

# *Sarei v. Rio Tinto* and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act

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## I. INTRODUCTION

¶1 Many Americans see their country as a beacon to the world, a country where the impoverished, oppressed or persecuted can come for a fresh start and a chance at self-improvement. A parallel to the migration of people from around the world to the United States is the migration of lawsuits regarding human rights violations from countries with inefficient, corrupt or nonexistent judicial systems to U.S. courts. Since 1980,<sup>1</sup> a number of foreign litigants with human rights claims have had success using the Alien Tort Claims Act (“ATCA”), a once-forgotten provision within the Judiciary Act of 1789 allowing foreign nationals to sue U.S. citizens or other foreign nationals for violations of the law of nations in U.S. courts.<sup>2</sup>

¶2 In 1991, Congress passed the Torture Victim Protection Act (“TVPA”) to codify a cause of action for a subset of ATCA claims.<sup>3</sup> Notably, while the rights of aliens to sue under ATCA are expressly constrained only by the provision that they allege a violation of the “law of nations,” plaintiffs pleading under TVPA (who can be either aliens or citizens) are required to exhaust all local remedies before bringing suit in U.S. courts.<sup>4</sup> The doctrine of exhaustion is widely recognized around the world and has been widely praised on the grounds that it supports efficiency, reduces costs to courts and litigants and strengthens state sovereignty while providing exceptions for futility, unreasonable delay or inadequate available local remedies.<sup>5</sup>

¶3 The recent Supreme Court decision in *Sosa v. Alvarez-Machain* has opened the door to expanding TVPA’s exhaustion requirement to all ATCA suits.<sup>6</sup> The Ninth

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<sup>1</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>2</sup> 28 U.S.C. § 1350 (2006).

<sup>3</sup> Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). Congress passed TVPA in response to the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *infra* note 88.

<sup>4</sup> *Id.*

<sup>5</sup> See generally Stephen W. Yale-Loehr, *The Exhaustion of Local Remedies Rule and Forum Non Conveniens in International Litigation in U.S. Courts*, 13 CORNELL INT’L L.J. 351, 358 (1980), Paula Rivka Schocket, *A New Role for an Old Rule: Local Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RIGHTS L. REV. 223, 228 (1987) and CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 71-83 (2d ed. 2004).

<sup>6</sup> See 542 U.S. 692, 733 n.21 (2004) (“[T]he European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals ... We would certainly consider this requirement in an appropriate case.”).

Circuit Court of Appeals recently provided the first major judicial exegesis of the arguments on both sides of the exhaustion debate in *Sarei v. Rio Tinto PLC*. The Ninth Circuit held that exhaustion of local remedies is not required under ATCA, in part because the exercise of judicial discretion in the field of international venue choice would overstep judicial authority since Congress had not spoken on the issue.<sup>7</sup> That decision was recently re-heard *en banc* by the Ninth Circuit.<sup>8</sup>

¶4 I argue in this casenote that the Ninth Circuit was correct in finding that no independent exhaustion requirement exists as a requirement for ATCA under the statute's "law of nations" language, but that the doctrine of *forum non conveniens* ("FNC") serves all of the purposes and includes all of the elements of exhaustion. When the Ninth Circuit considers *Sarei* en banc, it should recognize that the common law tests for FNC dismissals contains an exhaustion requirement similar to the requirement codified in TVPA and that FNC analyses of ATCA claims should be informed by the precedent of TVPA exhaustion claims, since the underlying cause of action and the elements of the discretionary analysis are so similar. In deciding against recognizing exhaustion as part of an existing prudential doctrine, the court has split exhaustion from its proper place within FNC. This could either cause future courts to ignore TVPA's exhaustion precedent or invite the imposition of a separate exhaustion requirement parallel to FNC, creating the unduly onerous requirement for plaintiffs to respond to two affirmative defenses.

¶5 Part II of this case note discusses the Alien Tort Claims Act from its inception as part of the Judiciary Act of 1789, through the emergence of its modern form to the questions raised by *Sarei v. Rio Tinto PLC*. Part III discusses the Torture Victim Protection Act as an instructive example of how an exhaustion requirement works in an international context. Part IV analyzes the nature of exhaustion in international law, the question of whether exhaustion should be read into ATCA, and how the possible methods of doing so would impact litigants.

## II. THE ALIEN TORT CLAIMS ACT

### A. ATCA from 1798 to 2003

¶6 In §9 of the Judiciary Act of 1789, the first Congress gave the federal courts "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."<sup>9</sup> Although little legislative history exists on this portion of the Judiciary Act, ATCA had its philosophical roots in Alexander Hamilton's Federalist 80, where he wrote, "as the denial or perversion of justice by the sentences of the courts, as well as in any other manner, it is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."<sup>10</sup> The Supreme Court has determined that at its inception, the statute contained a jurisdictional grant over treaty

<sup>7</sup> 456 F.3d 1069, 1099 (9th Cir. 2006) *withdrawn and superseded by Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007). All references *infra* are to the 2007 opinion.

<sup>8</sup> See *Sarei v. Rio Tinto PLC* (9th Cir. Aug 20, 2007) (NO. 02-56256, 02-56390).

<sup>9</sup> *Supra* note 2.

<sup>10</sup> THE FEDERALIST 80 (Alexander Hamilton).

violations and three broad common law causes of action: piracy, violations against ambassadors and violation of safe conduct.<sup>11</sup>

¶7 In its early history, the ATCA was used sparingly. Before 1980 only two successful cases were brought under the statute. In *Bolchos v. Darrel*, the District Court of South Carolina granted restitution for three slaves seized from a Spanish ship as a prize of war.<sup>12</sup> In *Adra v. Clift*, the District Court of Maryland adjudicated the wrongful withholding of custody of a child between two aliens as a violation of the law of nations.<sup>13</sup>

¶8 The number of cases citing ATCA as a basis of jurisdiction remained extremely sparse until *Filartiga v. Pena-Irala*.<sup>14</sup> In *Filartiga*, a Paraguayan doctor living in New York sued Americo Pena-Irala, the Inspector General of Police in Asuncion, Paraguay, for the torture and death of his daughter, Joelito, in 1976, claiming the killing came as a response to Filartiga's opposition to the regime of President Alfredo Stroessner.<sup>15</sup> At the commencement of the suit, Pena-Irala was detained in New York for immigration violations; the U.S. government deported him while the lawsuit was pending.<sup>16</sup> Pena-Irala's Paraguayan counsel filed an affidavit stating that Paraguayan courts provided an adequate remedy, but Filartiga claimed that such a suit would be futile.<sup>17</sup>

¶9 In holding that torture was a violation of the law of nations, the court expanded jurisdiction under ATCA to some violations of international law beyond those envisioned in the 1789 Judiciary Act. In determining the new limits of the statute, the court looked to sources of international law. The *Filartiga* decision quoted the statement from *The Paquete Habana*:

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>18</sup>

¶10 For additional support of a growing international common law, the court cited The Statute of The International Court of Justice, which listed international conventions, custom and judicial decisions of foreign nations as sources for international law, all allowing torture prosecution.<sup>19</sup> Perhaps recognizing the import of its decision, the court commented: "While the ultimate scope of those rights [to sue in U.S. courts for offenses committed elsewhere] will be a subject for continuing refinement and elaboration, we

<sup>11</sup> See generally *Sosa v. Alvarez-Machain* 542 U.S. 692 (2003).

<sup>12</sup> 3 F.Cas. 810 (D.S.C. 1795).

<sup>13</sup> 195 F. Supp. 857 (D. Md. 1961).

<sup>14</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>15</sup> *Id.* at 878.

<sup>16</sup> *Id.* at 879.

<sup>17</sup> *Id.* at 879-80.

