition on genocide, torture, slavery, crimes against humanity, and extrajudicial killing.”); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) (quoting *Committee of United States Citizens*, 859 F.2d at 941, for what constitutes peremptory norms); *see also United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (“Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. . . . [K]idnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery.”).

¹³⁵ *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion).

¹³⁶ *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1030–31 (C.D. Cal. 2009); *see also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) (explaining that war crimes, crimes against humanity, and racial discrimination are “*jus cogens* violations that form the

however, the ATS cases suggest that, at a minimum, all violations of peremptory norms do constitute cognizable ATS claims.¹³⁷

In *Sarei*, the Ninth Circuit did not create a categorical rule that district courts must require exhaustion for all claims of violations of general customary international law, except for claims of violations of peremptory norms.¹³⁸ Rather, the circuit court leaves open the possibility that in certain cases a plaintiff may have to exhaust claims of violations of peremptory norms—even though the court does not clarify when this would occur.¹³⁹ Nonetheless, the court implicitly suggests that exhaustion is advisable for claims of violations of nonperemptory norms.¹⁴⁰ The court seems to suggest that lower courts should require exhaustion more frequently for violations of customary international laws that are not peremptory norms than for violations of those that are.

It is important at this juncture to recognize a distinction between claims of violations of peremptory norms and claims of violations of other customary international laws. Doing so is consistent with the Supreme Court's directive that district courts act as vigilant doorkeepers.¹⁴¹ That is, claims of violations of peremptory norms should not be subject to the same rigorous procedure as claims of violations of other customary international law for many reasons. These reasons also establish the basis for arguing that the ATS should not require exhaustion of all claims.

First, in *Sosa* the Court stated that claims brought under the ATS must be violations of widely accepted norms that are definite in character.¹⁴² By definition, claims of violations of peremptory norms fit this criterion better than other claims do. Peremptory norms constitute a select group of norms under customary international law that

least controversial core of modern day [ATS] jurisdiction"), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion).

¹³⁷ See HENNER, *supra* note 2, at 128; KOEBELE, *supra* note 23, at 22–23. The purpose of this Note is to advocate for an approach that limits claims under the ATS. Prudential exhaustion does not limit ATS claims to claims of violations of peremptory norms, and I argue that it should not. However, prudential exhaustion does prevent the class of claims under the ATS from easily growing, which I argue is necessary.

¹³⁸ Instead, the court merely “counsels” that “where the United States ‘nexus’ 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.’” *Sarei*, 550 F.3d at 831.

¹³⁹ See *id.* at 831–32.

¹⁴⁰ See *id.* at 831.

¹⁴¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

¹⁴² See *id.* at 732 (“[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

are definite in nature and almost universally accepted.¹⁴³ Despite the Supreme Court's unclear limitations on ATS claims, claims of violations of peremptory norms are almost certainly included in the category of claims that are available to ATS plaintiffs without exhaustion.

Although mandatory exhaustion would not make it impossible for a plaintiff to bring claims of violations of peremptory norms under the ATS, the Supreme Court rejected mandatory exhaustion by stating that it would consider the "requirement in an appropriate case."¹⁴⁴ If the lower courts were to require exhaustion of claims of violations of peremptory norms, one would assume that they would generally require exhaustion of all claims of violations of the laws of nations because peremptory norms "form the least controversial core"¹⁴⁵ of ATS claims and "enjoy[] the highest status within international law."¹⁴⁶ Taking these propositions together leads to the conclusion that requiring exhaustion for claims of violations of peremptory norms would contravene the Supreme Court's rejection of mandatory exhaustion.

Second, because of the universal nature of peremptory norms, every state properly has the right to hear claims of violations of peremptory norms if it establishes a jurisdictional mechanism for doing so. In an example of universal jurisdiction—the criminal case against Adolf Eichmann for his involvement in the Holocaust—the Supreme Court of Israel confronted this issue. It stated: "[I]t is the universal character of the crimes in question which vests in every state the power to try those who participated in the perpetration of such crimes and to punish them"¹⁴⁷ Because of the universal character of peremptory norms, the United States is properly vested with the authority to hear such claims. The ATS creates the mechanism for establishing jurisdiction to do so in civil cases. Unlike the TVPA, which also establishes jurisdiction for hearing claims of the violation of certain peremptory norms,¹⁴⁸ the ATS does not include an explicit exhaustion requirement.

Third, it is improper to read an exhaustion requirement into the ATS for peremptory norms when neither the statute itself nor the legislative record express an intent to require exhaustion. The Supreme

¹⁴³ See *supra* notes 130–36 and accompanying text.

