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# Exhaustion of Remedies and the Alien Tort Statute

Regina Waugh\*

## I.

### INTRODUCTION

The purpose of this Article is to explore the concept of exhaustion of remedies in the context of the Alien Tort Statute (ATS). While there is no explicit mention of exhaustion in the ATS, the concept has appeared repeatedly throughout ATS jurisprudence and remains a subject of interest for courts wrestling with the statute.

The Article begins with a brief exploration of exhaustion of remedies in both the international and domestic contexts. Part III considers Supreme Court jurisprudence in this area, with special attention to *Sosa v. Alvarez-Machain*, the Court's first major comment on the ATS and the only Supreme Court case to consider exhaustion in the ATS context specifically. Part IV addresses the intersection between the ATS and two other statutes, the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA), both of which have explicit exhaustion requirements. Part V provides an overview of exhaustion jurisprudence in the district and circuit courts. Finally, I conclude with an examination of the consequences of the possible exhaustion requirements for ATS claims.

## II.

### WHAT IS EXHAUSTION OF REMEDIES?

Exhaustion of remedies in the United States is principally discussed in the context of administrative remedies. The doctrine provides that "if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available."<sup>1</sup> Like the

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\* J.D. Candidate, Class of 2010. I would like to thank Professor Buxbaum and Professor Caron as well as the students in the Fall 2009 International Law Writing Seminar for their assistance with this piece.

standing doctrine, the exhaustion requirement serves to restrict which disputes will be adjudicated in court. Unlike standing, the basis for the exhaustion of remedies doctrine is not found in the Constitution. Rather, the typical policy rationale for the exhaustion doctrine is efficiency—it conserves the resources of the courts, permits expert agencies to adjudicate the disputes that arise from their decision-making processes, and provides the reviewing court with a more complete record on which to base its decision. In the domestic context, exhaustion of remedies can also refer to the requirement that a petitioner exhaust their remedies in state court prior to bringing their claim in federal court.<sup>2</sup>

Exhaustion of remedies in international law requires that a claimant seek relief first in the forum where the harm occurred.<sup>3</sup> There are numerous rationales for this requirement. They include the notion that “the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs.”<sup>4</sup> The exhaustion requirement is also supported by the principle that national courts and administrative organs should be granted deference by foreign states.<sup>5</sup> Finally, exhaustion allows the host State a sufficient opportunity to remedy the injury.<sup>6</sup> The United States Congress has also noted that allowing a State to remedy a violation that took place within its borders encourages the development of “meaningful remedies in other countries.”<sup>7</sup> Exhaustion of local remedies under international law has generally, however, been found to include an exception for those cases where seeking relief under local remedies would be futile or impossible.<sup>8</sup>

Various human rights instruments also incorporate an exhaustion

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1. BLACK'S LAW DICTIONARY 613-14 (7th ed. 1999).

2. The classic example of this type of exhaustion is the requirement that a state prisoner seeking habeas relief in federal court first exhaust all of the available state court remedies. *See, e.g., Darr v. Burford*, 339 U.S. 200 (1950).

3. *See, e.g.* EDWIN MONTEFIORE BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 817 (1915). *See also* PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 104 (1958); Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 *BRIT. Y.B. INT'L L.* 83, 83 (1959).

4. BORCHARD, *supra* note 3, at 817.

5. *See, e.g.* CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 200 (2d ed., 2004) (“Respect for the sovereignty of the respondent or host State constitutes the foundation of the rule that local remedies must be exhausted.”).

6. *See* David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 *AM. J. INT'L L.* 389, 391 (1964); *Interhandel (Switz. v. U.S.)*, 1959 *I.C.J.* 6, 27 (Mar. 1959) (“[I]t has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”).

7. H.R. REP. NO. 102-367, at 1, 3-5 (1991).

8. *See, e.g.*, AMERASINGHE, *supra* note 5; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 (1987) (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”).

requirement, generally following the international law standard. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law . . . .”<sup>9</sup> Similarly, Article 41 of the American Convention on Human Rights requires that “the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”<sup>10</sup> Finally, the International Covenant on Civil and Political Rights refers to exhaustion of local remedies “in conformity with the generally recognized principles of international law.”<sup>11</sup> The futility exception to the exhaustion requirement is particularly valuable in the human rights context, where litigants may face violent retaliation or even death for attempting to seek redress for their harms in the local courts.