<sup>18</sup> 175 U.S. 677 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

<sup>19</sup> *Filartiga*, 630 F.2d at 881, n.8.

hold that the right to be free from torture is now among them.”<sup>20</sup> As a result of *Filartiga*, litigants began to invoke ATCA as an all-purpose cause of action statute for an open-ended list of international law violations, both commercial and human rights-related, testing the limits with varying success.<sup>21</sup>

¶11 Although *Filartiga* remained the main standard in ATCA jurisprudence until *Sosa v. Alvarez-Machain* more than two decades later, the decision was not without controversy and challenge. The most widely-recognized challenge to *Filartiga* came in Judge Bork’s concurring opinion in *Tel-Oren v. Libyan Arab Republic*.<sup>22</sup> In dismissing claims against the Libyan government, the Palestine Liberation Organization and other groups for injuries arising from a PLO attack on several civilian buses and private cars in Israel, Bork held that ATCA is purely jurisdictional in nature and that the statute does not create a cause of action for individual plaintiffs.<sup>23</sup> The scope of possible claims under ATCA also ran afoul of the separation of powers, Bork reasoned, because litigants would test the limits of international law norms, requiring courts to make decisions on issues still controversial enough to be left to the political branches.<sup>24</sup> Practical concerns also weighed against a private right of action, since a conflict of any size in which one or more belligerents engaged in international law violations would result in an unwieldy number of cases.<sup>25</sup> Although frequently cited, Bork’s analysis has not been widely accepted.<sup>26</sup>

#### B. Refining ATCA’s Jurisdiction: *Sosa v. Alvarez-Machain*

¶12 *Filartiga* opened the door to new claims under ATCA, but subsequent cases have limited the list of possible claims available to individual litigants.<sup>27</sup> In 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*, in which a Mexican national sued American officials for illegal abduction and detention as part of a cross-border drug investigation.<sup>28</sup> The court held that a single illegal detention of less than one day did not violate a *jus cogens* international norm required for ATCA jurisdiction.<sup>29</sup>

¶13 The court found that the statute created no new causes of action other than the three that were widely recognized in 1789 (piracy, crimes against diplomats and violations of safe conduct) and violations of widely accepted international law “rest[ing] on a norm of international character accepted by the civilized world and defined with a specificity

<sup>20</sup> *Id.* at 885.

<sup>21</sup> See generally *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1004 (1996) (holding genocide, war crimes, summary execution and torture are actionable); *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (holding war crimes are actionable); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D.Cal. 1988) (holding that causing disappearances are actionable); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5<sup>th</sup> Cir. 1999) (holding environmental degradation and cultural genocide are not actionable); and *Amlon Metals, Ind. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (holding environmental torts are not actionable).

<sup>22</sup> 726 F.2d 774, 798 (D.C. Cir. 1982).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 799.

<sup>25</sup> *Id.* at 810.

<sup>26</sup> See e.g. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D.Cal. 1987) (refusing to adopt Judge Bork’s reasoning).

<sup>27</sup> Aside from the more general restrictions of *Sosa*, see generally *supra* note 21.

<sup>28</sup> 542 U.S. 692, 694 (2004).

<sup>29</sup> *Id.* at 700.

comparable to the features of the 18<sup>th</sup>-century paradigms” in place when the law was passed.<sup>30</sup> Since *Sosa*’s brief illegal detention lacked the “definite content and acceptance” of either the three Judiciary Act-era causes of action or the other causes of action recognized in *Filartiga* and its progeny, the court said it fell outside the outer bounds of possible suits under ATCA.<sup>31</sup>

¶14 The defendants in *Sosa* did not claim non-exhaustion of local remedies or argue that exhaustion should be a requirement of ATCA pleadings, but the court said in a footnote that “we would certainly consider this requirement in an appropriate case.”<sup>32</sup>

¶15 Though Justice Souter’s majority opinion in *Sosa* contained only a footnote on the exhaustion issue, the question of local remedies in *Sosa*’s case, in relation to ATCA claims in general, was discussed thoroughly by the parties and in the numerous *amicus* briefs filed prior to the case. The European Commission (“EC”) filed a brief on behalf of neither party in which it claimed the exhaustion provision in the TVPA (discussed at length *infra*) “endorsed the prevailing interpretation of [ATCA] as a protection against other human rights abuses”<sup>33</sup> in line with a rule of general international law developed to give states the opportunity to remedy violations of international law before losing jurisdiction to other states.<sup>34</sup> The EC urged the court to allow universal civil jurisdiction of the type enabled by ATCA “only when the claimant would otherwise be subject to a denial of justice.”<sup>35</sup> In other words, jurisdiction should exist when local remedies are non-existent or have been exhausted.

¶16 In a brief on behalf of international human rights and religious organizations in support of *Sosa*’s claim, the University of Virginia International Human Rights Law Clinic argued that U.S. courts use other doctrines to weed out cases that belong elsewhere. For example, the *forum non conveniens* doctrine “requires dismissal of a lawsuit if an adequate, alternative forum provides a more efficient venue – a standard that inevitably leads to dismissal of claims that do not exhaust available domestic remedies.”<sup>36</sup>

### C. *Post-Sosa Discussion of Exhaustion in ATCA: Sarei v. Rio Tinto*

¶17 The first extended discussion of the ramifications of the footnote in *Sosa* suggesting that an exhaustion requirement may be implicit in ATCA came in *Sarei v. Rio Tinto PLC*, a suit against a British mining company for human rights violations allegedly committed by the government of Papua New Guinea (“PNG”) following an uprising at Rio Tinto’s Bougainville gold and copper mines.<sup>37</sup> The plaintiffs, PNG citizens, filed an ATCA suit against Rio Tinto for its vicarious liability in atrocities allegedly committed by the PNG military and government at the company’s behest, including racial

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<sup>30</sup> *Id.* at 725.

<sup>31</sup> *Id.* at 738.

<sup>32</sup> *Id.* at 733, n.21.

<sup>33</sup> Brief for the European Commission in Support as Amicus Curiae of Neither Party at 23, *Sosa v. Alvarez-Machain*, 542 U.S. 692, (2004) (No. 03-339).

<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.* at 26.

<sup>36</sup> Brief of International Human Rights Organizations and Religious Organizations as Amici Curiae Supporting Respondents, *Sosa v. Alvarez-Machain*, 542 U.S. 692, (2004) (No. 03-339) 2004 WL 419422.

<sup>37</sup> *See Sarei*, 487 F.3d at 1198.

discrimination, environmental devastation, war crimes and violations of the United Nations Convention of the Law of the Sea, among other charges.<sup>38</sup>

¶18 The trial court granted Rio Tinto's 12(b)(6) motion to dismiss the suit for failure to state a claim on justiciability grounds.<sup>39</sup> In doing so, the trial court did not accept the defense's argument that exhaustion was a requirement under ATCA, calling the statute "a creature of domestic law" and stating that a plain reading of the statute contained no reference to or inference of an exhaustion requirement.<sup>40</sup>

¶19 The defendants also argued in the alternative that the case should be removed from U.S. courts on *forum non conveniens* grounds, claiming PNG, Australia or Britain would be adequate alternative forums.<sup>41</sup> The court denied the defense request to dismiss the suit in favor of a PNG forum, citing the common law balancing of public and private factors discussed *infra*. The private interest factors considered included the likely inability of the plaintiffs to obtain a lawyer in PNG, the undue financial hardship associated with hiring counsel and difficulties with the discovery process.<sup>42</sup> In considering the public interest factors, the district court held that the defendants failed to show that PNG courts were any less congested than U.S. courts and that requiring U.S. courts to interpret PNG law would be more problematic than in other ATCA cases.<sup>43</sup> The court noted that denying dismissal on FNC grounds was "particularly appropriate given that the case is brought under the ATCA and alleges violations of international law."<sup>44</sup> The court also denied dismissal in favor of a suit in Australia, since the plaintiffs' claims were not cognizable under Australian law.<sup>45</sup> The district court decision does not discuss the possibility of dismissing the case in favor of a British forum.