¹⁴⁴ See *Sosa*, 542 U.S. at 733 n.21.

¹⁴⁵ See HENNER, *supra* note 2, at 126 (quoting *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion)).

¹⁴⁶ See *id.* at 127 (quoting *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

¹⁴⁷ JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 380 (2d ed. 2006) (providing excerpts from the Israeli Supreme Court's rejection of Adolf Eichmann's challenge to Israel's jurisdiction).

¹⁴⁸ See *Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73 (codified in a note to 28 U.S.C. § 1350 (2006)).

Court has instructed that “the initial question whether exhaustion is required should be answered by reference to congressional intent.”¹⁴⁹ In the original appeal to the Ninth Circuit in *Sarei*, the circuit court noted that the legislative record for the ATS is completely nonexistent.¹⁵⁰ In his dissent in that case, Judge Jay Bybee pointed to the Jay Treaty with Great Britain, which was signed in 1794 and included an exhaustion requirement, as proof that the first Congress was aware of exhaustion.¹⁵¹ Judge Bybee argued that at the time Congress passed the ATS, exhaustion was common practice and, therefore, the court should read that requirement into the ATS.¹⁵² This argument’s flaw, however, is, as the majority points out, that Congress may have purposefully decided not to include an exhaustion requirement in the ATS.¹⁵³ Without any congressional record on the issue, it is impossible to know Congress’s intent.

In addition, the argument’s weaknesses are apparent when one contrasts the ATS and the Jay Treaty. If the ATS was originally thought of as establishing jurisdiction for offenses against ambassadors, violations of safe conduct, and piracy—as the Court stated in *Sosa*¹⁵⁴—then it established jurisdiction for offenses that could not be redressed in any other jurisdiction. Exhaustion, therefore, would be futile because there would not be other forums in which to exhaust the claims. In contrast, the Jay Treaty “created an international arbitration procedure for pre-Revolutionary War debts claimed by British creditors against American debtors.”¹⁵⁵ The courts already existed as a separate forum for British creditors. The Jay Treaty created a new forum for redress only if ordinary court procedures proved futile.¹⁵⁶ Since no forum already existed for the original ATS claims, the Jay Treaty fails to serve as a proper comparison for the argument that one should read exhaustion into the ATS.

Some have also argued that courts should read exhaustion into the ATS because Congress required exhaustion for claims brought under the TVPA.¹⁵⁷ The TVPA provides a cause of action for claims

¹⁴⁹ *Patsy v. Bd. of Regents*, 457 U.S. 496, 501–02 (1982) (construing 42 U.S.C. § 1983 and justifying this test with the argument that “Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts.”).

¹⁵⁰ *See Sarei*, 487 F.3d at 1215.

¹⁵¹ *See id.* at 1231–32 (Bybee, J., dissenting).

¹⁵² *See id.* at 1231–32, 1231 n.8.

¹⁵³ *See id.* at 1215, 1218 (majority opinion); *id.* at 1231 n.8 (Bybee, J., dissenting).

¹⁵⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

¹⁵⁵ *Sarei*, 487 F.3d at 1215.

¹⁵⁶ *See Note, The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm*, 121 HARV. L. REV. 2110, 2122–23 (2008) (noting this differentiation between the ATS and the Jay Treaty).

¹⁵⁷ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified in a note to 28 U.S.C. § 1350 (2006)); *see Sarei*, 487 F.3d at 1229–30 (Bybee, J., dissenting).

of torture and extrajudicial killing as defined by the Act.¹⁵⁸ Court opinions and legislative history indicate that the purpose of the TVPA was to supplement, not substitute for, the ATS.¹⁵⁹ Congress's intent regarding exhaustion is quite clear in the TVPA: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."¹⁶⁰ The issue with using the TVPA as a basis for arguing that the ATS requires exhaustion is that the legislative record for the TVPA does not mention expanding exhaustion to the ATS. In addition, the passage of the ATS and the TVPA are separated by over two hundred years. One should not use congressional intent in the passage of the TVPA to read congressional intent into the passage of the ATS.¹⁶¹

The exhaustion clause in the TVPA reinforces the second reason why a plaintiff should not have to exhaust remedies for violations of peremptory norms under the ATS. As stated above, peremptory norms are universal in nature. Any nation can hear violations of peremptory norms as long as there exists a jurisdictional mechanism for doing so, which the ATS is.¹⁶² The TVPA suggests a clear congressional intent for limiting jurisdiction for claims under the TVPA by requiring exhaustion. As noted, no such clear expression of congressional intent exists for the ATS. Therefore, the standard should be that the ATS has jurisdiction without the limitation imposed by exhaustion for violations of peremptory norms until Congress makes its desire for an exhaustion requirement clear. If one must use the TVPA as a comparison to the ATS, the TVPA undoubtedly supports the conclusion that no exhaustion of claims of violations of peremptory norms is necessary unless congressional intent evinces otherwise. Although the Ninth Circuit's opinion correctly leaves open the possibility that courts can require exhaustion for such claims,¹⁶³ for the preceding reasons, courts should do so rarely.

