The Careless Gatekeeper: *Sarei v. Rio Tinto, PLC*, and the Expanding Role of U.S. Courts in Enforcing International Norms

I. OVERVIEW

Residents of Papua New Guinea's (PNG) Bougainville province filed suit in the United States District Court for the Central District of California in the fall of 2000, alleging that Rio Tinto, PLC's (Rio Tinto) Bougainville mining operations violated numerous provisions of international environmental and human rights law.[1] Specifically, the plaintiffs alleged that Rio Tinto's environmentally unsound techniques and racially discriminatory business practices had undermined the island's ecosystem and led to civil unrest, which culminated in a ten-year civil war.[2] The plaintiffs, who asserted jurisdiction under the Alien Tort Claims Act (ATCA), sought to hold the company liable for both the environmental damage caused by the mining operations and the wartime human rights violations committed by the PNG government at the company's behest.[3] In an amended opinion issued on July 9, 2002, the district court found that the ATCA, which provides that "[t]he 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

1. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1073-74 (9th Cir. 2006).

2. *Id.* at 1075. The dispute concerns Papua New Guinea's Bougainville mine, which is one of the world's largest gold and copper mines. R.J. May, *State and Society in Papua New Guinea: The First Twenty-Five Years, The Bougainville Crisis*, 3 PAC. REV. 174, 174 (1990). The mine began operation in the 1960s under the management of Bougainville Copper Limited (BCL). *Id.* Although it was very profitable for its principal shareholders, PNG government and Rio Tinto, the mine generated resentment among the local Melanesian people, who felt they had their land taken without compensation. *Id.* In March 1989, the Papua New Guinea Defense Force (PNGDF) had to be deployed to quell riots. *Id.* A "full-scale military operation" was launched against the local population. *Id.* During the resulting ten-year civil war, the brutal tactics of the PNG government claimed thousands of lives and left thousands more displaced. *Sarei*, 456 F.3d at 1075.

3. *See Sarei*, 456 F.3d at 1075.

United States," did not require the exhaustion of local remedies as a prerequisite for filing suit.[4] The district court further held that the plaintiffs had stated cognizable claims for racial discrimination, crimes against humanity, violations of the laws of war, and violations of the United Nations Convention on the Law of the Sea (UNCLOS).[5] If proven, the allegations supported liability against Rio Tinto for acts committed by the PNG government.[6] However, the district court ultimately dismissed all claims as presenting nonjusticiable political questions and, alternatively, dismissed the racial discrimination and UNCLOS claims under the act of state doctrine and the doctrine of international comity.[7]

On appeal, the United States Court of Appeals for the Ninth Circuit withdrew submission after hearing oral arguments to await the United States Supreme Court decision in *Sosa v. Alvarez-Machain*.[8] The Ninth Circuit *held* that the district court erred in dismissing the plaintiff's claims under the political question and act of state doctrines, and affirmed the lower court's conclusion that exhaustion of local remedies is not required under the ATCA. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006).[9]

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4. *Id.* at 1074.

5. *Id. See generally* David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, 542 NAT'L POL'Y ANALYSIS (Aug. 2006), *available at* http://www.nationcenter.org/NPA542LawoftheSeaTreaty.html. The Third United Nations Convention on the Law of the Sea, or UNCLOS III, was adopted in 1982. *Id.* The goal of the treaty was to establish a comprehensive set of rules that would replace earlier U.N. conventions, which were generally believed to be inadequate. *Id.* Today, the treaty has been ratified by 153 nations. United Nations, Status on the United Nations Convention on the Law of the Sea, http://www.un.org/Depts/los/reference_files/status2006.pdf (last visited Nov. 15, 2006). The latter category includes the United States, where opposition to ratification has remained strong since President Reagan initially rejected the Convention in the early 1980s. Ridenour, *supra*. Critics describe the treaty as "seriously flawed" and maintain that ratification, "could place U.S. sovereignty, security and political independence in doubt." *Id.*

6. *Sarei*, 456 F.3d at 1076.

7. *Id.*

8. *Id.* at 1077.

9. On April 12, 2007, the Ninth Circuit withdrew this opinion and issued a new opinion granting rehearing en banc and holding that the district court erred in (1) dismissing the plaintiffs' claims as presenting nonjusticiable political questions and (2) dismissing the plaintiffs' racial discrimination claim under the act of state doctrine. The Ninth Circuit vacated for reconsideration the district court's dismissal of the UNCLOS claim under the act of state doctrine and the dismissal of the racial discrimination claim on comity grounds and affirmed the conclusion that the ATCA does not contain an exhaustion requirement. Sarei v. Rio Tinto, PLC, Nos. 02-56256, 02-56390, 2007 WL 1079901, at *1 (9th Cir. Apr. 12, 2007).

II. BACKGROUND

The Alien Tort Claims Act, codified as 28 U.S.C. § 1350, dates to the earliest years of the American republic. The initial version of the ATCA provided for concurrent jurisdiction between federal and state courts in "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[10] This precursor of the modern statute first appeared embedded within § 9 of the Judiciary Act of 1789, the legislation which established the federal court system and articulated the areas of federal jurisdiction.[11]

The congressional impetus for including a provision for concurrent jurisdiction in such an important piece of legislation has been heavily debated. In fact, Judge Friendly once described the statute as a "legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[12] Many scholars have speculated that the Act was an outgrowth of the Founders' desire to centralize foreign policy power in the hands of the federal government, which they believed would be more sensitive to areas of national interest.[13] More specifically, it is maintained that the language was intended to safeguard the interest of the fledgling American democracy by providing a mechanism for addressing those offenses "in which case recourse can only be had to war."[14] In other words, the statute permitted a remedy for any foreigner who suffered mistreatment at the hands of an American citizen, but only in those instances in which the alleged act was so severe as to be considered "principally incident to whole states or nations, and not individuals seeking relief in court."[15] At common law, three wrongs were considered to rise to this level: "violation of the safe-conducts or passports, infringement of the rights of ambassadors and piracy."[16] These

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10. Judiciary Act of 1789, Sept. 24, 1789, § 9, 1 Stat. 73.

11. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 15 (1985).

12. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

13. Randall, *supra* note 11, at 11.

14. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475 (1989) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (George Chase ed., Banks Law Publ'g Co., 4th ed. 1923)).

15. Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *68).

16. Burley, *supra* note 14, at 469 (quoting BLACKSTONE, *supra* note 14, at 881). The second violation, infringement on the rights of ambassadors, is thought to have had a special significance to the drafters of the Judiciary Act. For example, in 1784, the French Consul General to the United States, Francis Barbe Marbois, was assaulted by a French national living in Pennsylvania. Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 14 TRANSNAT'L LAW. 207, 212 (2001). Despite the demands of the French Government, Pennsylvania refused to extradite the assailant to France, and Congress, which was

three acts formed the basis of the "law of nations," a collection of *jus cogens*—or universally accepted—norms, the violation of which was so severe that Blackstone wrote: "[W]here the individuals of any state violate this general law, it is then in the interest as well as the duty of the government, under which they live, to animadvert upon them with a becoming severity that the peace of the world may be maintained."[17]

Given the severity of the predicate breach, it is perhaps fortunate that the ATCA was rarely called upon by plaintiffs during the first two centuries of its existence.[18] Yet, as the statute itself lay dormant, the law of nations underwent a period of unprecedented expansion. This was especially true in the field of human rights law, where universal condemnation of the Holocaust led to a new international consensus that was codified in "over twenty universal treaties . . . twelve regional conventions and numerous other declarations, resolutions, and soft law instruments."[19] These intergovernmental agreements formed the basis for a new set of *jus cogens* norms, which included slavery, war crimes, crimes against humanity, apartheid, and torture.[20] It was under this greatly augmented version of the law of nations that foreign plaintiffs initiated suits in U.S. district courts under the ATCA.

The first post-World War II attempts to utilize the ATCA began in the 1960s,[21] but these early decisions continued to apply the narrow,

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still operating under the Articles of Confederation, found itself unable to compel state action. *Id.* After much congressional pleading, the attacker was eventually tried and sentenced by the Pennsylvania Supreme Court for violating the law of nations, which was held to be part of Pennsylvania's common law. *Id.*; *see also* Randall, *supra* note 11, at 24-28.

17. Burley, *supra* note 14, at 475 (quoting BLACKSTONE, *supra* note 14, at 881).

18. Randall, *supra* note 11, at 4 n.15 (asserting that from 1789 through 1980, only twenty-one cases have been discovered in which the plaintiff asserted jurisdiction under the Alien Tort Statute).

19. Sonia Jimenez, *The Alien Tort Claims Act: A Tool for Repairing Ethically Challenged U.S. Corporations*, 16 ST. THOMAS L. REV. 721, 724 (2004).

20. M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 VA. J. INT'L L. 81, 108 (2001); *see also* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992) (noting that a jus cogens norm "is a norm 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 general international law having the same character") (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332).

21. *See generally* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). The case involved a custody dispute between the Lebanese Ambassador to Iran and his former wife, an Arab national living in the United States. *Id.* at 859. The court found in favor of the father, reasoning that the wife's actions of removing and concealing the child in violation of a Lebanese custody decree was a violation of international law and actionable under the ATCA. Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENVTL. L.J. 151, 164-65 (2006); *see also* Randall, *supra* note 11, at 36.

eighteenth-century understanding of the law of nations.[22] It was not until two decades later, in *Filartiga v. Pena-Irala*, that the ATCA's potential as a mechanism for enforcing modern international human rights norms was brought to national attention.

In *Filartiga*, Dr. Joel Filartiga and his daughter, both Paraguayan nationals, filed suit in U.S. district court against Americo Pena-Irala, a Paraguayan military officer.[23] The plaintiffs alleged that Pena-Irala had participated in the torture and killing of seventeen-year-old Joelito Filartiga, Dr. Filartiga's son, in retaliation for the doctor's active opposition to Paraguay's undemocratic regime.[24] The district court dismissed the claims for want of subject matter jurisdiction.[25] However, the United States Court of Appeals for the Second Circuit reversed, noting that the modern expansion of the law of nations had significantly increased the ATCA's jurisdictional reach: "In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights . . . . [T]o recognize that respect for fundamental human rights is in their individual and collective interest."[26] The court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged tortured is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."[27] The door had been opened.

It was not long before the Supreme Court took notice of the ATCA's new application. An early pronouncement came in *Argentine Republic v. Amerada Hess Shipping Corp.*, a 1989 decision in which the Court attempted to reconcile the conflict between the ATCA and the Foreign

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22. Ryan Micallef, *Liability Laundering and Denial of Justice: Conflicts Between the Alien Tort Statute and the Government Contractor Defense*, 71 BROOK. L. REV. 1375, 1389 (2006).

23. *Id.* at 1386.

24. *See id.* (citing Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)); *see also Gruzen*, *supra* note 16, at 214. The evidence indicates that Joelito Filartiga died of cardiac arrest brought on by intentional electrocution, which he suffered during "a ninety-minute, tape-recorded interrogation." Gruzen, *supra* note 16, at 214. Following the boy's death, Pena-Irala and other police force members transported the corpse to Pena-Irala's house, and placed the body in the bed of his mistress's daughter. *Id.* at 215 n.51. Police then contacted the mistress's husband, and coerced him into confessing that he had murdered Filartiga after finding the boy in bed with his wife. *Id.* At the time, crimes of passion were excused from punishment under Paraguayan law. *Id.*

25. *Filartiga*, 630 F.2d at 880.

26. *Id.* at 890.

27. *Id.* at 878.