### III.

#### THE SUPREME COURT AND THE ATS

The ATS, codified at 28 USC § 1350, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>12</sup> There is little legislative history to indicate the original purpose of the ATS and the courts have been similarly silent on the subject; despite the fact that the ATS has been part of American law since 1789,<sup>13</sup> there was almost no judicial action on the Act prior to 1980.<sup>14</sup> Although ATS jurisprudence grew exponentially following the Second Circuit decision in *Filartiga v. Pena-Irela*, Supreme Court jurisprudence on the ATS is scant. A search turns up three cases, only one of which, *Sosa v. Alvarez-Machain (Sosa)*, directly addresses the ATS. *Sosa* is also the only Supreme Court case on the ATS to even mention exhaustion.<sup>15</sup>

In a paragraph summarizing the legal conclusion that any international norm must be sufficiently definite in order to constitute a cause of action under the ATS, and encouraging judicial constraint in identifying torts that would be

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9. The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 221.

10. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

11. International Covenant on Civil and Political Rights, art. 41 (1)(c), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

12. 28 USC § 1350.

13. The ATS was part of the Judiciary Act of 1789, 1 Stat. 73, § 9.

14. According to Kenneth C. Randall, the ATS was used only twenty-one times during this period and used as a basis of jurisdiction only twice. 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, 4 n.15 (1985). The two cases using the ATS to establish jurisdiction are: *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810, 1 Bee 74 (D. S.C. 1795)).

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

actionable under the ATS, the Court included the following footnote:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law. . . the 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 forums such as international claims tribunals.... We would certainly consider this requirement in an appropriate case.<sup>16</sup>

A look at the European Commission's amicus brief is instructive. The primary thesis of the brief, which was not written on behalf of either party to the case, is that because the United States is adopting substantive international law in construing which claims are actionable under the ATS, courts should also adopt the jurisdictional constraints found in international law. Specifically, the European Commission urges the Court to adopt the international law doctrine of exhaustion of remedies, which, as noted above, requires that the judicial remedies in the place where the harm occurred be exhausted before the case is heard by an international tribunal or court.<sup>17</sup>

The Commission cites the "Charming Betsy" canon in U.S. statutory interpretation, which requires that a statute be construed so as to not interfere with international law.<sup>18</sup> The Commission also notes the principle of comity underlying international exhaustion requirement: in order to "preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory."<sup>19</sup> Finally, the Commission refers to the limits underpinning universal civil jurisdiction, the principle that there are some violations of law so fundamental that they can be adjudicated by any state, as evidence that the international exhaustion of remedies doctrine should be adopted in ATS cases.<sup>20</sup> The Commission notes that limits on universal civil jurisdiction require that a State exercise universal civil jurisdiction "only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality."<sup>21</sup> In short,

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16. *Id.* at 733, n.21 (internal citations omitted).

17. Brief for European Commission as Amicus Curiae in Support of Neither Party at 19, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

18. *Id.* at 3. The canon referenced by the Commission refers to the case *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), in which the Court concluded: "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."

19. Brief for the European Commission, *supra* note 17, at 2.

20. The Commission does note that both jurists and academics are divided over the existence and scope of universal civil jurisdiction. *Id.* at 19.

21. *Id.* at 5. The Commission later cites the TVPA as "a prime example" of an approach to universal civil jurisdiction that favors "the pursuit of remedies in States that may regulate the

the Commission argues that action by an international court should only be taken when there is no domestic remedy available, a proposition that cannot be determined without an attempt to exhaust those remedies.

The referenced footnote is the only mention in *Sosa* of exhaustion of remedies in the ATS context. Interestingly, the Court did not provide any additional information of what type of case might be an “appropriate” one in which to require exhaustion of judicial remedies. Given its cryptic nature, it is not surprising that this brief reference has been a point of analysis in the ATS jurisprudence in the lower courts, discussed more expansively in Part V, *infra*.

I turn now to an exploration of the intersection between the ATS, the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA), and introduce some of the themes found in lower court ATS jurisprudence.

#### IV. THE ATS, TVPA, AND FTCA

The lower courts have been much more active than the Supreme Court in ATS jurisprudence generally, and the exhaustion issue particularly. In the majority of ATS cases in which district and circuit courts have considered exhaustion, the court addressed exhaustion in the context of one of two statutes: the Torture Victim Protection Act (TVPA) and the Federal Tort Claims Act (FTCA). Therefore, a discussion of exhaustion under the ATS necessarily requires an analysis of the relationship between these statutes.

##### A. *Interaction of the ATS and TVPA*<sup>22</sup>

As will become apparent from the review of ATS case law in the lower courts found in Section IV, claims under the ATS and the TVPA often appear in the same lawsuit. The Torture Victim Protection Act of 1991, which was codified as a note to the ATS, provides:

An individual who, under actual or apparent authority, or color of law, of any foreign nation— (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>23</sup>

The TVPA goes on to add, “[a] court shall decline to hear a claim under

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offensive conduct on traditional bases of jurisdiction.” *Id.* at 23.