B. Customary International Law

The reasons why exhaustion should not be a requirement for claims of violations of peremptory norms also underlie the argument for why exhaustion should be a requirement for claims of violations of all other norms of customary international law. Customary international law consists of practices that a general consensus of states fol-

¹⁵⁸ See sources cited *supra* note 157.

¹⁵⁹ See HENNER, *supra* note 2, at 93–94.

¹⁶⁰ Torture Victim Protection Act § 2(b).

¹⁶¹ See Note, *supra* note 156, at 2123–24; see also HENNER, *supra* note 2, at 93–96.

¹⁶² See *supra* notes 147–48 and accompanying text.

¹⁶³ See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion).

lows out of a sense of legal obligation.¹⁶⁴ Unlike peremptory norms (a subset of customary international law), which do not allow derogation, customary international laws that are not peremptory norms are based on consent. States do not have to adhere to a practice if they make their opposition known during the development of the customary international law.¹⁶⁵ The list of norms that constitute customary international law is much more fluid than the list that constitutes peremptory norms; it is also much more open to debate.

First and foremost, courts should require plaintiffs to exhaust claims of violations of customary international law that do not rise to the level of peremptory norms because doing so fulfills the Supreme Court's mandate in *Sosa* that district courts act as vigilant doorkeepers.¹⁶⁶ The Court wanted to limit the expansion of the ATS by reducing the claims that a plaintiff could bring.¹⁶⁷ Prudential exhaustion works to reduce claims. It does not necessarily settle whether a nonperemptory norm of customary international law rises to the level of specificity that is necessary under *Sosa's* reading of the ATS;¹⁶⁸ however, by reducing the number of claims brought under the ATS, prudential exhaustion guarantees that courts will have fewer opportunities to expand the group of claims accepted under the ATS. This approach effectively forces courts to act as vigilant doorkeepers. As compared to the analysis that the Second Circuit used in *Abdullahi*,¹⁶⁹ the additional procedure of prudential exhaustion guards against the expansion of the ATS, which, if unchecked, could end with courts determining that any violation of a customary international law constitutes a viable claim under the ATS.

When plaintiffs bring claims of violations of peremptory norms and customary international law, prudential exhaustion may entice them to drop their general customary international law claims so they can pursue their other claims without delay. With *Sarei* as an example, once the district court determined that the plaintiffs' nonperemptory-norm claims required exhaustion, the plaintiffs decided to drop those claims so that the peremptory-norm claims could proceed un-

¹⁶⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

¹⁶⁵ See *id.* § 102 cmt. d ("Although customary law may be built by the acquiescence as well as by the actions of states and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." (citation omitted)); *id.* § 102 reporters' note 2 ("That a rule of customary law is not binding on any state indicating its dissent during the development of the rule is an accepted application of the traditional principle that international law essentially depends on the consent of states." (citation omitted)).

¹⁶⁶ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 725.

¹⁶⁹ See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168 (2d Cir. 2009).

hindered.¹⁷⁰ If plaintiffs bring fewer nonperemptory-norm claims, courts will have fewer opportunities to expand what claims plaintiffs can bring. Thus, whether a plaintiff brings only claims of violations of customary international law or claims of violations of both customary international law and peremptory norms, prudential exhaustion helps to fulfill the Supreme Court's intent of leaving the door "ajar subject to vigilant doorkeeping."¹⁷¹

Second, there is no argument that exhaustion for claims of violations of nonperemptory norms of customary international law defies congressional intent. Mandatory exhaustion of all ATS claims would have the equivalent effect of legislation requiring exhaustion of all ATS claims. The Supreme Court has instructed, however, that a "court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [congressional] intent."¹⁷² Alternatively, because prudential exhaustion leaves the requirement of exhaustion in the hands of district court judges—and, as I have argued, should be used sparingly for claims of violations of peremptory norms—congressional intent should not be required. Prudential exhaustion is not meant to change jurisdiction under the ATS; rather, it is meant to serve a gate-keeping function based on the principles of comity.¹⁷³ This is especially true in light of the fact that the first step under a prudential exhaustion analysis is the determination of nexus to the United States. This leaves the decision of exhaustion in the hands of district court judges. In so doing, prudential exhaustion operates similarly to other devices that dictate the timing of federal-court decision making.¹⁷⁴ For this reason, prudential exhaustion can be read into a statute that grants courts jurisdiction to hear specific claims without the requirement of congressional intent.