Sovereign Immunities Act (FSIA).[28] In *Argentine Republic*, two Liberian corporations filed suit against Argentina, alleging that Argentine military forces had damaged their vessels during the Falklands War.[29] The district court dismissed the case on sovereign immunity grounds without reaching the merits of the plaintiffs' claims under the ATCA.[30] The Supreme Court ultimately affirmed this decision, holding that Argentina was immune from suit in the United States regardless of whether the elements of the ATCA had been satisfied.[31] The Court reasoned that "Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA . . . preclude[s] a construction of the Alien Tort Statute that permits the instant action."[32] Thus, the Supreme Court concluded that the norms embodied in the ATCA did not override traditional notions of foreign sovereignty.

The Supreme Court's decision in *Argentine Republic* threatened to halt the expansion of the ATCA as a means of vindicating foreign plaintiff's rights. While the Court's opinion can be read narrowly to preclude only those claims made directly against a foreign government, a broader analysis suggests that all sovereign acts, including those undertaken by an individual or on behalf of a corporation, are immune from suit under the ATCA unless one of the FSIA exceptions applies.[33]

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28. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). The modern understanding of the sovereign immunities doctrine is based on a notion of state sovereignty that "required governments to refrain from taking any action that would interfere with another state's ability to conduct its own domestic affairs." David P. Vandenberg, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006). In the early twentieth century, however, the classical notions of comity began to erode. *See id.* at 744. A restrictive theory developed, under which U.S. courts were permitted to entertain commercial suits against foreign powers. *Id.* at 744-45. The adoption of the restrictive theory by the United States Department of State led to a period of confusion in which rulings on the applicability of sovereign immunity were undertaken by both the executive and the judicial branches. *Id.* at 745. The resulting confusion prompted Congress to enact the FSIA in 1976. *Id.* at 746. The FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the states" except in limited cases, such as those involving purely commercial matters or an express or implied waiver of immunity. 28 U.S.C. § 1605 (2000). Thus, the legislation created a uniform system of determining whether sovereign immunity applied "by removing politics from the process and standardizing the tools of judicial interpretation." Vandenberg, *supra*, at 746. More important, FSIA vested the power to make immunity decisions squarely in the hands of the judiciary. *Id.*

29. *Argentine Republic*, 488 U.S. at 431-32; Cuervo, *supra* note 21, at 179.

30. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73, 77 (S.D.N.Y. 1986) ("[T]o hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act.").

31. *Argentine Republic*, 488 U.S. at 443.

32. *Id.* at 438.

33. *See* Gruzen, *supra* note 16, at 229-30; *see also* 28 U.S.C. § 1605(a) (listing instances in which a foreign state may be tried in U.S. courts).

Yet, in the years following *Argentine Republic*, plaintiffs circumvented this more expansive interpretation by arguing that a violation of a *jus cogens* norm constituted an implicit waiver of sovereign immunity. This theory brought many of the most serious violations perpetrated by foreign governments within the jurisdictional reach of the ATCA. While some jurisdictions rejected these attempts,[34] the view that illegal acts could not constitute official acts of a state eventually found favor with the circuit courts. Thus, despite the Supreme Court's holding in *Argentine Republic*, the ATCA became an increasingly popular vehicle for enforcing *jus cogens* norms in the decades following *Filartiga*. Over the years, *Filartiga*'s language protecting acts committed "under color of official authority"[35] fell by the wayside, and the scope of the ATCA expanded to encompass acts of private individuals and corporations.

An initial step in the expansion of the scope of the ATCA was realized in *Kadic v. Karadžić*, which upheld the statute's application to private individuals.[36] In *Kadic*, members of Bosnian minority groups filed suit against the president of the unrecognized Bosnian-Serb republic alleging genocide, rape, forced impregnation, torture, and summary execution.[37] The district court dismissed the case, reasoning that nonstate actors, such as Karadžić, could not violate the law of nations.[38] The Second Circuit reversed, concluding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[39] The court likened modern human rights violations, such as slavery and war crimes, to the acts of piracy that the ATCA was initially intended to address, noting that "pirates were '*hostis humani generis*' (an enemy of all mankind) in part because they acted 'without . . . any pretense of public authority.'"[40] Thus, *Kadic* signaled a major victory for human rights advocates.

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34. Gruzen, *supra* note 16, at 229-30.
35. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
36. 70 F.3d 232, 239 (2d Cir. 1995).
37. *Id.* at 236-37.
38. *Id.* at 237-38. Bridgeman argues that a distinction exists between the law of nations and *jus cogens* norms, which can be understood in terms of "a three-stepped pyramid—with *jus cogens* norms at the pinnacle, the law of nations in the middle, and customary and treaty-based international law as the foundation." Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 7 (2003). Because the law of nations pertains only to the actions of "private individuals with no connection to the state must rise to the non-preemptory level of a *jus cogens* violation for the private defendant to be liable under the ATCA." *Id.* at 8.
39. *Kadic*, 70 F.3d at 239.
40. *Id.* (citing BLACKSTONE, *supra* note 15, at *68).

The expansion of the scope of the ATCA to include individual, nonstate actors was only the beginning; starting with *Doe v. Unocal Corp.*, the ATCA also became a vehicle of corporate accountability.[41] In *Unocal*, fifteen Myanmar villagers filed suit against the multinational petroleum conglomerate Unocal Corporation (Unocal).[42] The plaintiffs sought to impose liability on the corporation for human rights violations committed on Unocal's behalf by the Myanmar military during the construction of the Yadana natural gas pipeline, a collaborative effort of Unocal, the Myanmar government, and the French company, Total.[43] In ruling for the plaintiffs, the Ninth Circuit affirmed its position that a cause of action is created under the ATCA "as long as plaintiffs . . . allege a violation of a 'specific, universal, and obligatory' international norm as part of [their] ATCA claim."[44] More surprisingly, the court found that "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime," could provide a basis for liability under the ATCA.[45] Thus, *Unocal* paved the way for further expansion of the ATCA and suits against major corporations such as Coca-Cola[46] and Exxon Mobile.[47]