22. See Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT’L L. 640 (2010), for a thorough treatment of the ATS and TVPA relationship.

23. Torture Victim Protection Act of 1991 (TVPA), Pub.L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

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>24</sup>

The courts have fleshed out the exhaustion requirement, relying heavily on the legislative history of the TVPA, which is much more extensive than that of the ATS, and on the treatment of exhaustion under domestic and international law. Under international law, exhaustion of remedies is an affirmative defense.<sup>25</sup> Once the defense has demonstrated that there are remedies available, the burden is on the plaintiff to demonstrate why those remedies are futile, ineffective, or otherwise unavailable.<sup>26</sup>

In *Wiwa v. Royal Dutch Petroleum Co.*, the court cited the Senate Report’s discussion of exhaustion of remedies under the TVPA for the proposition that the burden of proof in exhaustion cases ultimately lies with the defense:

[T]he committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.... Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.<sup>27</sup>

The TVPA has impacted ATS case law regarding exhaustion in two major ways. In most ATS cases in which exhaustion is mentioned, it is mentioned because claims are also brought under the TVPA.<sup>28</sup> In these cases, the court only considers exhaustion in the context of the TVPA. In other cases, the courts have substituted the TVPA, including its exhaustion requirement, for ATS claims related to torture and extrajudicial killing.<sup>29</sup> As discussed further below, and indicated by the TVPA’s legislative history, in many TVPA cases the court has found that plaintiffs’ claims are exempted from the exhaustion requirement on futility grounds.

Because the role of exhaustion in the ATS remains unclear, and because it seems likely that the TVPA will continue to play a role in how exhaustion is treated under the ATS, it is instructive to review how the courts have considered the various elements of the TVPA exhaustion requirement.<sup>30</sup> These elements

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24. *Id.* § 2(b).

25. S. REP. NO. 102-249, at 9-10 (1991).

26. AMERASINGHE, *supra* note 5, at 166-71, 187-207.

27. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

28. *See, e.g., id.*; *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002); *Lizarbe v. Rondon*, 2009 WL 2487083 (D. Md. Aug. 12, 2009); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004); *Jean v. Dorelian*, 431 F.3d 776 (11th Cir. 2005).

29. *See, e.g., Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005); *Ruiz v. Martinez*, 2007 WL 1857185 (W.D. Tex. May 17, 2007).

30. The following cases are those in which the court has considered both ATS and TVPA

include what it means to exhaust remedies under the TVPA, the extent of the defendant's initial burden, and the circumstances under which the court has found attempts to exhaust local remedies to be futile.

The content of the TVPA's exhaustion requirement is not entirely clear. In *Ruiz v. Martinez*, for example, the court dismissed plaintiff's ATS claims (characterized as TVPA claims) for failure to exhaust local remedies.<sup>31</sup> The court found the filing of "numerous grievances" against United States and Mexican officials to be insufficient, and concluded that the federal court would lack jurisdiction until "Ruiz exhausts the 'adequate and available remedies' of Mexico."<sup>32</sup> The court did not provide additional detail as to what those adequate and available remedies were.

As noted above, exhaustion of remedies under the TVPA is considered an affirmative defense, and, therefore, the defendant bears the initial burden of demonstrating available local remedies that plaintiff has failed to exhaust. That initial burden has proven to be a difficult hurdle for many TVPA defendants to clear.<sup>33</sup> Some courts have found that alternative dispute resolution mechanisms, such as the Oputa Commission in Nigeria, designed to investigate serious human rights abuses, are insufficient alternative forums because they are not designed to provide remedies.<sup>34</sup> For example, in *Jean v. Dorelien*, the Eleventh Circuit rejected defendant's suggestion that because plaintiffs had successfully filed suit and won a judgment against defendant in Haiti in 1994, the Haitian courts remained an adequate forum in 2004, following a regime change which returned defendant's party to power.<sup>35</sup> However, in *Corrie v. Caterpillar, Inc.*, a case in which the mother of a peace activist killed by an Israeli bulldozer in the Occupied Territories sued the bulldozer's manufacturer, the court found that the Israeli courts "are generally considered to provide an adequate alternative forum for civil matters."<sup>36</sup>

In many more cases, the courts have excused the exhaustion requirement on the grounds that attempts to exhaust local remedies would be futile.<sup>37</sup> Citing State Department reports, expert testimony and other evidence provided by

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claims.

31. *Ruiz v. Martinez*, 2007 WL 1857185 (W.D. Tex May 17, 2007).

32. *Id.* at \*6.