Third, prudential exhaustion of claims of violations of nonperemptory norms of customary international law promotes comity.¹⁷⁵ As noted, the category of nonperemptory norms of customary international law is not as stable as the category of peremptory norms. By requiring exhaustion, the country where the event occurred has the

¹⁷⁰ Plaintiffs' Status Report, *supra* note 129.

¹⁷¹ *Sosa*, 542 U.S. at 729.

¹⁷² *See Patsy v. Bd. of Regents*, 457 U.S. 496, 501–02 (1982).

¹⁷³ *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–29 (9th Cir. 2008) (en banc) (plurality opinion).

¹⁷⁴ *See id.* at 828 ("Judicially-imposed or prudential exhaustion is not a prerequisite to the exercise of jurisdiction, but rather is 'one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking.'" (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992))).

¹⁷⁵ *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.").

first opportunity to address the claim. That country will determine whether the claim is a violation of a customary international law. Prudential exhaustion thus limits the reach of district courts because district courts will only begin to determine whether a plaintiff may bring a claim of a customary international law violation under the ATS if a proper forum does not exist. Internationally this benefits the United States by promoting the image that it respects the decisions made by other judicial systems. In addition, underlying the Court's reasoning in *Sosa* is the belief that the judiciary should avoid interfering with U.S. foreign policy, which is properly under the control of the executive and legislative branches.¹⁷⁶ Requiring a plaintiff to exhaust a claim of a violation of customary international law complies with this caution by minimizing interference. The fewer claims of violations of customary international law that a court hears, the fewer opportunities it has to reach determinations that have an effect on U.S. foreign relations and the internal politics of foreign nations.

Fourth, while promoting comity, prudential exhaustion does not completely bar a plaintiff from seeking redress. Remedies in the country where the act occurred must be "available, effective, and not futile."¹⁷⁷ If these conditions do not exist, then the plaintiff can proceed with the claim under the ATS. This leaves the door slightly ajar¹⁷⁸ for claims of violations of customary international law. Human rights, therefore, are not simply abandoned when violations do not rise to the level of peremptory norms. Prudential exhaustion is concerned with such violations, but it balances them against the interest in comity. If a foreign court proves inadequate, the ATS remains a viable option. As noted earlier, though, this does not solve the issue of whether a claim is cognizable under the ATS, but it limits the number of claims a district court will hear; thus, district courts will have fewer opportunities to expand the reach of the ATS. In this sense, prudential exhaustion of claims of violations of customary international law fulfills an original goal of the ATS: providing a forum in the federal district courts when no other forum exists.¹⁷⁹

The structure of prudential exhaustion recommended by the Ninth Circuit affords further advantages, including providing court decisions with additional legitimacy. In a speech at Vanderbilt University Law School in 2008, John Bellinger III, former legal adviser to the secretary of state, stated that the ATS offers three major benefits:

¹⁷⁶ See *Sosa*, 542 U.S. at 727.

¹⁷⁷ *Sarei*, 550 F.3d at 832 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. d (1987); *id.* § 713 cmt. f).

¹⁷⁸ See *Sosa*, 542 U.S. at 729.

¹⁷⁹ See *id.* at 720.

First, is that ATS suits can promote accountability and provide a public voice to victims of terrible human rights abuses when no other forum is available. . . . *Second*, is that ATS litigation may help to raise public and political awareness of human rights abuses that might not gain attention otherwise. . . . *Third*, ATS litigation might advance U.S. participation in the development of customary international law.¹⁸⁰

Prudential exhaustion advances each of these three benefits. First, the victims of violations of human rights retain their public voice and can seek redress under the ATS if no other forum exists. Human rights abuses will continue to garner attention. If the violation is one of peremptory norms, the United States exists as an available forum without exhaustion. If the violation is not of a peremptory norm and the country where the claims occurred does not provide “available, effective, and not futile”¹⁸¹ means of redress, then the United States possibly will. In either event, the victims retain the ability to seek meaningful redress and to use this opportunity to call notice to the abuses they suffered.