¶20 The plaintiffs appealed to the Ninth Circuit Court of Appeals. Between the trial court's ruling and the circuit court's review of the case, the Supreme Court published *Sosa*, forcing a re-evaluation of the possibility that non-exhaustion is a valid affirmative defense.<sup>46</sup>

¶21 The Ninth Circuit looked to ATCA's legislative history to determine whether the drafters of the Judiciary Act assumed an exhaustion requirement. Majority opinion author Judge Fisher cited the Jay Treaty with Great Britain, noting that it was passed shortly after the Judiciary Act and contained an exhaustion requirement, the implication being that had ATCA assumed exhaustion, including a similar requirement in the Jay Treaty would be redundant.<sup>47</sup> Fisher then discussed the differences between ATCA and TVPA, passed as an amendment to the statute containing ATCA. The TVPA contained an exhaustion requirement that applied only to claims of torture and extrajudicial killing, not to any other provisions of the statute.<sup>48</sup> When Congress amended ATCA to add TVPA, it did not add an exhaustion requirement to ATCA lawsuits that were beyond the

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<sup>38</sup> *Id.* at 1197.

<sup>39</sup> *See Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

<sup>40</sup> *Id.* at 1139.

<sup>41</sup> *Id.* at 1164.

<sup>42</sup> *Id.* at 1174.

<sup>43</sup> *Id.* at 1175.

<sup>44</sup> *Id.* at 1175.

<sup>45</sup> *Id.* at 1177-1178.

<sup>46</sup> *See Sosa*, 542 U.S. 692, 733 n.21 (2004).

<sup>47</sup> *Sarei*, 487 F.3d at 1215.

<sup>48</sup> *Id.* at 1215-1216.

new statute.<sup>49</sup> As to whether exhaustion should be a matter of judicial discretion, the court said that courts lacked the discretion to add an exhaustion requirement because to recognize any judicial discretion for ATCA claims in manners related to jurisdiction would overrule Congress' inaction on the issue by the issuance of a judicial fiat.<sup>50</sup>

¶22 On the issue of whether exhaustion is an element of widely recognized international law, the court's majority opinion differentiates the ubiquity of exhaustion requirements in international treaties and court opinions from ATCA's grounding in international law by noting that the issues of sovereignty at stake when an international body adjudicates a dispute between two signatory nations are not implicated by ATCA litigation brought by a foreign national against another in a U.S. court.<sup>51</sup>

¶23 The court also reasoned that exhaustion rules, as they exist in international tribunals, are strictly procedural. The majority opinion in *Sarei* rejects the notion of denial of justice as a necessary part of an international claim as advanced in *Interhandel*,<sup>52</sup> citing the International Court of Justice case *Phosphates in Morocco*, which held that the responsibility for a substantive harm arose when the harm took place, not when local remedies were exhausted.<sup>53</sup> The dissent essentially passes on the issue, citing international law and secondary sources that fall on both sides of the issue of whether exhaustion is substantive or procedural,<sup>54</sup> but concluding that "*Sosa's* rule would incorporate even procedural exhaustion, because the international community does not recognize virtually any 'violation of the law of nations' without it."<sup>55</sup> Essentially, the dissent concludes that it does not matter whether the doctrine is substantive or procedural because, even if it could be deemed "procedural," it falls into a newly-invented category of "super-procedural" doctrine that requires it to be considered a widely accepted norm of international law as per *Sosa*.

¶24 Issues of international law aside, the majority and dissenting opinions in *Sarei* also differed on whether exhaustion could be used by judges as a prudential doctrine. In his dissent in *Sarei*, Judge Bybee wrote that exhaustion of local and administrative remedies has long been a part of American jurisprudence, but has served as "one among related doctrines - including abstention, finality, and ripeness - that govern the timing of federal court decisionmaking."<sup>56</sup> Just as the international law doctrine of exhaustion exists partly to respect the sovereignty of independent states, domestic exhaustion considerations often arise out of a deference to the separation of powers and a concern that adjudicating a

<sup>49</sup> *Id.* at 1222. For additional discussion on the differences between ATCA and TVPA, *see generally infra* notes 84-88.

<sup>50</sup> *Id.* at 1223.

<sup>51</sup> *Id.* at 1220 ("[T]he exhaustion limitation imposed on and accepted by *international* tribunals as a requirement of international law is not dispositive as to a United States court's discretion to impose exhaustion as part of the ATCA.").

<sup>52</sup> *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d at 1164.

<sup>53</sup> *Sarei*, 487 F.3d at 1221, *citing* *Phosphates in Morocco (Italy v. Fr.)* 1938 P.C.I.J. (ser.A/B) No. 74, at 28 (June 14). The court also cites AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW at 416 ("Judges or states may have made statements supporting the view that the [exhaustion] rule is substantive, but the *practice* of [international] judicial bodies relating to the rule leads overwhelmingly to the conclusion that the rule has not been treated as substantive or as both substantive or procedural, but as solely procedural in character.").

<sup>54</sup> *See generally Sarei*, 487 F.3d at 1234-1235.

<sup>55</sup> *Id.* at 1236, note 11.

<sup>56</sup> *Id.* at 1225, (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), superseded on other grounds by statute as recognized in *Booth v. Churner*, 532 U.S. 731 (2001)).

matter that has not been fully exhausted in other appropriate channels usurps discretion and power from its rightful holders.<sup>57</sup> The majority opinion in *Sarei* dismissed the comparisons between domestic and international exhaustion, stating, “We should not be lulled into a false sense of familiarity with the term ‘exhaustion’ just because it is the same term that we use to describe an analogous doctrine in our domestic law.”<sup>58</sup>

¶25 The ruling in *Sarei* is an important milestone in ATCA jurisprudence since it addresses the post-*Sosa* exhaustion question on three grounds: exhaustion as widely accepted international law, exhaustion as a substantive or procedural rule and exhaustion as a matter of judicial discretion. When the Ninth Circuit reconsiders *Sarei* en banc, it will reconsider a decision that discusses these major elements in detail. But, as discussed below, the court’s exhaustion analysis misses one important factor: whether exhaustion requirement is already incorporated into an analysis of an existing rule, namely *forum non conveniens*.

#### D. *Forum Non Conveniens* in ATCA Cases

¶26 Pleadings under ATCA are similar to pleadings under most other statutes with regards to venue choice, including the requirement that the court establish personal jurisdiction and the doctrine of *forum non conveniens* (FNC).<sup>59</sup>

¶27 FNC is a doctrine that states that a court can “decline to exercise its jurisdiction, even though the court has venue, where it appears that for the convenience of the parties and the court, and in the interests of justice, the action should be tried in another forum.”<sup>60</sup> The common law doctrine of FNC is similar to exhaustion as envisioned in the TVPA and under international treaties because, like exhaustion, it allows the defense to request a case to be dismissed from one court because it belongs in another.<sup>61</sup> The power to dismiss under FNC “finds its roots in the inherent power of the courts ‘to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”<sup>62</sup>

¶28 The defendant in *Filartiga* argued for FNC, arguing that Filartiga’s claim should have been brought in a Paraguayan court, to which the plaintiff claimed futility.<sup>63</sup> The district court did not address the issue because it dismissed Filartiga’s claims on other grounds and as a result, the Second Circuit did not address the issue.<sup>64</sup> If it had, it would have likely come to the same conclusion as it did without the decision: that Filartiga could pursue his claims in U.S. federal court. This is because FNC is so similar to exhaustion in form and function.

<sup>57</sup> *Id.* at 1226, (citing *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1984)) (“Parties are generally required to exhaust their administrative remedies, in part because of concerns for separation of powers.”).

<sup>58</sup> *Id.* at 1220, n.31.

<sup>59</sup> *See In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992).

<sup>60</sup> *Ford v. Brown*, 319 F.3d 1302, 1306-7 (11th Cir. 2003) (quoting *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985)).