33. *See, e.g.*, *Sinaltrainal v. Coca Cola*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003); *Lizarbe v. Rondon*, 2009 WL 2487083 (D. Md. Aug. 12, 2009); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002); *Jean v. Dorelian*, 431 F.3d 776, 782 (11th Cir. 2005).

34. *Wiwa*, 2002 WL 319887, at \*18.

35. *Jean*, 431 at 783 (11th Cir. 2005).

36. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) *aff'd*, *Corrie v. Caterpillar, Inc.*, 2007 WL 2694701 (9th Cir. 2007).

37. In some cases where the court has found that defendant failed to sustain their burden, the court has still determined that even if defendant had sustained their burden, any attempt by the plaintiff to exhaust those remedies would be futile.



plaintiffs, courts have found futility due to: corruption in the judiciary and/or the judiciary under the control of those who caused the harm,<sup>38</sup> risk of retaliation for even filing the claim,<sup>39</sup> and amnesty or other governmental mechanism that would prevent relief.<sup>40</sup>

### B. Interaction of the ATS and FTCA

The Federal Tort Claims Act (FTCA) has had a considerable impact on the viability of ATS claims. Under the FTCA, which is often raised in cases where the defendants are employees or entities of the United States government, plaintiffs are required to exhaust their administrative remedies before the federal court exercise subject matter jurisdiction.

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, otherwise known as the Westfall Act, the United States can choose to be substituted as a defendant in any action in which the original defendant is a government employee accused of committing a common law tort within the scope of their employment.<sup>41</sup> Once the United States enters the case as a defendant it is protected by sovereign immunity.

The FTCA provides a limited waiver of the United States' sovereign immunity which, under the Westfall Act is "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment."<sup>42</sup> Therefore, once the United States has entered into the case as defendant, plaintiffs' claims can no longer be brought under the ATS. In addition, in order to be eligible for the FTCA's limited waiver, a plaintiff is required to exhaust any available administrative remedies.<sup>43</sup>

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38. *Bowoto v. Chevron*, 557 F.Supp.2d 1080 (N.D. Cal. 2008); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d (S.D.N.Y. 2002); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

39. *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

40. *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Doe v. Saravia*, 348 F.Supp.2d 1112 (E.D. Cal. 2004); *In re XE Services Alien Tort Litigation*, 2009 WL 3415129 (E.D. Va. 2009); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004).

41. The Westfall Act provides, in pertinent part: "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679.

42. 28 U.S.C. § 2679(b)(1) (2006).

43. "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate

Generally, courts have found that plaintiffs have not exhausted their administrative remedies at the time they bring their ATS suits.<sup>44</sup> Because plaintiffs are required to bring “a timely administrative claim before bringing suit against the government,” the failure to exhaust administrative remedies deprives the plaintiff of the chance to bring their ATS claims under the FTCA.<sup>45</sup> However, in *In re Iraq and Afghanistan Detainees Litigation*, the district court of D.C. found that “pursuant to the Westfall Act, the United States having been substituted as the sole defendant for those claims brought under the Alien Tort Statute, those claims shall be dismissed *without prejudice* for lack of subject matter jurisdiction pending the exhaustion of all administrative remedies,” indicating that plaintiffs in that case may have the opportunity to exhaust their administrative remedies and then bring their case under the FTCA.<sup>46</sup>

There are two exceptions to the FTCA exclusivity requirement. Under 28 U.S.C. § 2679(b)(2), Westfall Act immunity does not apply to a civil action against a federal employee “(A) which is brought for a violation of the Constitution of the United States or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.”<sup>47</sup> ATS plaintiffs have argued that the ATS is such a statute. The courts have uniformly rejected this argument on the ground that the ATS is a jurisdictional statute rather than one that confers substantive rights.<sup>48</sup>

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Federal agency and his claim shall have been finally denied by the agency in writing.” 28 U.S.C.A. § 2675(a) (2006).

44. See, e.g., *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008), *vacated on other grounds*, by *Rasul v. Myers*, 129 S.Ct. 763 (2008) (“plaintiffs have presumably been able to comply with the exhaustion requirements of FTCA—indeed, they do not argue otherwise. The record is devoid, however, of any suggestion that they complied with any of the procedures governing the filing of an administrative claim with the DoD or one of the military departments. Accordingly, the district court properly dismissed the three ATS claims for lack of subject matter jurisdiction.”); *Czertwytynski v. U.S.*, 514 F. Supp. 2d 592 (S.D.N.Y. 2007) (letters to the State Department did not constitute an administrative claim for the purposes of the FTCA).

45. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 39 (D.D.C. 2006), *vacated on other grounds*, *Rasul v. Myers*, 129 S.Ct. 763 (2008); see also *Czertwytynski v. U.S.*, 514 F. Supp. 2d 592, 597 (S.D.N.Y. 2007).

46. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 119 (D.D.C. 2007).

47. 28 U.S.C. § 2679(b)(2) (2006).

48. See, e.g., *Turkmen v. Ashcroft*, 2006 WL 1662663 \*50 (E.D.N.Y. 2006). (“[The ATS] is analogous to 42 U.S.C. § 1983, which creates a cause of action against state actors for violations of federal rights committed under the color of state law. Section 1983 and the [ATS] do ‘not create substantive rights, but simply provide[ ] the procedural mechanism[s] through which a plaintiff may bring . . . suit for violation[s] of . . . federal right[s]’ and the law of nations or a treaty of the United States.”); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006) (“The Supreme Court, however, recently held that the [ATS] is strictly a jurisdictional statute available to enforce a small number of international norms.”); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 38 (D.D.C. 2006) (“the [ATS] cannot be the subject of ‘a violation’ of a federal statute because the [ATS] provides no substantive rights that could be the subject of any claimed violation”); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 112 (D.D.C. 2007) (“The question whether the Alien Tort Statute falls within the statutory exception to the Westfall Act was answered by the Supreme Court’s decision in [*Sosa*] where it held that ‘the ATS is a jurisdictional statute creating no new causes of

V.  
ATS IN THE LOWER COURTS

Both before and after the Court's decision in *Sosa*, the lower courts considered the role of exhaustion of remedies in the context of the ATS. While the *Sosa* decision did much to elucidate the Supreme Court's position on how the lower courts should treat ATS claims more generally, the brief mention of exhaustion in footnote 21 provided little guidance for lower courts on how to treat the issue. As a result, the case law issuing from the lower courts after *Sosa* reveals as much diversity in decisions with relation to exhaustion as do lower court decisions before *Sosa*.

A. Circuit Court Decisions

The Seventh, Ninth, Eleventh and DC Circuits have all considered an ATS case in which exhaustion of remedies was at issue. Of particular interest is the Ninth Circuit's opinion in *Sarei v. Rio Tinto*, heard on appeal from the district court's decision, considered first by a regular panel and then by the Ninth Circuit, sitting en banc. The *Sarei* case will be considered at length later in this section.

In *Enahoro v. Abubakar*, the plaintiffs, Nigerian nationals, brought ATS claims against a former Nigerian head of state, claiming grave human rights violations, including torture and extrajudicial killing.<sup>49</sup> The Seventh Circuit held that plaintiffs could only get relief for their torture and extrajudicial killing claims under the Torture Victim Protection Act (TVPA): "the cause of action Congress provided in the Torture Victim Protection Act is the one which plaintiffs alleging torture or extrajudicial killing must plead."<sup>50</sup> Noting the TVPA's exhaustion requirement and the lack of evidence that plaintiffs exhausted Nigerian remedies, the Seventh Circuit remanded the case back to the district court, "for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state such a claim and, if they do, whether, in fact, the exhaustion requirement in the Torture Victim Protection Act defeats their claim."<sup>51</sup> Judge Cudahy, in dissent, disagreed with the court's decision that the TVPA was the only available remedy for the torture and extrajudicial killing.<sup>52</sup> Citing both the plain language and the legislative history of the TVPA, Judge Cudahy noted that the TVPA "was meant to expand, not restrict, the remedies available under the [ATS]."<sup>53</sup>

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action.' Accordingly, the plaintiffs cannot rely on the Alien Tort Statute to waive the Westfall Act because the plaintiffs have no claim for a violation of that statute itself").

49. *Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005).

50. *Id.* at 885.

51. *Id.* at 886.

52. *Id.* at 886 (Cudahy, J., dissenting).

53. *Id.* at 886-87.

The Eleventh Circuit considered ATS and TVPA claims brought by Haitian nationals in *Jean v. Dorelian*.<sup>54</sup> The court found that the district court erred in dismissing plaintiffs' ATS claims for failure to exhaust local remedies, holding that "the exhaustion requirement does not apply to the [ATS]."<sup>55</sup> The court went on to conclude that plaintiffs' claims under the TVPA should also not have been dismissed for failure to exhaust local remedies because defendant had "not in any way met the requisite burden of proof to support an affirmative defense of nonexhaustion of remedies and the district court erred in failing to require him to do so."<sup>56</sup>