Second, prudential exhaustion provides an additional advantage: if claims proceed under the ATS, human rights abuses will gain attention and will not have to compete with arguments that a local court should have rightfully heard the claim. By determining that a proper local forum does not exist or that the violation is one of a peremptory norm, prudential exhaustion dulls the argument that United States courts are overreaching by hearing a case. It adds legitimacy to argue that a district court is only hearing a case because the claim is a violation of a peremptory norm or because local remedies proved illusory.

Finally, prudential exhaustion continues to allow the federal courts to participate in the development of customary international law but with the understanding that the country where such actions occurred should have the first opportunity to address the claims. Since customary international law is based on international consent, such an approach actually enhances the goal of developing customary international law by offering other nations the opportunity to demonstrate their consent to a practice. Providing redress for violations of an action strengthens a nation’s commitment to adhering to that practice. If redress proves futile, U.S. district courts remain a forum in which the plaintiff can argue that a certain action violated the laws of nations. By considering concerns of comity, prudential exhaustion provides additional legitimacy both to customary international law and to the determinations that district courts reach in ATS cases. Ad-

¹⁸⁰ Bellinger, *supra* note 59, at 7–8.

¹⁸¹ See *supra* note 177.

ding a requirement of prudential exhaustion therefore enhances the three benefits of the ATS that Bellinger discussed.

IV CONFRONTING POTENTIAL WEAKNESSES OF PRUDENTIAL EXHAUSTION

Although prudential exhaustion fulfills the goals the Supreme Court listed in *Sosa*, it does have weaknesses. By confronting these limitations, it will become apparent that even though prudential exhaustion is not perfect, it is the best solution currently available. Its shortcomings should not prevent other circuit courts from adopting prudential exhaustion in the absence of further action by the Supreme Court or Congress.

A. Mandatory Exhaustion

As mentioned in the previous Part, some have advocated for exhaustion of all claims before a plaintiff can bring a claim under the ATS.¹⁸² This approach to exhaustion would certainly better fulfill the goal of comity than prudential exhaustion because it would always provide the relevant local judicial system an opportunity to address the plaintiff's claims before the plaintiff could bring the claim under the ATS. Mandatory exhaustion would also further remove district courts from involving themselves in U.S. foreign policy, which the Supreme Court provided as a reason for courts to proceed with caution in ATS cases.¹⁸³

The problem with this approach, though, is that there is no congressional mandate stating that exhaustion must be a requirement of ATS litigation. There is no mandate from the Supreme Court either. When the Supreme Court addressed exhaustion in *Sosa*, it did so by stating that it would "consider [it] in an appropriate case."¹⁸⁴ Until the Court or Congress addresses exhaustion, there is no basis for arguing that exhaustion of all claims is or should be required. In addition, given the Court's mandate that exhaustion must be based on congressional intent,¹⁸⁵ such an approach would actually contradict the

¹⁸² See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1225–26, 1235–36 (9th Cir. 2007) (Bybee, J., dissenting), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion); Bellinger, *supra* note 59, at 12–13; Popova, *supra* note 69, at 2 (arguing that "despite the Ninth Circuit's majority opinion in *Sarei*, the exhaustion requirement is a universal and binding norm which should not be severed from the traditional law of nations as applied in American courts through the [ATS]").

¹⁸³ See *Sosa*, 542 U.S. at 727.

¹⁸⁴ *Id.* at 733 n.21.

¹⁸⁵ *Cf.* *Patsy v. Bd. of Regents*, 457 U.S. 496, 501–02 (1982) ("[C]ourts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial

Court's current stance. Although prudential exhaustion does not fulfill *Sosa's* goals to the extent that mandatory exhaustion would, without more guidance from Congress or the Supreme Court, there simply is no option of mandatory exhaustion.¹⁸⁶

B. Lack of Mandate for Nonperemptory Norms

Prudential exhaustion, as described by the Ninth Circuit, does not require district courts to demand exhaustion for all claims that are not of "universal concern."¹⁸⁷ Instead, when nexus to the United States is weak, the Ninth Circuit asks courts to "carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.'"¹⁸⁸ One can argue that without mandatory exhaustion, at least for nonperemptory norms, district courts will ignore the Ninth Circuit's directive.¹⁸⁹ In other words, by providing district courts discretion, prudential exhaustion does not solve the problem of the unchecked ability of district courts to expand the ATS.

It is true that the Ninth Circuit provided district courts with discretion over whether to apply exhaustion. However, by definition, under prudential exhaustion judges must retain the ability to decide what claims require exhaustion. Without a congressional mandate, the Ninth Circuit could not require district courts to apply exhaustion. Given this fact, requiring district courts to determine whether to apply exhaustion was as forceful an exhaustion mandate as the Ninth Circuit could prescribe.