In the decades following *Filartiga*, the circuit courts proved that they were amenable to using the ATCA to redress a more expansive set of *jus cogens* norms. The Ninth Circuit's decision in *Unocal* was quickly noticed by environmentalists, who viewed the statute as a powerful tool for imposing liability on the most serious polluters. Unlike the earlier human rights claims, however, the application of the ATCA to environmental issues had little success. In *Beanal v. Freeport-McMoran, Inc.*, for example, an Indonesian resident brought claims against American mining corporations under the ATCA alleging environmental abuses, human rights violations, and genocide.[48] The district court dismissed the claims after finding that conventions against environmental degradation were not "universally recognized," and therefore, did not meet the standard required by the ATCA.[49] The United States Court of Appeals for the Fifth Circuit affirmed on appeal, noting that "federal

41. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
42. *Id.* at 937.
43. Micallef, *supra* note 22, at 1395 n.118.
44. *Unocal*, 395 F.3d at 944 (quoting Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002)).
45. *Id.* at 947.
46. *See generally* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003).
47. *See generally* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005).
48. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999).
49. *Id.* at 167.

courts should exercise extreme caution when adjudicating environmental claims under international law . . . especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries."[50] A similar decision was reached by the Second Circuit four years later in *Flores v. Southern Peru Copper Corp.*[51] The plaintiffs in *Flores* brought claims against an American mining company alleging that mine-generated pollution had caused wide-spread lung disease among the local population and violated their right to life.[52] In rejecting the plaintiff's claims, the Second Circuit found "*no* evidence that intranational pollution violates customary international law."[53]

Failure on the environmental front did not discourage foreign plaintiffs from filing suits in U.S. federal court. On the contrary, the success of the ATCA human rights litigation at the circuit court level prompted a proliferation of suits, as plaintiffs hurried to test the bounds of this previously untapped statutory resource. Yet despite the flurry of activity that occurred following the *Filartiga* decision, the Supreme Court remained relatively silent on the question of the ATCA in the years after *Argentine Republic*. In 2002, the Court finally confronted the issue of the ATCA's scope in *Sosa v. Alvarez-Machain*.[54] The plaintiff in *Sosa*, Humberto Alvarez-Machain, alleged he had been the victim of a United States Drug Enforcement Agency (DEA) kidnapping plot.[55] In 1990, Alvarez-Machain was forcibly taken from his home in Mexico by Sosa and other Mexican nationals and brought to the United States to stand trial for his alleged participation in the torture and killing of a DEA agent.[56] Following his acquittal, Alvarez-Machain sued the United States and Sosa for damages, claiming his arrest and detention violated international law.[57] The Supreme Court held that Sosa was not liable for arbitrary arrest and detention under the ATCA,[58] reasoning that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of

50. *Id.*
51. Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).
52. *Id.* at 237.
53. *Id.* at 266.
54. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
55. *Id.* at 698-99.
56. *Id.* at 698.
57. *Id.*
58. Alvarez-Machain v. United States, 331 F.3d 604, 620-22 (9th Cir. 2003) (en banc).

customary international law so well defined as to support the creation of a federal remedy."[59]

The Supreme Court's decision in *Sosa* clarified several key issues surrounding the application of the ATCA. For instance, the Court approved the body of ATCA jurisprudence that had developed in the lower courts, finding that the ATCA not only bestows jurisdiction, but also creates a cause of action "based on the present-day law of nations [that] rest[s] 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."[60] However, the Court's willingness to embrace the ATCA's expansion should not be construed too broadly. On the contrary, the majority in *Sosa* called for the lower courts to exercise self-restraint when faced with ATCA claims, noting that "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping."[61] The Court specifically cautioned against further expansion of *jus cogens* norms, reasoning that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[62] While these caveats offered a glimpse of the Court's underlying position, they did little to resolve the broader challenges inherent in ATCA litigation. In particular, the Supreme Court's decision in *Sosa* failed to address the proper treatment of the three most commonly invoked defenses to ATCA claims: the act of state doctrine, the political question doctrine, and the exhaustion requirement. I will take up each of these issues in turn.

One frequently invoked ATCA defense is the act of state doctrine. The act of state doctrine is a judicially created principle that is implicated whenever "a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[63] In such instances, the doctrine recognizes that "[e]very sovereign is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[64] When a foreign sovereign acts within its own territory, the act of state doctrine requires that "[r]edress of

59. *Sosa*, 542 U.S. at 738.
60. *Id.* at 725.
61. *Id.* at 729.
62. *Id.* at 727-28.
63. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 406 (1990).
64. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."[65]

As previously noted, the Supreme Court's decision in *Argentine Republic* held that a claim barred on sovereign immunity grounds was not justiciable despite having satisfied the elements of the ATCA. While this may have laid the conflict between the ATCA and the FSIA to rest, lower courts have developed several methods of circumventing the spirit of *Argentine Republic* and extending the reach of the ATCA to situations beyond the scope of the FSIA exceptions.[66] First, courts often limit the holding of *Argentine Republic* to situations in which the ATCA claim is directed against a sovereign state per se, thereby precluding the defense from corporate and individual defendants.[67] Moreover, when dealing with a sovereign nation, courts routinely inquire into the nature of the underlying acts when determining whether sovereign immunity applies. Specifically, the lower courts have expressed doubt as to whether action by a state official in violation of the Constitution and laws of the nation, "and wholly unratified by that nation's government, could properly be characterized as an act of state."[68] By limiting the protection of the act of state doctrine to situations where the underlying sovereign act conforms to acceptable international standards of behavior, "it would be a rare case in which the act of state doctrine precluded suit under [the ATCA]."[69] Thus, it appears that the circuits are more than willing to circumvent the deferential posture normally required under the act of state doctrine to redress alleged violations of *jus cogens* norms.

A second frequently invoked defense that arises in the context of ATCA litigation is the political question doctrine. The political question doctrine is "founded primarily of the policies of separation of power and

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65. *Id.*

66. The FSIA exceptions include cases where

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a) (2000).

67. *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995).