In *Rasul v. Myers*, plaintiffs, detainees at Guantanamo Bay, brought ATS claims against the Secretary of Defense and commanding officers for alleged torture, arbitrary detention, and cruel, inhuman or degrading treatment.<sup>57</sup> The D.C. Circuit agreed with the district court that because defendants were employees of the United States, acting within the scope of their employment while committing the alleged torts, the United States could be substituted in as defendant, pursuant to the Westfall Act.<sup>58</sup> The court also upheld the district court's holding that because of the substitution of the United States as defendant, plaintiffs' sole avenue for relief was the FTCA.<sup>59</sup> As a result, the court concluded that plaintiffs' ATS claims were properly dismissed since they failed to exhaust their administrative remedies, as required by the FTCA.<sup>60</sup>

#### B. The Ninth Circuit: *Sarei v. Rio Tinto*

The most thorough treatment of the ATS exhaustion issue to date can be found in the Ninth Circuit's consideration of *Sarei v. Rio Tinto*. *Sarei* moved from the Central District of California (*Sarei I*), to a panel of Ninth Circuit judges (*Sarei II*), to the Ninth Circuit sitting en banc (*Sarei III*), and, finally, back to the Central District of California (*Sarei IV*).

*Sarei v. Rio Tinto* was an ATS action for international law violations committed in connection with the operation of a copper mine in Papua New Guinea. The Ninth Circuit first considered the case in April 2007 (*Sarei II*), on appeal from the Central District of California.<sup>61</sup> The court ultimately held that plaintiffs were not required to exhaust local remedies before bringing their ATS case in the US. Before moving on to conduct a statutory analysis of the ATS, the majority noted that "[t]his circuit has sustained the justiciability of [ATS]

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54. *Jean v. Dorelian*, 431 F.3d 776 (11th Cir. 2005).

55. *Id.* at 781.

56. *Id.* at 784.

57. *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008), *vacated on other grounds*, *Rasul v. Myers*, 129 S.Ct. 763 (2008).

58. *Id.* at 660.

59. *Id.*

60. *Id.* at 661.

61. *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007).

claims, both before and after *Sosa*, without requiring exhaustion.”<sup>62</sup> The court observed that there is nothing in the plain language of the ATS related to the exhaustion requirement and that the legislative history on the ATS is also silent on the subject.<sup>63</sup> The court then considered the TVPA as further evidence of Congressional intent on the subject of exhaustion and concluded that the TVPA legislative history indicates that the ATS should be left intact.<sup>64</sup> In addition, the court noted that Congress was certainly aware of the ATS when it added the TVPA and had the opportunity then to amend the statute to include the exhaustion requirement.<sup>65</sup> Judge Bybee, in dissent, considered *Sarei* to be exactly the kind of case that would fall into *Sosa*’s category of “appropriate” to consider the exhaustion requirement.<sup>66</sup> Judge Bybee also noted that principles of comity and separation of powers are served by following the international standard for exhaustion.<sup>67</sup>

Defendants appealed the Ninth Circuit panel decision and *Sarei* was reheard on the exhaustion issue before the Ninth Circuit, sitting en banc (*Sarei III*).<sup>68</sup> The majority in *Sarei III* found that the Court in *Sosa* seemed to consider exhaustion a prudential requirement and determined that whether exhaustion applies depends on the defendant’s ability to plead and justify an exhaustion requirement.<sup>69</sup> The majority was careful to note that the exhaustion requirement is not absolute in ATS cases, rather “[w]here the ‘nexus’ to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of ‘universal concern.’”<sup>70</sup> The majority argued that the prudential exhaustion requirement for ATS purposes mirrors the gatekeeping function in habeas cases and serves the principle of comity, particularly in area where the nexus of the case to the United States is weak.<sup>71</sup>

The majority also laid out a framework for evaluating whether exhaustion is required. Under this framework, consistent with the domestic exhaustion principles such as the TVPA, the defense bears the burden of raising exhaustion.<sup>72</sup> Also like the TVPA, the court would require that the remedy be effective, not futile, based on a review of the totality of the circumstances

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62. *Id.* at 1214.

63. *Id.* at 1214-15.

64. *Id.* at 1216.

65. *Id.* at 1217.

66. *Id.* at 1224 (Bybee, J., dissenting).

67. *Id.* at 1225.

68. *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008) (en banc).

69. *Id.* at 824.

70. *Id.*

71. *Id.* at 829.

72. *Id.* at 832. The court, borrowing a definition from the *Interhandel* case, describes exhaustion as a “final decision of the highest court in the hierarchy of courts in the legal system at issue.”

surrounding access to the remedy, the ultimate utility of the remedy to the petitioner, the enforceability of the decision, and any delay in getting such a decision.<sup>73</sup> The majority remanded *Sarei* back to the district court for proceedings to determine whether exhaustion was required in plaintiff's case.