Like the *Sosa* Court, though, the Ninth Circuit filled its opinion with reasoning demanding caution by district courts,¹⁹⁰ and much of the court's reasoning is grounded in concerns for comity.¹⁹¹ However, what the Ninth Circuit's prudential exhaustion standard offers, and the Supreme Court's decision in *Sosa* lacks, is clear guidance. The Ninth Circuit provides district courts with a concept they know

question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.").

¹⁸⁶ Senator Feinstein's proposed legislation, which never made it out of committee, included an exhaustion requirement for all claims under the ATS. See S. 1874, 109th Cong. § 2(d) (2005); *supra* notes 77–78 and accompanying text.

¹⁸⁷ *Sarei*, 550 F.3d at 831.

¹⁸⁸ *Id.*

¹⁸⁹ Cf. HENNER, *supra* note 2, at 371–72 ("It seems likely that an exhaustion analysis, conducted as a matter of discretion, will consider the same factors that have traditionally been considered as part of a forum non conveniens analysis. If so, the imposition of an exhaustion requirement in ATS cases will have little, if any, practical effect, as the result will be the same under either theory.").

¹⁹⁰ See *Sarei*, 550 F.3d at 827–32.

¹⁹¹ See *id.* at 830–31.

how to apply (exhaustion) and guided instructions on when to apply it.¹⁹² Hopefully, such a clear set of directives will assist district courts in applying prudential exhaustion. As I argued above, in *Abdullahi*,¹⁹³ the Second Circuit did not purposefully ignore *Sosa*'s mandate by using a lenient standard for determining claims under the ATS,¹⁹⁴ rather, it tried to implement the Supreme Court's vague standard. Alternatively, prudential exhaustion's clarity and simplicity of application would help to ensure that courts do not lose sight of their vigilant doorkeeping responsibility.

The fact that prudential exhaustion does not solve the problem of district court discretion is a weakness of the doctrine that should not be dismissed; it is perhaps its greatest limitation. Nevertheless, the clarity of the directive might provide sufficient incentive to persuade the district courts to apply an exhaustion analysis.

C. Comparison with Forum Non Conveniens

In his book, *Human Rights and the Alien Tort Statute*, Peter Henner argues that prudential exhaustion will have no practical effect because courts already have the authority to dismiss an ATS case under the doctrine of forum non conveniens.¹⁹⁵ Henner's argument is premised on the assumption that district courts will consider the factors used to determine whether to dismiss under forum non conveniens when determining whether to impose exhaustion.¹⁹⁶ He goes on to argue that the factors are the same and, thus, the doctrine of prudential exhaustion does not limit the amount of claims under the ATS in any manner that forum non conveniens does not already.

The factors used to determine forum non conveniens, though, are not the same as those used to determine whether or not to impose exhaustion. The doctrines are similar in that both require that an alternative forum be adequate and available.¹⁹⁷ If there is an adequate and available alternative forum under forum non conveniens, the district court makes its determination regarding dismissal by balancing factors involving private interests of the parties and public in-

¹⁹² See *id.* at 831–32; see also *supra* text accompanying notes 112–22.

¹⁹³ *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

¹⁹⁴ See *id.* at 176–77; *supra* notes 60–68 and accompanying text.

¹⁹⁵ See HENNER, *supra* note 2, at 371–72.

¹⁹⁶ See *id.*

¹⁹⁷ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (“At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.” (citation omitted)); *Sarei*, 550 F.3d at 832.

terests.¹⁹⁸ Private interests include access to evidence, access to witnesses, issues of expense, and enforceability of a judgment.¹⁹⁹ Public interests include the burden on the U.S. court, the burden of jury duty on the community when the events occurred elsewhere, and the interest in having issues decided where they occurred.²⁰⁰ Under prudential exhaustion, however, the district court makes a determination based on whether the matter is one of universal concern when nexus to the United States is weak;²⁰¹ the enforceability of the judgment is the only private and public interest considered because “the remedy must be available, effective, and not futile.”²⁰² Since the basis for the determination for dismissal under the two doctrines is different, Henner’s assumption—and, consequently, conclusion—is incorrect.

There is, however, a more fundamental difference between forum non conveniens and prudential exhaustion that undermines the argument that the two serve the same function in the context of the ATS. Forum non conveniens only allows a federal court to dismiss a claim over which it has subject-matter jurisdiction;²⁰³ therefore, before dismissing, a court must first determine whether it has jurisdiction to hear the claim. If a court determines that it does not, then there would be no need to dismiss under forum non conveniens grounds. Thus, unlike prudential exhaustion, forum non conveniens does not help to fulfill the doorkeeping mandate stated in *Sosa* because the courts are still determining what claims plaintiffs can and cannot bring under the ATS even if they are dismissing the action. The possible reach of the ATS will expand even if individual cases are dismissed.