<sup>61</sup> *Sarei*, 487 F.3d at 1237, n.12, (citing *Menendez Rodriguez v. Pan American Life Insurance Co.*, 311 F.2d 429, 433 (5th Cir. 1962) (finding Cuban courts are a more suitable forum for a claim brought by political refugees)), *vacated on other grounds*, 376 U.S. 779, 84 S. Ct. 1130, 12 L. Ed. 2d 82 (1964).

<sup>62</sup> *Monegasque de Reassurances S.A.M. v. NAK Naftgaz of Ukraine*, 311 F.3d 488, 497 (2d Cir. 2002) quoting *Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991).

<sup>63</sup> Brief for Plaintiffs-Appellants at 23, *Filartiga v. Pena-Irala*, 19 I.L.M 585, *reprinted in* 12 HASTINGS INT’L & COMP. L. REV 34 (1988) (E.D.N.Y. 1979).

<sup>64</sup> *Filartiga v. Pena-Irala*, 630 F.2d at 879.

¶29 Adjudicating FNC motions is a two-part test in which the defendant has the burden of proving that the factors weigh in their favor.<sup>65</sup> The first part of the test is to determine whether there is an “alternative forum” available to the parties. FNC “presupposes at least two forums in which the defendant is amenable to process,”<sup>66</sup> so a court that dismisses a lawsuit on FNC grounds must first ascertain that an alternative forum exists.<sup>67</sup> Even if such a forum exists, it will be considered inadequate “where the plaintiff demonstrates that he would encounter exceptional legal, political or practical barriers in litigating in the other forum, such as the prospect of execution or a justice system closed to him as a member of an outcast class.”<sup>68</sup> An inadequate forum is “characterized by a complete absence of due process or an inability of the forum to provide substantial justice to the parties.”<sup>69</sup> This language is extremely similar to language used by courts evaluating whether suits brought pursuant to the TVPA should be dismissed for failure to exhaust local remedies.<sup>70</sup>

¶30 The second part of the test involves a weighing of public and private interest factors. As listed in *Gulf Oil Co. v. Gilbert*, relevant “private interests” include: (1) the private interest of the litigant; (2) the relative ease of access to sources of proof; (3) the cost and availability of compulsory process for attendance of unwilling witnesses; (4) the possibility of view of premises where the actions in question took place; (6) “all other practical problems that make trial of a case easy, expeditious and inexpensive;” and (7) the enforceability of a judgment. Public interest factors include the congestion of courts and the difficulty of a court interpreting the law of another jurisdiction.<sup>71</sup> Later cases have also included within the scope of FNC inquiry which venue “will serve the ends of justice” and whether “litigation may be conducted elsewhere against all defendants” in the proposed alternate venue.<sup>72</sup> These factors are almost identical to those that inform the doctrine of exhaustion.<sup>73</sup> In the realm of human rights cases pursued under the TVPA discussed *infra*, exhaustion defenses have not to date hinged on unsatisfactory results in a foreign court, but the inability of a plaintiff to sue in a foreign court due to intimidation, excessive delay, statutory immunity or lack of due process.

<sup>65</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000).

<sup>66</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-7, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), *superseded by statute on other grounds as recognized in* *Hartford Fire Ins. Co. v. Westinghouse Elec. Corp.*, 725 F. Supp. 317 (S.D.Miss. 1989).

<sup>67</sup> *Murray v. BBC*, 81 F.3d 287, 292 (2d Cir. 1996).

<sup>68</sup> *Turedi v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y.) (citing *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), *aff'd* 767 F.2d 908 (2d Cir. 1985)).

<sup>69</sup> *Monegasque*, 3111 F.3d at 499. *See also* *Mujica v. Occidental Petroleum Corp*, 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) (finding “[a]n alternative forum is inadequate if the claimants cannot pursue their case without fearing retaliation”) *citing* *Aldana v. Fresh Del Monte Produce, et al.* No. 01-3399, slip op. at 4 (S.D. Fla. Jun. 5, 2003) (finding that a “credible threat of retaliatory violence against Plaintiffs” renders the alternative forum in Guatemala insufficient) *and* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 336 (S.D.N.Y. 2003) (finding the alternative forum of Sudan inadequate partly because the plaintiffs “would be endangered by merely returning”).

<sup>70</sup> Pub.L. No. 102-256, 106 Stat. 73 (1992).

<sup>71</sup> *Gulf Oil*, 330 U.S. at 508. For purposes of ATCA, the choice of law factors are irrelevant under the *Sosa* construction of ATCA, since the law being applied is international law, recognized by all civilized nations.

<sup>72</sup> *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998).

<sup>73</sup> *See e.g. Schocket A New Role for an Old Rule: Local Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RIGHTS. L. REV. at 227 (1987) (“[exhaustion] assumes local adjudication is speedier, less expensive, and more effective.”).

¶31 The seven “private interests” *Gilbert* factors tend to argue in favor of pushing ATCA cases out of American courts and into the judicial systems of countries where the actions on which ATCA claims are based took place. However, courts are amenable to hearing human rights cases under ATCA despite the presence of another forum because the *Gilbert* “public interest” factors should also include a consideration of policy interest in providing a forum for such cases. In *Wiwa v. Royal Dutch Petroleum Co.*, the Second Circuit Court of Appeals overturned a district court dismissal on FNC grounds partially because Congressional action in passing the TVPA shows a policy preference for hearing claims of violations of international law in the United States.<sup>74</sup>

¶32 As is the case with other causes of action, FNC is an obstacle to ATCA plaintiffs. An illustrative example is *Abdullahi v. Pfizer*, in which a group of Nigerian citizens received an experimental antibiotic without their knowledge during an epidemic.<sup>75</sup> The district court dismissed on FNC grounds since the plaintiffs were pursuing a parallel suit in Nigerian courts, which provided a more appropriate forum. The defendant, Pfizer, Inc., claimed that Nigeria’s Kano Federal High Court was a more appropriate forum. The plaintiffs responded that the Nigerian court lacked a “modicum of independence and impartiality necessary to ensure that the remedy available in the alternative forum [is not] so inadequate to amount to no recovery at all.”<sup>76</sup>

¶33 Citing *Piper Aircraft v. Reyno*,<sup>77</sup> the court said the traditional preference for a forum closer to where the acts in question allegedly took place could be defeated under “rare circumstances” when “the remedy offered is clearly unsatisfactory,” and “if the plaintiff shows that conditions in the foreign forum plainly demonstrate that ‘plaintiffs are highly unlikely to obtain basic justice therein.’”<sup>78</sup> The district court found the Nigerian court the preferable venue.<sup>79</sup> In doing so, the court found that the plaintiffs’ conclusory statements about the independence of the Nigerian judiciary were insufficient to defeat the defendant’s FNC motion.<sup>80</sup>

¶34 However, plaintiffs have successfully used arguments such as those made by the plaintiffs in *Abdullahi* to defeat FNC motions. In *Mujica v. Occidental Petroleum Corp.*, plaintiffs defeated an FNC motion by citing documents including a State Department Human Rights Report for Colombia, the proposed alternate venue, that listed intimidation of judges, prosecutors and witnesses as a major problem for that country’s judicial system.<sup>81</sup> The defense argued that the documents were inadmissible under the Federal Rules of Evidence, but the court held that it had the discretion to review the documents in considering a motion to dismiss for FNC.<sup>82</sup> Similar tactics have been used to defeat exhaustion claims under TVPA.<sup>83</sup>

<sup>74</sup> 226 F.3d 88, 108. It should be noted that the plaintiff in this case alleged torture, which would have been actionable under TVPA had the defendant been an individual, but since the defendants are corporations, ATCA provided the cause of action.

<sup>75</sup> 2002 WL 31082956 (S.D.N.Y. 2002), *upheld in part, vacated in part*, 77 Fed.Appx. 48 (2d Cir. 2003).

<sup>76</sup> *Id.* at \*6 (citing Plaintiff’s Mem. in Opp. at 29.).