68. *Id.* at 250; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) (questioning "whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could be properly characterized as an act of state").

69. *Kadic*, 70 F.3d at 250.

judicial self-restraint."[70] It requires that courts refrain from issuing opinions on matters better suited to the executive or legislative branches. Yet, while the doctrine exists to prevent "inappropriate interference in the business of the other branches of Government,"[71] the Supreme Court has routinely observed that "[n]ot all interference is inappropriate or disrespectful."[72] Even in areas such as foreign affairs, where the commitment to the coordinate branches is the strongest, courts must still undertake a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[73]

The Supreme Court's classic statement on the issue of political questions is found in *Baker v. Carr*, which enunciated a six-factor test for determining whether a political question had been raised.[74] The factors include

> a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . [the] unusual need for unquestioning adherence to a political decision already made . . . [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[75]

Foreign policy issues, whose resolution "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature . . . [or] uniquely demand single-voiced statement of the Government's views," often constitute political questions under the *Baker* analysis.[76] Yet, when these same factors are applied to claims arising under the ATCA, the results have varied. Many early cases were quick to disregard the weight of executive and legislative pronouncements on issues of foreign policy. In *Kadic*, for example, the Second Circuit determined that, despite U.S. participation in Operation Deliberate Force, no political question was

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70. Gruzen, *supra* note 16, at 226 (quoting CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 75 (1983)).

71. Nixon v. United States, 506 U.S. 222, 252-53 (1993) (citing United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)).

72. *Id.* at 253.

73. Baker v. Carr, 369 U.S. 186, 211-12 (1962).

74. *Id.* at 217.

75. *Id.*

76. *Id.* at 211.

raised by the adjudication of the self-proclaimed Serbian leader.[77] The court observed that, while not conclusive, the United States Department of State (State Department) had expressly disclaimed any political question implications.[78] More importantly, the court reasoned that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary."[79] The Second Circuit's suggestion that claims under the ATCA were outside the scope of the political question doctrine was challenged in *Sosa*, where the Supreme Court encouraged the federal courts to "give serious weight to the Executive Branch's view of the case's impact on foreign policy."[80] This advice seems to have been taken to heart by at least one court; in *Whiteman v. Dorotheum GMBH & Co.*, the Second Circuit dismissed a suit brought by Holocaust survivors based "on a statement of interest from the executive branch explaining that the implementation of a general settlement plan negotiated between the United States and Austria was contingent upon dismissal of the suit."[81] A more nuanced position was seen in *Alperin v. Vatican Bank*, in which the Ninth Circuit determined that property claims brought by Holocaust survivors were justiciable, while those that called for "retroactive political judgment as to the conduct of war," were barred by the political question doctrine.[82] Thus, *Sosa*'s statement on the political question doctrine appears to have left room for interpretation.

A final defense frequently invoked in the context of ATCA litigation is exhaustion. Exhaustion is a convention that requires courts to abstain from hearing cases committed to another judicial system until the plaintiff has exhausted all possible remedies within that system. The Supreme Court recognized the importance of the exhaustion requirement in *Banco Nacional de Cuba v. Sabbatino*.[83] In *Banco Nacional*, the Court noted that under international law, "the usual method for an individual to

77. Kadic v. Karadžić, 70 F.3d 232, 249 (2d Cir. 1995).

78. *Id.* at 250. The court went on to remark that "even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication." *Id.*

79. *Id.* at 249 (citing Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

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

81. Recent Case, *Separation of Powers—Foreign Sovereign Immunity; Second Circuit Uses Political Question Doctrine To Hold Claims Against Austria Nonjusticiable Under Foreign Sovereign Immunity Act.*—Whiteman v. Dorotheum GMBH & Co., *431 F.3d 57 (2d Cir. 2005)*, 119 HARV. L. REV. 2292, 2292 (2006); *see* Whiteman v. Dorotheum GMBH & Co. KG, 431 F.3d 57 (2d Cir. 2005).

82. Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005) (finding that the "broad allegations tied to the Vatican Bank's [profiting from the] alleged assistance to the war objectives of the Ustasha . . . are, by nature, political questions").

83. 376 U.S. 398, 422-23 (1964).

seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."[84]

Despite the prevalence of exhaustion in the broader international context, it is not mandated under the ATCA and courts have proved unwilling to read such a requirement into the statute.[85] In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, for example, the district court refused to require that Sudanese plaintiffs exhaust their claims in Sudan before seeking relief under the ATCA.[86] The court remarked that "[r]equiring plaintiffs to seek justice in the courts of an allegedly genocidal regime bent on their extermination would be a grotesque miscarriage of justice, and the case law concerning comity precludes such a result."[87] Other courts have reached a similar conclusion in cases where exhaustion would *not* expose the plaintiff to personal harm, reasoning that "[t]here is nothing in the ATCA which limits its application to situations where there is no relief available under domestic law. There is no reason why plaintiffs cannot seek relief on alternative grounds."[88] At the same time, however, at least one circuit judge has found that "[c]onsiderations of equity and consistency," weigh in favor of "incorporating an implicit exhaustion requirement in the ATCA."[89] Moreover, in *Sosa* the Supreme Court appeared to agree with this reasoning, suggesting that it would "certainly consider [the exhaustion] requirement in an appropriate case."[90] Thus, the time may be ripe for the judicial branch to reconsider the role that exhaustion should play in ATCA claims.

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84. *Id.*

85. *See, e.g.*, Jean v. Dorélien, 431 F.3d 776, 781 (11th Cir. 2005) ("[T]he exhaustion requirement does not apply to the ATCA.").

86. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

87. *Id.* at 343.