Exhaustion, in contrast, allows a federal court to dismiss a claim before it determines whether or not it has jurisdiction over the claim under the ATS. If a court dismisses a claim under exhaustion, jurisdiction is not determined until, and only if, other available remedies have proven futile.²⁰⁴ The postponement of an assessment regarding jurisdiction for claims that are not of universal concern when nexus to the United States is weak provides all of the benefits discussed in Part III. Because forum non conveniens forces a court to reach a conclusion regarding jurisdiction before dismissal, that doctrine does not

¹⁹⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

¹⁹⁹ *Id.* at 508.

²⁰⁰ *Id.* at 508–09.

²⁰¹ *See Sarei*, 550 F.3d at 831.

²⁰² *Id.* at 832.

²⁰³ *See Gulf Oil*, 330 U.S. at 504 (“Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.”); *see also Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 504–06 (S.D.N.Y. 2005) (conducting a forum non conveniens analysis but dismissing the claims for lack of subject-matter jurisdiction).

²⁰⁴ *See Sarei*, 550 F.3d at 832.

provide these benefits. As a result, a significant difference exists between whether a court dismisses a claim under *forum non conveniens* or under exhaustion. Although *forum non conveniens* is an important and useful jurisdictional tool, it does not assist in effectively limiting the scope of the ATS as prudential exhaustion does.

D. Hindering Development of Local Judicial Systems and Hindering Redress for Victims

An additional argument against prudential exhaustion is that it hinders the development of local judicial systems that could or should handle such claims. If plaintiffs can bring claims of violations of peremptory norms in federal courts, then the plaintiffs are not bringing such claims in the country where the violations occurred. As a result, this approach possibly prevents those countries from developing the necessary judicial mechanisms for hearing such claims.²⁰⁵

In response, first, even if this argument is taken as correct, although mandatory exhaustion would solve the concern that the ATS is keeping claims from local courts, mandatory exhaustion is currently not an option.²⁰⁶ Second, this approach completely sacrifices the individual plaintiff in the hope that doing so might spur human rights development. Those who bring claims under the ATS are most often from developing countries where a strong rule of law does not exist.²⁰⁷ For those who bring claims of violations of peremptory norms, what guarantee is there that the same government that allowed such acts to occur will allow the victims to seek redress? For instance, in *Sarei*, many of the plaintiffs' claims against Rio Tinto stem from actions that the corporation allegedly conducted with the consent of the local government or actions that the government allegedly took on behalf of the corporation.²⁰⁸ Exhaustion would create an additional hurdle and prolong the process of a judgment. If the plaintiffs had to exhaust their claims of crimes against humanity, war crimes, and racial

²⁰⁵ See Note, *supra* note 156, at 2129–30.

²⁰⁶ See *supra* Part IV.A.

²⁰⁷ See Kendra Magraw, Note, *Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L L. 458, 482 (2009) (“Human-rights violations are most likely to occur in developing countries that are in need of investment and that are eager to ensure that corporations do not look elsewhere to invest. These nations are unlikely to have the resources to enforce national laws and might feel constrained from doing so in order to ensure continued investment. The governments of such nations might be more likely to engage in the types of practices that could expose a corporation to liability” (footnotes omitted)).

²⁰⁸ *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1122–27 (C.D. Cal. 2002), *aff'd in part, rev'd in part, and vacated in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh'g*, 487 F.3d 1193, 1208 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion).

discrimination, how long would it take for their case to be heard in the Central District of California, if ever?

For the purpose of human rights, because peremptory norms are universal principles from which no derogation is allowed, the ATS should stand for the principle that if plaintiffs were the victims of violations of peremptory norms, they can seek redress in the U.S. federal court system without exhaustion. The violations themselves are what allow for jurisdiction if the country creates a mechanism for hearing the claims.²⁰⁹ Given this stance, corporations like Rio Tinto might learn that violations of peremptory norms are unacceptable and that they will be held accountable in a U.S. federal court for their derogation of such norms. This may keep corporations from investing in countries, such as Papua New Guinea, that might commit violations of peremptory norms in association with a corporation's investment. As a result, this stance may incentivize these countries not to commit such acts if they hope to attract or retain foreign investment.