<sup>77</sup> 454 U.S. 235, 241 (1981).

<sup>78</sup> *Abdullahi*, 2002 WL31082956 at \*8.

<sup>79</sup> *Id.* at \*10.

<sup>80</sup> *Id.* at \*9.

<sup>81</sup> *Mujica*, 381 F. Supp. 2d at 1144.

<sup>82</sup> *Id.* at n.4.

<sup>83</sup> *See infra* note 91.

### III. THE TORTURE VICTIM PROTECTION ACT OF 1991

#### A. TVPA Generally

¶35 In 1991, Congress passed the TVPA, which created a specific cause of action for victims of torture or extrajudicial killing in foreign countries and for the first time gave U.S. citizens a cause of action for international law violations outside the country.<sup>84</sup> In doing so, it carved out a piece of ATCA's jurisdictional and cause of action grants and subjected plaintiffs pleading under the act to an exhaustion requirement that is not clearly under ATCA. The exhaustion provision states, "[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."<sup>85</sup>

¶36 The Senate report accompanying TVPA acknowledges that torture and extrajudicial killing violate the law of nations and are actionable under ATCA, citing *Filartiga*.<sup>86</sup> In noting that the statute gives jurisdiction and a cause of action to federal courts for a class of actions over which they already have both, the report claims a statute providing a specific grant is needed (1) because Judge Bork's concurrence in *Tel-Oren* threatened the private right of action under ATCA; and (2) to be in clear compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention).<sup>87</sup>

¶37 Under TVPA, filing a claim in a U.S. court is "virtually prima facie" evidence of exhaustion of local remedies, but non-exhaustion can be used as an affirmative defense. If non-exhaustion is claimed, the burden is shifted to the plaintiff to show that remedies were "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."<sup>88</sup> The Senate report said the provision "can be expected to encourage the development of meaningful remedies in other countries."<sup>89</sup>

¶38 The TVPA did not repeal ATCA, but courts have interpreted it to supersede ACTA in cases of torture or extrajudicial killing involving both citizen and alien plaintiffs. In *Enaharo v. Abubakar*, the Seventh Circuit Court of Appeals held that TVPA "hold[s] the field" due to the presence of an additional requirement for the cause of action, namely exhaustion.<sup>90</sup> If plaintiffs could choose whether to file a claim under TVPA or ATCA, the court reasoned, the lower requirements of ATCA would make TVPA redundant. However, the court left the door open for TVPA's redundancy (and for the inclusion of an exhaustion requirement in ATCA) by noting "it may be that a requirement for exhaustion is itself a basic principle of international law."<sup>91</sup>

¶39 Judge Cudahy's dissent in *Enaharo* provides an alternate view of the TVPA's relationship to ATCA. Citing the canon of construction positing that repeals by

<sup>84</sup> See Pub.L. No. 102-256, 106 Stat. 73 (1992).

<sup>85</sup> *Id.* at note 2a.

<sup>86</sup> S.Rep. 102-249 at 2 (1991).

<sup>87</sup> *Id.* at 5; see also Torture Convention, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 5.

<sup>90</sup> 408 F.3d 877, 884 (7th Cir. 2005), cert denied 546 U.S. 1175 (Feb 21, 2006) (NO. 05-788).

<sup>91</sup> *Id.* at 886. This raises the question of whether the discovery of an exhaustion requirement in ATCA, through international law or FNC, would render TVPA redundant in form and function for all cases not involving American citizens.

implication are disfavored, Judge Cudahy interpreted the TVPA as creating a new cause of action for litigants who have been torture victims in other countries.<sup>92</sup>

### B. Exhaustion under TVPA

¶40 The operation of the TVPA's exhaustion requirement may be a good indicator of how exhaustion would operate under ATCA should such a requirement be read into the statute. TVPA case law shows the difficulties of requiring U.S. courts to sit in judgment of foreign legal systems and the relative ease with which most plaintiffs can defeat the non-exhaustion defense. Compared with the difficulty many plaintiffs face defeating FNC motions, the exhaustion defense, as it operates under TVPA, is often a mere formality. This leads to the conclusion that if the factors considered in an exhaustion analysis were added to the balancing of factors implicit in the FNC test, a greater number of ATCA plaintiffs would survive FNC motions.

¶41 In *Abiola v. Abubakar*, the difficulties inherent in evaluating a foreign judicial system were mitigated by the fact that the alternate forum in question, Nigeria, publishes laws in English and has a familiar common law system.<sup>93</sup> Despite these advantages, the court's determination that the plaintiffs were excused from exhausting local remedies exposes some common issues encountered in the process of adjudicating an exhaustion defense.

¶42 The plaintiffs in *Abiola* were all Nigerian citizens who claimed that either they or their parents were tortured by the military junta that ruled their country between 1993 and 1999 for their pro-democracy views or activism.<sup>94</sup> The defendant, General Abdulsalami Abubakar, was a member of the regime and its leader for the last year of its reign before the restoration of civilian authority and stood accused of ordering their torture. Among other defenses brought by Abubakar, he claimed that local remedies available in Nigeria had not been exhausted by the plaintiffs. To adjudicate these claims, the court held an evidentiary hearing at which both sides called witnesses who professed expertise with Nigerian law to help the court decide on Abubakar's exhaustion defense.<sup>95</sup>

¶43 Abubakar called Nigerian commercial lawyer Adebayo Adaralegbe, who testified that Nigeria's 1999 constitution is retroactively effective and allows plaintiffs to sue under its human rights provisions for violations that occurred during the military junta's reign.<sup>96</sup> Specifically, the constitution states that "any person who alleges that any of the provisions of [the chapter of the constitution dealing with fundamental rights] has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that state for redress."<sup>97</sup> Adaralegbe also testified that while the military junta abrogated provisions of a previous constitution protecting fundamental human rights, the regime's assent to the African Charter created an avenue for suit, as does the Nigerian common law of torts, which has a six-year statute of limitations in Lagos state.<sup>98</sup>

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<sup>92</sup> *Id.* at 887.

<sup>93</sup> 435 F. Supp. 2d 830 (N.D. Ill 2006) (*Abiola II*), cert. denied 546 U.S. 1175 (2006).

<sup>94</sup> *Id.* at 832.

<sup>95</sup> *Id.* at 833.

<sup>96</sup> *Id.*

<sup>97</sup> Const. of Nigeria, §46, Ch. IV (1999).

<sup>98</sup> *Abiola*, 435 F. Supp. 2d at 833.

¶44 The plaintiffs called Nigerian human rights lawyer Femi Lalana, who agreed with Adaralegbe about his interpretation of the African Charter and the common law, but claimed that another Nigerian statute, the Public Officers Protection Act (POPA), imposed a statute of limitations of three months and that the 1999 constitution is not retroactive for human rights violations committed by the military junta.<sup>99</sup>

¶45 In finding that local remedies in Nigeria were futile, the court agreed that the POPA's short statute of limitations applied to the plaintiff's case and that Nigeria's common law of torts was a futile avenue for relief because the country's judicial system was largely corrupt, intimidated and ignored, even after the transition to democracy. Citing the U.S. Department of State country reports for Nigeria between 2000 and 2005, the court said, "during the time of the regime, military decrees barred Nigerian courts from calling into question the regime's actions, and that 'even if a courageous judge might have proceeded despite the military decrees ... the military routinely ignored any occasional judgments that may have been issued against the government.'"<sup>100</sup>

¶46 Abiola objected to the over-reliance on the State Department's country reports, noting that the reports' language changed little from year to year and were subject to political judgment. The Seventh Circuit expressed similar concern on over-reliance on country reports in several cases.<sup>101</sup> Despite the objection, the court held that the plaintiffs had met their burden in responding to the defendant's affirmative defense of non-exhaustion.<sup>102</sup>

¶47 The use of evidentiary hearings to evaluate foreign judicial systems as seen in *Abiola* is not standard practice in TVPA cases. In *Xuncax v. Gramajo*, seven Guatemalan expatriates and one U.S. citizen sued Guatemala's former Minister of Defense for atrocities committed under his watch against that country's Kanjobal Indians.<sup>103</sup> The Guatemalans sued under ATCA and did not plead exhaustion. The U.S. citizen, Dianna Ortiz, sued under TVPA since ATCA does not provide a cause of action for U.S. citizens.