88. Jama v. I.N.S., 22 F. Supp. 2d 353, 364 (D.N.J. 1998).

89. Enahoro v. Abubakar, 408 F.3d 877, 889-90 (7th Cir. 2005) (Cudhay, J., dissenting in part). Judge Cudhay explained that an exhaustion requirement

> would, among other things, bring the Act into harmony with both the provisions of the TVPA (with which it is at least partially coextensive) and with the acknowledged tenets of international law. And while not directly applicable to the ATCA, the TVPA scheme is surely persuasive since it demonstrates that Congress not only assumed that the exhaustion requirements imposed by customary international law were discernible and effective in themselves, but also that they should be reflected in U.S. domestic law.

Id. at 890.

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

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit continued the expansion of the ATCA's jurisdictional reach, holding that the plaintiffs had asserted valid and sufficient claims against Rio Tinto. The majority expressly rejected the lower court's finding that the State Department's statement of interest (SOI) required judicial abstention under the political question doctrine and the convention of international comity.[91] Moreover, the Ninth Circuit ruled that the district court had erred in its dismissal of the plaintiff's claims as nonjusticiable political questions and, alternatively, under the act of state doctrine.[92] Finally, the court found that no exhaustion requirement presently existed under the ATCA.[93]

The Ninth Circuit began by addressing subject-matter jurisdiction. First, the court determined that *Sosa*'s requirement that ATCA claims "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,"[94] affirmed the "specific, universal and obligatory" norms standard articulated in *In re Marcos*.[95] The court further noted that the allegations against Rio Tinto, which included war crimes, violations of the laws of war, and racial discrimination, implicated those *jus cogens* norms "that form the least controversial core of modern day ATCA jurisdiction."[96] The majority next turned to the UNCLOS claims, observing that a violation of the convention did not rise to the same normative level as the allegations of human-rights abuse; however, the court stated that the ratification of the UNCLOS "by at least 149 nations . . . is sufficient for it to codify customary international law that can provide the basis of an ATCA claim."[97] Finally, the majority determined that the *jus cogens* violations allegedly committed by the PNG military at the behest of Rio Tinto were sufficient for a claim of vicarious liability under the ATCA.[98]

Having dispensed with the threshold question of jurisdiction, the Ninth Circuit addressed the political question doctrine. After acknowledging the doctrine's historical importance, the majority applied the relevant *Baker* factors. The court began with the first *Baker* factor,

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91. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1082, 1088 (9th Cir. 2006).
92. *Id.* at 1084, 1086.
93. *Id.* at 1099.
94. *Id.* (quoting *Sosa*, 542 U.S. at 725).
95. *Id.* (quoting *In re* Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).
96. *Id.* at 1078.
97. *Id.*
98. *Id.* at 1078-79.

prohibiting adjudication when there is "a textually demonstrable commitment of the issue to a coordinate political department."[99] Here, the court adopted the Second Circuit's holding that claims brought under the ATCA are constitutionally entrusted to the judiciary, noting that the Supreme Court had not challenged this reasoning in *Sosa*.[100] The court then addressed the fourth, fifth, and sixth *Baker* factors and summarized that the factors precluded jurisdiction "if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[101] In determining whether these factors were present, the majority specifically focused on the State Department's SOI,[102] which stated that adjudication of the plaintiffs' claims "would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations."[103] While noting that executive pronouncements must be afforded "serious weight" in matters of foreign policy,[104] the court found that "claims that relate to a foreign conflict in which the United States had little involvement" do not infringe upon the prerogatives of the Executive Branch.[105] Thus, the court concluded that even when given "serious weight," the statement of interest (SOI) was insufficient to create a true political question.[106]

Having determined that the suit was not barred by the political question doctrine, the Ninth Circuit next addressed whether the act of state doctrine precluded consideration on the merits. The court noted that the act of state doctrine forbids adjudication when: "(1) there is an 'official act of a foreign sovereign performed within its own territory'; and (2) 'the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.'"[107] However, the court observed that under *Sabbatino* these factors often serve only as the beginning of the inquiry.[108]

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99. *Id.* at 1079-80.

100. *Id.* at 1080 (citing Alvarez-Machain v. United States, 331 F.3d 604, 615 n.7 (9th Cir. 2003) (en banc)).

101. *Id.* (citing Kadic v. Karadžić, 70 F.3d 232, 249 (2d Cir. 1995)).

102. *Id.* at 1080-83.

103. *Id.* at 1075.

104. *Id.* at 1081 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)).

105. *Id.* at 1082.

106. *Id.*

107. *Id.* at 1084 (quoting W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990)).

108. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for

The court concluded that the alleged acts of racial discrimination could form the basis of an official act because "international law does not recognize an act that violates *jus cogens* as a sovereign act."[109] The majority contrasted this to the alleged UNCLOS violations, which involved the PNG government's exploitation of its own natural resources.[110] The court determined that because UNCLOS violations did not rise to the level of *jus cogens* norms, the PNG government had not waived immunity by violating a convention of international law.[111] Ultimately, the court determined the *Sabbatino* considerations must be reapplied to the UNCLOS violations in light of their ruling that the SOI is not an absolute bar to adjudication.[112]

The Ninth Circuit next turned to the related issue of international comity. As a threshold inquiry, the majority considered whether a true conflict of law existed.[113] The Ninth Circuit determined that the district court's ruling that a conflict existed between ATCA's jurisdictional grant and PNG law, which "prohibit[s] the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea" was not an abuse of discretion.[114] The majority then turned to the standards set forth in section 403 of the *Restatement (Third) of Foreign Relations Law of the United States* in order to determine whether its jurisdiction was reasonable in light of the conflict.[115] The court noted the district court's finding that the factors articulated in § 403 weighed heavily against adjudication.[116] However, the majority concluded that this assessment must also be reconsidered in light of the determination that the SOI did not bar adjudication.[117]

Finally, the Ninth Circuit addressed the question of whether exhaustion of local remedies was a prerequisite to adjudication under ATCA. The majority noted that in *Sosa*, the Supreme Court had "hinted

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exclusivity in the political branches. . . . The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.")).

109. *Id.* at 1085 (quoting Siderman de Blake v. Republic of Arg., 965 F.2d 699, 718 (9th Cir. 1992)).