Judges Bea and Callahan concurred in the judgment, but found an exhaustion requirement in the ATS.<sup>74</sup> They agreed with Judge Bybee's dissent in the panel decision that exhaustion is mandatory under international law.<sup>75</sup> The concurring judges expressed concern about the prudential exhaustion requirement proposed by the majority which, they argued, would allow a single district court judge to inject the judicial branch into international affairs.

Judge Reinhardt, writing for four judges, dissented from the majority opinion. They disagreed with the majority's conclusion that the *Sosa* Court counseled the adoption of a prudential requirement.<sup>76</sup> The dissenters also argued that while the ATS incorporates substantive international law, there was no need to also incorporate the exhaustion requirement.<sup>77</sup>

In July 2009 the Central District of California took up the case following the direction of the Ninth Circuit en banc opinion.<sup>78</sup> Applying the framework set out by the Ninth Circuit, the district court found the nexus between plaintiffs' claims and the United States to be weak, based on the fact that Rio Tinto is a foreign corporation, that the alleged torts took place on foreign soil, and that the victims were all aliens with no connection to the United States.<sup>79</sup> The court also found that plaintiffs' war crimes, crimes against humanity, and racial discrimination claims were matter of "universal concern" to the point that they outweighed the weak nexus to the United States and would therefore not be subject to the prudential exhaustion requirement.<sup>80</sup> The court found that the remaining claims were subject to the prudential exhaustion analysis.<sup>81</sup>

### C. The District Courts

District courts in the Second, Third, Fourth, Fifth, and Sixth Circuits have also considered exhaustion of remedies in ATS cases. The Southern District of New York has considered four ATS cases that included a claim for exhaustion of remedies. In two of these cases, *Wiwa v. Royal Dutch Petroleum Co.* and *Chiminya Tachiona v. Mugabe*, exhaustion of remedies was raised in the context

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73. *Id.*

74. *Id.* at 833 (Bea, J., concurring).

75. *Id.* at 834.

76. *Id.* at 841, (Reinhardt, J., dissenting).

77. *Id.* at 846.

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

79. *Id.* at 1031.

80. *Id.* at 1030-31.

81. *Id.* at 1031.

of the Torture Victim Prevention Act.<sup>82</sup> In both cases, the court found that plaintiffs' claims were not barred by the TVPA's exhaustion requirement.<sup>83</sup> In the case *Presbyterian Church of Sudan v. Talisman Energy* the court rejected defendant's argument that plaintiffs were required to exhaust remedies before bringing their ATS claims.<sup>84</sup> Finally, in *Turkman v. Ashcroft*, the Eastern District of New York concluded that plaintiffs ATS claims could only be brought under the Federal Tort Claims Act (FTCA) once the United States was substituted in as a defendant in the case.<sup>85</sup> Under the FTCA, plaintiffs were required to exhaust all available administrative remedies.<sup>86</sup>

The district courts in the remaining circuits considered many of the same issues as those faced by the Eastern and Southern districts of New York. In *Lizarbe v. Rondon* (District of Maryland) and *Chavez v. Carranza* (Western District of Tennessee), the courts rejected defendants' claims that plaintiffs' TVPA claims were defeated by failure to exhaust local remedies.<sup>87</sup> In *The Hereros v. Deutsche Afrika-Linien GMBLT & Co* (District of New Jersey) and *In re XE Services Alien Tort Litigation* (Eastern District of Virginia), the courts failed to find plaintiffs' ATS claims barred by failure to exhaust local remedies.<sup>88</sup>

Finally, in *Ruiz v. Martinez*, an unpublished decision out of the Western District of Texas, the court, like the Seventh Circuit in *Enahoro v. Abubakar*, considered defendant's torture claim under the TVPA, despite the fact that

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82. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002).

83. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at \*17 (S.D.N.Y. Feb. 28, 2002) (“[defendant] does not demonstrate that a Nigerian court would be amenable to a suit for violations of international law... Even if [defendant] had demonstrated that a Nigerian court could exercise jurisdiction over such a suit, plaintiffs have provided sufficient evidence of the inadequacy of that forum . . . . Nigerian courts remain an uncertain forum for justice.”); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 275 (S.D.N.Y. 2002) (“the plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Zimbabwean judicial system is sufficiently under the control of President Mugabe, the principal officer of ZANU-PF, so as to render it inaccessible to the plaintiffs.”).

84. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003) (“Whether or not the [ATS] generally requires exhaustion of local remedies, the Court is aware of no case, nor does Talisman cite any, in which plaintiffs were required to exhaust local remedies in the courts of an allegedly genocidal state, where doing so would be futile and would put plaintiffs in great danger.”).

85. *Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y. June 14, 2006).