¶48 In finding Gramajo liable and awarding \$3 million in compensatory damages, the court addressed the issue of exhaustion, finding that Ortiz lacked sufficient remedies in Guatemalan courts. However, unlike *Enaharo* and *Abiola*, the court did not cite any Guatemalan statute or constitutional provision blocking a cause of action. To the contrary, Ortiz traveled to Guatemala in 1992 to testify in a criminal case against Gramajo that had languished without progress for several years. Since Guatemalan courts do not allow civil actions until final judgment in the criminal action has been reached, the court found that delays in the criminal case were sufficient to prove exhaustion of local remedies.<sup>104</sup>

¶49 Even the existence of a judgment against a TVPA defendant in the country where the actions at issue occurred does not necessarily serve as a bar against suit in a U.S. court. In *Jean v. Dorelein*, the plaintiffs won a legally binding judgment in a Haitian court in 2000, in which the defendant, a Colonel in the Haitian Armed Forces and Chief

<sup>99</sup> *Id.* at 834.

<sup>100</sup> *Id.* at 837.

<sup>101</sup> See generally *Zheng v. Gonzalez*, 409 F.3d 804, 811 (7th Cir. 2005), *Lin v. Ashcroft*, 385 F.3d 748, 754 (7th Cir. 2004) (on whether State Department reports should be trusted in relation to other evidence).

<sup>102</sup> *Abiola*, 435 F. Supp. 2d at 838.

<sup>103</sup> *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995).

<sup>104</sup> *Id.* at 178.

of Personnel, was found liable for an attack on civilians in Raboteau, Haiti, in 1994.<sup>105</sup> In reversing the district court's dismissal on non-exhaustion and other grounds, the Eleventh Circuit Court of Appeals noted that since the 2000 ruling, Dorelien was freed from prison during an uprising and the judge who prosecuted the case had been attacked by a violent mob. Citing the Senate report's statement on the burden of proof for the non-exhaustion defense, the court found that the defendant had not met his burden that the plaintiff could presently file a successful case in Haiti.<sup>106</sup>

¶50 In cases where the defendants have not made a claim of non-exhaustion of local remedies, the Senate report's statement that the filing of a suit under TVPA is virtual *prima facie* evidence of exhaustion has been followed by federal courts.<sup>107</sup>

¶51 Even when courts have found that some local remedies do exist and are functional, they do not automatically serve as proof of non-exhaustion. Defendants in a suit for human rights violations related to an oil project in Nigeria cited the existence of the Oputa Commission<sup>108</sup> as an "alternative remedy" for plaintiffs denied justice by a corrupt judiciary. However, since the Commission's main purpose "is not to remedy [human rights] violations, but to promote reconciliation," the defendant's burden of proof had not been met.<sup>109</sup>

¶52 While most defendants either fail to claim non-exhaustion or fail to meet the burden of proof, there are examples where courts have found in the defendant's favor. In *Corrie v. Caterpillar, Inc.*, the mother of a peace activist killed by an Israeli bulldozer while standing in front of it to block the demolition of Palestinian homes in the Occupied Territories sued the bulldozer's manufacturer on the grounds that it knew of and helped the Israeli military commit extrajudicial killings using their products.<sup>110</sup>

¶53 In claiming non-exhaustion, the defense reply in support of the motion to dismiss noted that the TVPA exhaustion requirement is not met simply by arguing that the foreign court is not amenable to claims under international law, but that a "similar" claim must be available in the proposed alternative forum.<sup>111</sup> Additionally, the brief cites the fact that 700 suits by Palestinians regarding the Israeli government's activities in the Occupied Territories were pending in Israeli courts at the time and that Corrie had a suit pending in Israeli court.<sup>112</sup> The district court accepted the defense's non-exhaustion argument (among others), adding that Israeli courts "are generally considered to provide an adequate alternative forum for civil matters."<sup>113</sup>

<sup>105</sup> *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005).

<sup>106</sup> *Id.* at 783.

<sup>107</sup> *See generally* *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (Suit not dismissible for lack of subject matter jurisdiction on non-exhaustion grounds because defendant failed to claim non-exhaustion. However, the suit was dismissed on other subject matter grounds).

<sup>108</sup> A government commission on human rights violations occurring during the period of military rule.

<sup>109</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at \*18 (S.D.N.Y.).

<sup>110</sup> 403 F. Supp. 2d 1019 (W.D. Wash. 2005) *affirmed by* *Corrie v. Caterpillar, Inc.*, 2007 WL 2694701 (9th Cir. 2007). The 9th Circuit decision upheld the district court's dismissal of the suit on political question doctrine grounds and thus did not address the issue of exhaustion.

<sup>111</sup> Reply in Support of Motion to Dismiss by Defendant Caterpillar Inc. pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State A Claim and Pursuant to the Political Question and Act of State Doctrines, 22, 2005 WL 2889368 (Sept. 22, 2005) (citing *Xuncax*, 256 F. Supp. 2d at 1267). *See also* *Reyno*, 454 U.S. at 254 n.22 (1981) (on the adequacy of foreign remedies that are not exactly analogous to the domestic equivalent).

<sup>112</sup> *Id.*

<sup>113</sup> *Corrie*, 403 F. Supp.2d at 1026 (citing *Diatronics Inc. v. Elbit Computers*, 649 F. Supp. 122, 127-9

¶54 In the fifteen year history of the TVPA, exhaustion has never been a particularly effective affirmative defense. Suits under the Act are far more often defeated on the grounds that the alleged torture was not committed “under color of law,”<sup>114</sup> or that TVPA applies specifically to “individuals” and not corporations or government agencies.<sup>115</sup> On its own, the requirement that a plaintiff exhaust local remedies has not been particularly difficult to defeat by plaintiffs due to the placement of the burden of raising the issue on the defendant and the significant nexus between countries where torture and extrajudicial killing take place and countries with non-functioning, poorly-functioning or corrupt judicial systems. It can be argued that the rate of success among TVPA plaintiffs in defeating non-exhaustion defenses is a result of venue selection that takes exhaustion into account, but such a claim would be problematic to evaluate objectively.

### C. *Forum Non Conveniens* under TVPA

¶55 As discussed *supra*, the doctrine of *forum non conveniens* is often a major obstacle for litigants pleading under ATCA. However, due to a more detailed legislative history favoring the adjudication of specific causes of action in U.S. courts, plaintiffs pleading under TVPA are less likely to have their cases dismissed on FNC grounds.

¶56 For example, the trial court in *Abiola* refuted an argument made by the defendant in favor of FNC by citing the House of Representatives report for TVPA, which states in part, “A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact.”<sup>116</sup>

¶57 In *Wiwa*, the trial court dismissed the case on the grounds that U.S. courts are an inappropriate venue for a suit between Nigerians residing in the U.S. and a corporation based in the United Kingdom and the Netherlands over actions occurring in Nigeria.<sup>117</sup> In overturning the lower court’s decision, the Second Circuit noted the reports accompanying TVPA articulate a policy preference favoring litigation of torture and extrajudicial killing cases in U.S. courts, writing, “[i]f in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 [Judiciary] Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations.”<sup>118</sup>

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(S.D.N.Y. 1986)), *Postol v. El-Al Israel Airlines, Ltd.*, 690 F. Supp. 1361 (S.D.N.Y. 1988).

<sup>114</sup> See *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *Doe v. Exxon Mobil Corp*, 393 F. Supp. 2d 20 (D.D.C. 2005).