110. *Id.*

111. *Id.* at 1086.

112. *Id.*

113. *Id.* at 1087-88.

114. *Id.* at 1087 (citing Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1201 (C.D. Cal. 2002)).

115. *Id.* at 1088.

116. *Id.*

117. *Id.*

that it might be amenable to recognizing an exhaustion requirement as implicit in the ATCA."[118] However, in the absence of clear judicial mandate, the court applied principals of statutory construction. First, the majority determined that the ATCA contained no explicit exhaustion requirement.[119] The court further observed that the first Congress's understanding of the appropriateness of such a requirement was inconclusive at best.[120] The court turned its gaze to the Torture Victim's Protection Act (TVPA), a more recent congressional pronouncement that was drafted to clarify some of the confusion surrounding the ATCA. Once again, the court found insufficient support for imposing an exhaustion requirement into the ATCA.[121] Finally, the court observed that in the absence of a clear congressional pronouncement, the Judicial Branch could, at its own discretion, choose to require exhaustion of local remedies as a prerequisite to adjudication.[122] However, the majority concluded that "the balance tips against judicially engrafting an exhaustion requirement onto a statute where Congress has declined to do so, and in an area of international law where the Supreme Court has called for the exercise of judicial caution rather than innovation."[123] Thus, the court determined that exhaustion was unnecessary under the ATCA.[124]

The dissent challenged the majority's conclusion that neither Congress nor the Supreme Court required exhaustion, and maintained that the exhaustion of local remedies was a prerequisite to jurisdiction under the ATCA. First, the dissent conceded that the ATCA "does not expressly require exhaustion of remedies before an alien may invoke the jurisdiction of U.S. courts."[125] At the same time, however, the dissent maintained that a comparison of the ATCA to the TVPA was inappropriate given the "unique history" of the two statutes.[126] The

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118. *Id.* at 1089 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004)).

119. *Id.* at 1090.

120. *Id.* at 1091 (referencing the Jay Treaty, which was signed five years after the passing of the Judiciary Act of 1789). The Jay Treaty contained an express exhaustion requirement, which provided that international arbitration could be invoked only if "by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation." *Id.* (citing Treaty of Amity, Commerce and Navigation (Jay Treaty), U.S.-U.K., Nov. 19, 1794, 8 Stat. 116, 119).

121. *Id.* at 1094-95 (noting three factors weighing against exhaustion: "(i) the lack of express historical or contemporary congressional intent regarding exhaustion under the ATCA, (ii) Congress' recent pronouncement that the ATCA should remain 'intact' and 'unchanged' and (iii) Congress' specific focus in the TVPA on torture and extrajudicial killing"). *Id.* at 1094.

122. *Id.* at 1096.

123. *Id.* at 1095 (citing *Sosa*, 542 U.S. at 728).

124. *Id.* at 1099.

125. *Id.* at 1103 (Bybee, J., dissenting).

126. *Id.* at 1105.

dissent further noted that the norm of exhaustion was well established at the time the ATCA was enacted, and has been subsequently recognized by all three branches of the federal government.[127] Moreover, Judge Bybee argued that exhaustion was routinely required by various supra-national courts and tribunals, both as procedural and substantive issues of law.[128] The dissent concluded by suggesting three prudential reasons for instituting an exhaustion requirement: "respect for the courts of a separate sovereign or the administrative agencies of a coordinate branch of government"; a desire to "permit[] such courts or agencies to apply their own expertise to the matters in question, and [to allow] the sovereign or branch to correct any errors in its own procedures,"; and the benefit of requiring "the parties to refine their issues and develop the record in a way that will aid decision in U.S. courts."[129] Thus, the dissent determined that under the ATCA, exhaustion is appropriate for historical, political, and practical reasons.

IV. ANALYSIS

The Ninth Circuit's opinion in *Sarei* was a surprising response to *Sosa*, especially considering that the court postponed adjudication of the claims against Rio Tinto because it "anticipated [*Sosa*] would clarify whether the plaintiffs' claims were cognizable under the ATCA."[130] The Supreme Court's decision in *Sosa* was a partial victory for ATCA plaintiffs. On one hand, the Court recognized an extension of *jus cogens* norms that included many of Rio Tinto's alleged human rights abuses. On the other hand, *Sosa*'s underlying message was decidedly cautionary, counseling the lower courts to exercise self-restraint and defer to the coordinate branches on matters of foreign policy.[131] The majority prevailed upon the lower courts to exercise "vigilant doorkeeping,"[132] to refrain from extending the ATCA remedies beyond the "narrow class of international norms,"[133] and to "give serious weight" to executive pronouncements.[134] Yet, the Ninth Circuit's decision in *Sarei* was a far cry from vigilant doorkeeping. On the contrary, the court's holding regarding exhaustion and the alleged UNCLOS violations threw the door open to a new class of individual plaintiffs. Moreover, the Ninth Circuit's

127. *Id.* at 1106-08.
128. *Id.* at 1108-12.
129. *Id.* at 1114.
130. *Id.* at 1077 (majority opinion).
131. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).
132. *Id.* at 729.
133. *Id.*
134. *Id.* at 733 n.21.

cursory weighing of the State Department's SOI clearly ran contrary to the deferential posture mandated by the Supreme Court. Thus, it seems likely that the Supreme Court will grant certiorari in order to clarify the issues that it failed to address in *Sosa*.