86. *Id.* Plaintiffs' ATS claims were also barred for failure to exhaust administrative remedies under the FTCA in *Czetwertynski v. U.S.*, 514 F. Supp. 2d 592 (S.D.N.Y. 2007).

87. *Lizarbe v. Rondon*, 2009 WL 2487083, at \*2 (D. Md. Aug. 12, 2009) (“[Defendant] bears the burden of showing the availability and adequacy of the foreign remedies he contends Plaintiffs failed to exhaust, and he has not carried it.”); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004).

88. *The Hereros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078 (D. N.J. Apr. 10, 2007); *In re XE Services Alien Tort Litigation*, 2009 WL 3415129 (E.D. Va. Sep. 8, 2009).

plaintiff brought his allegations under the ATS.<sup>89</sup> The court ultimately concluded that plaintiff failed to exhaust his local remedies, even though he had filed some grievances against the Mexican authorities:

[N]one of these filings satisfy the exhaustion requirements of the TVPA. Until Ruiz exhausts the ‘adequate and available remedies’ of Mexico, the ATS bars his torture claim in the United States, and the Court has no jurisdiction over this issue.<sup>90</sup>

## VI.

### WHAT ARE THE CONSEQUENCES OF AN ATS EXHAUSTION REQUIREMENT?

The ATS jurisprudence in the lower courts illustrates the range of approaches for treating exhaustion under the ATS. There are three main possibilities for an exhaustion requirement in the ATS, all laid out in the Ninth Circuit’s opinion in *Sarei III*: 1) Exhaustion of remedies is never required under the ATS; 2) Exhaustion of remedies is always required under the ATS; 3) Exhaustion of remedies may be required in some ATS cases.

There is a good argument to avoid finding any kind of exhaustion requirement in the ATS. First, there is nothing in the plain language of the statute to indicate that Congress intended there be an exhaustion requirement. In drafting the TVPA, Congress had the opportunity to make any desired changes to the ATS, including extending the exhaustion requirement to the ATS. Congress chose not to do so. Indeed, in the legislative history to the TVPA, Congress indicated that the intention of the TVPA was to expand rather than contract the reach of the ATS. Leaving an exhaustion requirement out of the ATS would not only realize this legislative intent, it would also be consistent with the majority of ATS jurisprudence to date.

Reading an absolute exhaustion requirement into the ATS, as advocated by Judge Bybee, would satisfy those concerned about comity and respect for other nation’s judicial systems and the burden on the U.S. federal courts. This approach would also be consistent with international law, which may make sense given that the ATS looks to international law for its substantive elements. It seems likely that in adopting this position the courts would consider the exhaustion requirement in a manner similar to the way exhaustion is analyzed under the TVPA.

The final option is to follow Judge McKeown’s position in *Sarei III* and consider the exhaustion analysis to be a prudential requirement in ATS cases, essentially following the Court’s dicta in *Sosa*. This prudential exhaustion requirement would be employed when the nexus between the United States and the acts in question is weak, and when the acts in question are not “universal” in the international human rights law sense. While a prudential exhaustion

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89. Ruiz v. Martinez, 2007 WL 1857185 (W.D. Tex. May 17, 2007).

90. *Id.* at \*6.



requirement would allow courts to conduct a more nuanced case-by-case analysis of whether exhaustion is appropriate, this approach would also result in a wide variety of outcomes in ATS jurisprudence and a lack of predictability for future ATS litigants.

Despite these three distinct options, it seems that whether or not there is an exhaustion requirement in the ATS may be a moot point, by and large. Presuming that the requirements for ATS exhaustion would closely mirror those of the TVPA, it seems likely that most ATS cases would not be dismissed for failure to exhaust, just as most are not dismissed under the TVPA. Like TVPA cases, many ATS plaintiffs experience human rights violations in places where exhausting their local remedies would be futile, ineffective or impossible. As a result, including an exhaustion requirement would likely make little difference, as the requirement would generally be waived on futility grounds.

What is much more dangerous to plaintiffs' ability to bring claims under the ATS is the Westfall Act and the FTCA. In cases against U.S. government employees, once the United States is substituted in for the named defendant, after trial has begun, the case comes under the constraints of the FTCA in terms of the exhaustion of administrative remedies. At this point, plaintiffs often no longer have the opportunity to exhaust those remedies and the requirement proves fatal to the case.

Given the number of recent ATS cases generated by the global "War on Terror," it seems likely that the FTCA may come to impact a greater proportion of ATS cases in the future. Of course, now that the courts have spoken almost unanimously on the consequences of failing to exhaust administrative remedies before bringing an ATS case against US government employees, plaintiffs should be on notice to consider their administrative remedies before bringing their cases to court.