<sup>115</sup> Unlike the TVPA, ATCA does allow suits against corporations. See *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997). For dismissals of cases alleging non-individual liability under TVPA, see *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230 (D.D.C. 2005) (TVPA does not apply to government agencies as defendants); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D.La.1997) (holding TVPA does not apply to corporations as plaintiffs).

<sup>116</sup> *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003) (citing H.R. Rep. No. 102-367, pt.1, at 3 (1991)).

<sup>117</sup> *Wiwa*, 226 F.3d at 99.

<sup>118</sup> *Id.* at 106.

IV. ANALYSIS: DOES *SAREI* GET IT RIGHT?A. *Exhaustion as Widely Recognized International Law*

¶58 The dissent in *Sarei* argued that since the causes of action available under ATCA derive from widely recognized international law, and since exhaustion requirements exist throughout international law, exhaustion should be required under ATCA.<sup>119</sup> There is a large volume of material that speaks to the notion that the doctrine of exhaustion is a well-developed standard in international law.

¶59 For example, the European Convention on Human Rights and Fundamental Freedoms has an admissibility requirement that includes exhaustion: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.”<sup>120</sup> Under the Convention, an individual must pursue both administrative and judicial remedies; these are considered exhausted when: (1) the highest competent domestic court grants a final and unappealable decision; or (2) when an individual applicant can prove available remedies are inadequate or ineffectual; or (3) when an applicant claiming human rights violations can prove the probability of failure.<sup>121</sup> The Convention has a stricter exhaustion requirement than the TVPA, since the respondents’ failure to raise a non-exhaustion defense does not waive the right to do so at a later time, and the trying body has an *ex officio* duty to determine whether local remedies have been exhausted, a duty not required of U.S. courts adjudicating TVPA claims.<sup>122</sup>

¶60 Several other treaties specifically require exhaustion before international human rights bodies may hear a case. For example, the United Nations Convention on Elimination of Racial Discrimination provides:

The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.<sup>123</sup>

The Inter-American Convention to Prevent and Punish Torture states:

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to

<sup>119</sup> *Sarei*, 487 F.3d at 1231.

<sup>120</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 35, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited Dec. 1, 2006).

<sup>121</sup> Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RIGHTS L. REV. at 248 (1987).

<sup>122</sup> *Id.* at 249.

<sup>123</sup> U.N. Convention on Elimination of Racial Discrimination, Art. 11, Para. 3, 5 I.L.M. 350 (1966).

the international body whose competence has been recognized by that State.<sup>124</sup>

And the International Covenant on Civil and Political Rights specifies that:

[T]he Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.<sup>125</sup>

¶61 The language of these exhaustion clauses is important to note because of the common allusions to “generally recognized principles of international law.” These references weaken the claim that the codification of exhaustion requirements in treaties speaks to the requirement being non-standard.

¶62 However, there are several differences between ATCA and the above-referenced treaties that make their statutory language less than fully applicable to the question of whether ATCA should recognize exhaustion as a substantive element of international law. First and foremost, in all cases that come before the human rights bodies in the treaty language cited above, the defendants are states, not individuals. ATCA, however, does not allow for litigation against states. Additionally, the treaties apply to signatory nations that have agreed to allow their citizens to make claims in a supernational judicial system. As a result, the exhaustion requirement behaves more like a procedural barrier to suit in a particular court than a substantive basis of a claim, especially in human rights cases.

¶63 Even if exhaustion is an international law norm, U.S. courts may not apply it if it is strictly procedural in nature and not a substantive part of a cause of action. Some argue that the exhaustion of local remedies is either substantive or procedural depending on what type of offense is committed. Fawcett argued that international law violations fall into three distinct categories: (1) cases where international law is alleged to be breached, but not any local law in which case exhaustion is not applicable; (2) cases where the breach is local but not international in nature, in which case exhaustion is a substantive bar that prevents international adjudication until a denial of justice is committed by the state; and (3) cases where the breach is of both local and international law in which case exhaustion is procedural in nature, except in cases where the state seeks a declaratory judgment that no violation of international law has taken place.<sup>126</sup>

¶64 Since international human rights claims by individual litigants were unknown at the time Fawcett addressed the issue, his analysis is limited in usefulness by its context; namely, international commercial disputes and disputes arising under bilateral or multilateral treaties. Human rights violations are both international and local in nature, whether or not the laws of the nation in which the violation occurred are enforced. If

<sup>124</sup> Organization of American States, Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519, Art. 8 (1986).

<sup>125</sup> International Covenant on Civil and Political Rights, Art. 41, 6 I.L.M. 360 (1967).

<sup>126</sup> J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?* 31 BRIT. Y.B. INT’L L. 452, 457-8 (1954).

exhaustion is procedural, it means that the doctrine merely assigns responsibility between courts. If it is substantive, it is part of the claim that brings the litigant to the court.

¶65 If the denial of justice on the local level necessitates the international claim, then it stands to reason that exhaustion of local remedies is indeed substantive in nature. The *Interhandel* court also takes the substantive approach: “by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.”<sup>127</sup> On the other hand, the TVPA version of exhaustion, in which the claim is adjudicated if brought up by the defendant as an affirmative defense, makes the doctrine operate more like a procedural motion such as *forum non conveniens*.

¶66 Another relevant question about the applicability of exhaustion to ATCA is whether the international precedent cited to support its adoption applies to the type of litigants that use it. Under ATCA, aliens can sue other aliens, including corporations, which are generally considered individuals in the eyes of the law.<sup>128</sup> In *Interhandel* (Switz v. U.S.), the International Court of Justice said, “the rule [of exhaustion] has been generally observed in cases in which a state has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.”<sup>129</sup>

*B. Conclusion: A Form of Exhaustion is Already Applied to ATCA Plaintiffs in the Doctrine of Forum Non Conveniens.*

¶67 The Supreme Court’s decision in *Sosa v. Alvarez-Machain* can be optimistically considered a victory for human rights advocates who seek to use U.S. courts to redress violations that take place outside national boundaries. On one hand, the decision limited ATCA claims to those “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 specificity comparable to the features of 18<sup>th</sup>-century paradigms we have recognized.”<sup>130</sup> At first blush, that requirement reads like a massive restriction of possible torts available under the statute, but the post-*Filartiga* ATCA jurisprudence had already restricted the types of international law violations cognizable in federal courts, excluding, for instance, environmental claims.<sup>131</sup> However, the Supreme Court’s recognition of the evolutionary nature of ATCA vindicates two decades’ worth of ATCA jurisprudence and opens the door to the incorporation of new torts under the statute. When considered in comparison to the countervailing (and repeatedly rejected) argument from *Tel-Oren* that ATCA is purely jurisdictional and provides no private cause of action,<sup>132</sup> the restrictions in *Sosa* can be viewed as merely a codification of existing generally accepted principles.

¶68 In fact, the one element of the *Sosa* decision that had the capacity to be truly revolutionary, the engrafting of an exhaustion requirement, was relegated to a footnote

<sup>127</sup> *Interhandel*, 1959 I.C.J. at 26.

<sup>128</sup> See Corrie, 403 F. Supp. 2d at 1026 (citing *Diatronics Inc. v. Elbit Computers*, 649 F. Supp. 122, 127-9 (S.D.N.Y. 1986)).

<sup>129</sup> *Interhandel*, 1959 I.C.J. at 27.

<sup>130</sup> *Sosa*, 542 U.S. at 725.

<sup>131</sup> See *supra* note 21.