The Ninth Circuit's determination that exhaustion was improper under the ATCA marks a fundamental shift in jurisprudence. Previously, many courts had assumed that exhaustion was not required.[135] *Sarei* was the first time that a court undertook a detailed analysis of ATCA's purpose and history and determined that exhaustion is inappropriate. However, the majority's weighing of factors such as legislative intent, international norms, and prudential concerns were cursory and biased. For example, the court dismissed the broad-based international consensus as "patchwork,"[136] and reasoned that "the international law of exhaustion does not *compel* a U.S. court to apply it in an ATCA cause of action."[137] As further support for its position, the majority noted that it could not "conclude that legislative intent *supports* importing an exhaustion requirement into the ATCA."[138] Yet the Ninth Circuit's emphasis only highlights the weakness of its position; as the dissent correctly points out, "exhaustion of local remedies [has widespread acceptance] as a condition to bringing an international cause of action in a foreign tribunal."[139] This point was also acknowledged in *Sosa*, where the Supreme Court acknowledged that there was an argument "that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals."[140]

Despite the tenuousness of the Ninth Circuit's position, however, it is likely that its determination will have far-reaching consequences. It may be reasoned, for example, that by expressly rejecting the exhaustion requirement, the Ninth Circuit has taken the first step toward establishing the federal court system as a de facto international tribunal. Although this result would provide a short-term victory for human rights activists, the long-term negative implications of such a system would greatly outweigh its benefits. For example, a flood of ATCA suits by foreign

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135. *See, e.g.*, Jean v. Dorélien, 431 F.3d 776, 781 (11th Cir. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 343 (S.D.N.Y. 2003); Jama v. I.N.S., 22 F. Supp. 2d 353, 364 (D.N.J. 1998).

136. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1096 (9th Cir. 2006).

137. *Id.*

138. *Id.* at 1094.

139. *Id.* at 1101 (Bybee, J., dissenting).

140. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (citation omitted).

plaintiffs would place a tremendous burden on the already overcrowded federal courts. More importantly, allowing alien plaintiffs to bypass their own judicial systems denies foreign sovereigns the opportunity to resolve important disputes internally. As the dissent observed, "exhaustion of remedies gives other countries the opportunity to address their own conflicts and craft their own solutions."[141] The possibility of developing national remedies is especially important in the case of ATCA litigation, which frequently arises in instances where a government or former government has violated the human rights of its citizens. In *Sosa*, for example, the Supreme Court cited the South African government's fear that a failure to require exhaustion would "interfere with the policy embodied by its Truth and Reconciliation Commission, which . . . [chose an approach] based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill."[142] Furthermore, as the dissent in *Sarei* correctly observed, a sovereign's refusal to adjudicate a plaintiff's claim over the possible violation of a *jus cogens* norm would not in any way preclude a subsequent claim under the ATCA. Nations who have endured periods of civil war should be afforded the opportunity to address past crimes and craft remedies that will help them proceed forward. Thus, prudential interest weighs heavily in favor of exhaustion.

The Ninth Circuit's determination that UNCLOS violations were actionable under the ATCA was also surprising. As previously noted, the lower courts have refused to hear actions for environmental degradation under the ATCA. Some courts have reasoned that environmental violations are "too general"[143] to satisfy the strict *jus cogens* standard, while others have argued that environmental torts are simply "not part of international law."[144] In acknowledging a cause of action against Rio Tinto for UNCLOS violations, the majority opened the ATCA to a whole new class of plaintiff. Such a result ignores *Sosa*'s warning that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[145]

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141. *Sarei*, 456 F.3d at 1116 (Bybee, J., dissenting).

142. *Sosa*, 542 U.S. at 733 n.21 (internal quotations omitted).

143. John Knox, Case of the Month: Sarei v. Rio Tinto, http://www.opiniojuris.org/posts/1157061441.shtml (last visited Oct. 12, 2006).

144. *Id.*

145. *Sosa*, 542 U.S. at 727-28.

The reasoning behind the decision to dramatically expand the scope of the ATCA is unclear. The majority merely stated in passing that "[a]s for the UNCLOS claim, the treaty has been ratified by at least 149 nations, which is sufficient to codify customary international law that can provide the basis for an ATCA claim."[146] However, as Knox observed, "there is no rule whereby treaties are magically converted to customary international law upon reaching 149 parties."[147] Furthermore, in determining that UNCLOS reflected universally accepted principles, the Ninth Circuit failed to recognize that the United States has consistently refused to ratify the convention because of the "risk that the United States—and other parties to the treaty—may lose control of their environmental laws."[148] Thus, in extending the ATCA to UNCLOS violations, the Ninth Circuit violated the express will of the Legislative Branch in a matter of foreign policy, and exposed American interests to large-scale liability. This result is not in accord with the Supreme Court's decision in *Sosa*.

A final twist in *Sarei* was the Ninth Circuit's holding that the political question doctrine precluded consideration of the plaintiffs' claims. As previously discussed, the Judicial Branch generally defers to the pronouncements of the coordinate branches in matters of foreign policy. As the Supreme Court stated in *Sosa*, the "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[149] Yet, in determining that the State Department's SOI was insufficient to render the claims nonjusticiable, the court once again failed to provide any real justification for its holding. More significantly, the court adopted the reasoning of the Second circuit that "the resolution of claims brought under the ATCA has been constitutionally entrusted to the judiciary."[150] Such a cursory weighing of an executive pronouncement is against the Supreme Court's admonitions in *Sosa*. Thus, it appears that the Ninth Circuit's decision may have gone too far.

V. CONCLUSION

The Ninth Circuit's decision in *Sarei* has potentially serious domestic and foreign consequences. For example, by denying the necessity of exhaustion as a prerequisite to adjudicating ATCA claims, the court has usurped the power of weaker sovereigns to resolve internal

146. *Sarei*, 456 F.3d at 1078.
147. Knox, *supra* note 143.
148. Ridenour, *supra* note 5.
149. *Sosa*, 542 U.S. at 733 n.21.
150. *Sarei*, 456 F.3d at 1080.

conflicts and rebuild nations recovering from years of civil war. In addition, by finding that UNCLOS claims constitute universal norms, the court has opened the door to liability for American companies both at home and abroad. These factors, in addition to the majority's cursory treatment of the State Department's Statement of Interest, make it likely that *Sari* will invite a backlash that will undermine much of the progress that has been made in expanding the ability of U.S. courts to adjudicate *jus cogens* norms under the ATCA. In throwing open the door of the ATCA, the Ninth Circuit risks having it slammed shut.

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