Additionally, a case can be made that one cannot even trust a nation that allowed violations of customary international law to provide a legitimate forum in which victims can seek redress for those actions. For example, if the plaintiffs in *Sarei* brought their claims of violations of customary international law in Papua New Guinea, their efforts might have proven futile. Even though their claims are against Rio Tinto and not the government of Papua New Guinea, most of the claims arose out of the government's actions or the government's support of private actions.²¹⁰ At its extreme, this argument contends that exhaustion stands in the way of victims seeking redress for any violations of customary international law and, therefore, exhaustion should never be required. In other words, the interest in redress always outweighs the development of local courts, comity, and the concern for foreign relations.

It may be true that a local remedy will prove futile, but in order to limit the ATS and to promote comity, the plaintiff's interest cannot always come first. Distinguishing between peremptory norms and nonperemptory norms is a clear demarcation.²¹¹ It provides a point at which concerns of comity should outweigh a plaintiff's interest and vice versa. Perhaps the distinction means that sometimes an individual plaintiff will suffer because of delays and futile remedies. This unfortunate result, however, is necessary to limit the ATS consistent with

²⁰⁹ See *supra* note 147 and accompanying text.

²¹⁰ See *Sarei*, 221 F. Supp. 2d at 1126–27.

²¹¹ District courts have issued many ATS opinions that identify peremptory norms. See *supra* note 134 and accompanying text. These cases can serve as a basis for future decisions regarding what constitutes a peremptory norm in the same manner that previous ATS cases serve as a basis for determining what constitutes a tort violating the law of nations.

the Supreme Court's reasoning and mandate in *Sosa*. No limitation would be possible if the plaintiff's interest in redress always outweighed concerns of comity. Such a policy would also cause a situation in which there would be no restraint—other than self-restraint—on a district court's ability to involve itself in U.S. foreign policy.

As it currently stands in every circuit without prudential exhaustion, district courts determine on their own whether to allow a claim under the ATS. The guidance from *Sosa* is unclear and difficult to implement in a consistent fashion. For these reasons, when the claim is one that does not rise to the level of a violation of a peremptory norm and the nexus to the United States is weak, the plaintiff should exhaust the claim. Prudential exhaustion does not solve the problem of how to determine whether a plaintiff may properly bring an exhausted claim under the ATS, but it acts as an additional guard by ensuring that district courts will have fewer opportunities to expand the ATS. Additionally, when a claim has been exhausted and the district court must determine whether the claim can be brought under the ATS, the court will have the added legitimacy of arguing that it is acting because other forums proved futile.

CONCLUSION

The ATS can be an extremely effective resource to redress violations of human rights internationally. This is especially true if a plaintiff can collect from a corporation for actions associated with that corporation's projects. What has remained unclear in the wake of *Sosa* is how far the ATS will expand. The recent use of the Statute raises serious questions about comity and the role the U.S. courts should play in policing abuses of human rights in other countries. The Supreme Court began to address these concerns in *Sosa*, but its directives to district courts remain vague and difficult to implement with precision.

Although not a perfect solution, prudential exhaustion, as implemented by the Ninth Circuit, solves many of the problems that the Supreme Court attempted to fix in *Sosa*. Most importantly, prudential exhaustion provides limits on the claims that a district court can hear under the ATS. In so doing, the doctrine promotes comity and restricts the courts' potential for interfering in foreign policy. It also maintains a forum that can address violations of human rights.

Currently, there are not many claims brought under the ATS. This fact, though, does not negate the importance of determining how to implement the goals the Supreme Court articulated in *Sosa*. Courts and plaintiffs are determining the limits of the ATS on a case-by-case basis. In addition, in recent years, litigation has increased, especially against corporations, and this litigation could be a source of

remuneration for victims. Prudential exhaustion offers what is necessary for dealing with ATS litigation in the future: clarity and restraint.

At the moment, the Ninth Circuit requires prudential exhaustion. The Eleventh Circuit has held that the ATS has no exhaustion requirement,²¹² but that court reached its decision before the Ninth Circuit's en banc ruling in *Sosa*. The Eleventh Circuit did not address the possibility of prudential exhaustion. Other circuits have not ruled on this issue. Given that the Supreme Court has only heard one case involving the ATS, it may prove unlikely that they will hear another case in the coming years to deal with the split between the Ninth and Eleventh Circuits. Despite the Eleventh Circuit's opinion, though, the circuit courts should adopt prudential exhaustion. Without additional guidance from the Supreme Court or Congress, it remains the best approach for achieving comity and keeping "the door . . . ajar subject to vigilant doorkeeping."²¹³

²¹² *Jean v. Dorélien*, 431 F.3d 776, 781 (11th Cir. 2005).

²¹³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