<sup>132</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1982). See also Reply Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 2004 WL 577654 (March 23, 2004).

because the instant case did not lend itself to such a discussion.<sup>133</sup> *Sarei* provided the first full discussion of the issue following *Sosa*, with the majority concluding that an exhaustion requirement should not be read into ATCA based on the lack of original legislative intent for such a requirement,<sup>134</sup> the inapplicability of TVPA to ATCA claims,<sup>135</sup> and from the fact that Congress failed to add an exhaustion requirement to ATCA when it created TVPA -- signaling that judicial discretion in dismissing a case for non-exhaustion of local remedies is disfavored.<sup>136</sup> Due to the dearth of contemporary sources explaining ATCA's goals and the brevity of the statute, divining what the statute's authors meant has continually vexed courts.<sup>137</sup> Since TVPA has been held to cleave off torture and extrajudicial killing from the ATCA,<sup>138</sup> the argument that TVPA shows that exhaustion belongs in ATCA causes of action is generally unpersuasive. The treaties and conventions cited in support of the notion that exhaustion is an international norm are not clearly analogous to ATCA claims and the leading international law cases on the subject are divided on the issue of whether exhaustion is substantive or procedural. As a result, the state of international law with regard to exhaustion is not dispositive on the issue of whether exhaustion belongs in ATCA.

¶69

Where the *Sarei* majority's opposition to an exhaustion requirement is weakest is in the area of judicial discretion. The court's concern that proponents of an exhaustion requirement are "lulled into a false sense of familiarity" with the term is overblown. First, domestic exhaustion and the related domestic common law doctrine of *forum non conveniens* ("FNC") are well-understood, with a large body of precedent from which to draw. Second, FNC is in many ways parallel to the international law doctrine of exhaustion in form and effect. The *Sarei* majority failed to see that the elements of exhaustion already exist in domestic common law, namely in the requirement that an adequate alternative forum be available for a suit to be dismissed on FNC grounds. By dismissing the argument that determining the correct forum for a case is an issue of judicial discretion, the *Sarei* decision has ignored the fact that courts have already been performing all of the elements of exhaustion analysis under the banner of FNC.<sup>139</sup> The "adequate alternative venue" requirement of FNC has been held to exclude foreign venues where justice would not be available due to corruption or intimidation, just as exhaustion claims have failed under TVPA's statutory exhaustion requirement for the same reasons.<sup>140</sup> The second part of the FNC test includes a list of public and private-interest factors, many of which read like the list of reasons for an exhaustion requirement in the TVPA's Senate report.<sup>141</sup>

<sup>133</sup> See *Sosa*, 542 U.S. 692, 733 n.21 (2004).

<sup>134</sup> *Sarei*, 487 F.3d at 1215.

<sup>135</sup> *Id.* at 1218-1219.

<sup>136</sup> *Id.* at 1223.

<sup>137</sup> In *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1095) (the court stated: "[ATCA] is a kind of judicial Lohengren; although it has been with us since the first Judiciary Act ... no one seems to know whence it came.").

<sup>138</sup> See *supra* note 88.

<sup>139</sup> See generally Reus, *Judicial Discretion: A Comparative View of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 13 LOY. L.A. INT'L & COMP. L.J. 455 (1994).

<sup>140</sup> See *Abiola*, 435 F. Supp. 2d at 838, *Xuncax*, 886 F. Supp. 162 (D. Mass. 1995).

<sup>141</sup> See *supra* note 87.

¶70 In the past, a motion to dismiss on FNC grounds has been a difficult hurdle for many ATCA plaintiffs to overcome.<sup>142</sup> However, the fundamental lack of justice available in many courts that have jurisdiction where human rights violations take place may negate the benefits of better access to evidence and witnesses. In cases of severe delay, such as in *Xuncax*, the most “easy, expeditious and inexpensive” forum is likely in a U.S. court.<sup>143</sup> As the precedent of TVPA’s exhaustion provision has shown, local remedies in countries where human rights violations have taken place are rarely “exhausted” in the manner of domestic administrative remedies;<sup>144</sup> but are instead rejected outright, similar to venue choice in purely domestic FNC cases.<sup>145</sup> When foreign courts are involved, the traditional FNC considerations are not limited to purely practical concerns, such as those listed in *Gulf Oil*. In *Mobil Tankers Co., S. A. v. Mene Grande Oil Co.*, a negligence claim, the Third Circuit Court of Appeals accepts the *Gulf Oil* factors in considering a defense motion to dismiss on FNC grounds, but puts them within the context that “[t]he ultimate inquiry is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice.”<sup>146</sup> Clearly, the history of the TVPA’s exhaustion requirement shows that the guiding principle behind it is essentially that of FNC as interpreted in *Mobil Tankers*.

¶71 The Senate Report accompanying the TVPA listed effectiveness and speed of the local remedy and the unfairness (synonymous with lack of justice) of the foreign jurisdiction as factors to be used when evaluating a defense of non-exhaustion.<sup>147</sup> These considerations are strikingly similar to the private interest factors of a FNC analysis. However, courts have not used TVPA exhaustion cases for guidance in evaluating the quality of a foreign jurisdiction while considering FNC motions under ATCA. By splitting exhaustion off into a discrete question involving lawmakers’ intent and international law, the *Sarei* court has framed the issue in such a way as to discourage the meaningful analysis of whether exhaustion already exists and whether common law exhaustion (as part of FNC) can be bolstered by lessons learned from statutory exhaustion under TVPA.

¶72 By considering exhaustion as a wholly discrete doctrine separate from FNC, with which it shares both goals and means, the *Sarei* court has increased the risk of a Supreme Court reversal. In ATCA cases regarding human rights violations, FNC has been one of the main roadblocks to U.S. courts issuing decisions on the merits.<sup>148</sup> Under TVPA, exhaustion defenses have been relatively ineffective.<sup>149</sup> Had the *Sarei* court found it unnecessary to add an exhaustion requirement to ATCA because it already existed within FNC, it could have required the lower courts to consider, in their analysis of FNC, the factors commonly cited by courts evaluating exhaustion defenses in TVPA lawsuits --

<sup>142</sup> It has been suggested that “a majority” of the *Gulf Oil* factors pointed to the dismissal of *Filartiga* at the District Court level. See generally Yale-Loehr, *The Exhaustion of Local Remedies Rule and Forum Non Conveniens in International Litigation in U.S. Courts*, 13 CORNELL INT’L L.J. 351, 370 (1980).

<sup>143</sup> See *Abiola*, 435 F. Supp. 2d at 838.

<sup>144</sup> See e.g., *Honig v. Doe*, 484 U.S. 305, 325-29 (1988) (allowing a futility exception for an administrative exhaustion requirement).

<sup>145</sup> See *Xuncax*, 886 F. Supp. 162 (D. Mass. 1995), *Abiola*, 435 F. Supp. 2d at 833.

<sup>146</sup> *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3rd Cir.), cert denied 385 U.S. 945 (1966). For additional discussion of the role of justice in FNC, see e.g. note 142, Yale-Loehr at 366, n.90.

<sup>147</sup> See *supra* note 86.

<sup>148</sup> See e.g. *supra* note 76.

<sup>149</sup> See e.g. *supra* notes 114-115.

factors that are largely favorable to plaintiffs. Should a future court decide that exhaustion is an affirmative defense separate from and in addition to FNC, plaintiffs would have to clear two hurdles, one relatively difficult (FNC) and one that is likely easier (exhaustion). Failure to clear either hurdle means the end of the case in U.S. courts. Should the precedent set by TVPA exhaustion analyses be incorporated into the FNC common law, the threat of a separate exhaustion requirement would be neutralized and the FNC requirement itself would be more favorable to plaintiffs.

¶73 At the very least, the *Sarei* majority missed an opportunity to explain the difference it saw between FNC as applied to other causes of action and exhaustion as it would operate under ATCA. At worst, the court may have exempted ATCA claims from FNC entirely because Congress failed to cover judicial discretion issues when it passed the statute over 200 years ago.<sup>150</sup> In defending ATCA from the possibility of an exhaustion requirement as raised in *Sosa*, the Ninth Circuit split exhaustion from its traditional home within FNC, and in doing so, overlooked a way to end the exhaustion debate started in *Sosa* while creating a fairer standard for plaintiffs.

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<sup>150</sup> *Sarei*, 487 F.3d at 1218-19.