
THE ALIEN TORT STATUTE, FORUM SHOPPING, AND THE EXHAUSTION OF LOCAL REMEDIES NORM

I. INTRODUCTION

In *Sosa v. Alvarez-Machain*,¹ the Supreme Court answered a number of questions regarding the Alien Tort Statute² (ATS) and the legitimacy of transnational human rights litigation in U.S. federal courts. The Court's opinion, however, seems to raise more questions than it answers. After holding that the ATS authorizes federal courts to recognize a limited set of federal common law causes of action based on customary international law (CIL),³ the Court went on to demand judicial restraint in recognizing these claims. In particular, the Court made clear that the calculation of whether a norm can support a cause of action involves "an element of judgment" regarding the practical consequences that may result from making that cause of action available.⁴ Yet the Court offered only vague guidance for applying this standard. It did, however, suggest that a possible consideration could be whether the petitioner complied with the principle of international law that requires litigants to exhaust all adequate remedies in the place where the alleged misconduct occurred before asserting a claim in an international forum.⁵ The Court then went further and suggested that "perhaps" courts should require petitioners to exhaust "other forums such as international claims tribunals."⁶

Thus, *Sosa* left the question of whether the ATS should include an exhaustion requirement to percolate in the lower courts. But in referring to the international system and the international rule regarding exhaustion of local remedies, the Court may have done more than merely invite lower courts to consider reading an exhaustion requirement into the statute. By referencing two elements of international litigation, the Court highlighted an aspect of ATS litigation noticeably

¹ 542 U.S. 692 (2004).

² 28 U.S.C. § 1350 (2000). For a summary of ATS litigation and an outline of the legal controversies addressed by *Sosa*, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 881–910 (2007).

³ *Sosa*, 542 U.S. at 725. CIL, or the "law of nations," is the corpus of international law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)].

⁴ *Sosa*, 542 U.S. at 732–33 & n.21.

⁵ *Id.* at 733 n.21; see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472–73 (6th ed. 2003) (describing in detail the international legal norm that requires exhaustion of local remedies).

⁶ *Sosa*, 542 U.S. at 733 n.21.

absent from the debates, in both the courts and the academy, concerning the appropriate scope of human rights litigation in domestic courts — the possibility that human rights complainants may choose to litigate their claims before an international tribunal as well as before domestic courts. ATS litigation is a complement to the large amount of human rights litigation that takes place at the international level.⁷ And while commentators have noted that victims of human rights abuses often forum shop among international venues for favorable decisions,⁸ the possibility that ATS litigation factors into their forum selection calculus has gone unexplored.

This Note seeks to break that trend by examining what implications the interaction between domestic and international human rights litigation, and the forum shopping phenomenon, have for the exhaustion of local remedies debate. Part II begins by outlining the global human rights litigation system — which includes ATS litigation, the international petition system, and the tendency of litigants to forum shop. Part III then changes gears and attempts to demonstrate that the text, legislative history, and context of the ATS do not speak clearly on the issue of exhaustion of local remedies. Finally, Part IV argues that, given this ambiguity, courts should fashion a federal common law rule that incorporates the exhaustion of local remedies norm into the ATS.⁹ Focusing on forum shopping and the relationship between the ATS and the broader international human rights regime, this section seeks to show that both opponents and proponents of ATS litigation should favor an exhaustion of local remedies requirement.

⁷ The international community has developed an intricate human rights petition system, composed of several international tribunals, which grants individuals the opportunity to litigate their claims of human rights abuse. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 289 (1999).

⁸ See, e.g., *id.* at 308–41.

⁹ This Note accepts as a premise the claim by both international and domestic commentators that the exhaustion of local remedies rule is a well-established and well-defined norm of international law. See RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. d (noting the rule that international remedies may be pursued “only after the individual claiming to be a victim of a human rights violation has exhausted available remedies under the domestic law of the accused state,” or has proven that resort to such remedies would be “futile”); CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 3 (2d ed. 2003) (“[T]he celebrated ‘rule of local remedies’ is accepted as a customary rule of international law [and] needs no proof today, as its basic existence and validity has not been questioned.”). In addition, this Note does not attempt to define with precision the exhaustion principle — for example, by outlining what remedies should be deemed inadequate or futile. Instead, this Note suggests that federal courts incorporate into the ATS an exhaustion requirement similar to that which exists in international law while taking account of the policies underlying exhaustion explained in Part IV. This approach, like the approach taken in other domestic contexts, would leave courts with the task of developing a federal common law doctrine of exhaustion on a case-by-case basis. *Cf.*, e.g., *McKart v. United States*, 395 U.S. 185, 194–95 (1969) (discussing the federal common law rule requiring exhaustion of administrative remedies); *Jean v. Dorélien*, 431 F.3d 776, 781–83 (11th Cir. 2005) (discussing the exhaustion of local remedies rule incorporated into the Torture Victim Protection Act).

II. GLOBAL HUMAN RIGHTS LITIGATION

This Part summarizes the nature of human rights litigation at both the ATS and international levels. However, rather than attempting to provide a comprehensive picture of this litigation, this Part aims only to illuminate a few distinct elements that, as Parts III and IV explain, have relevance for the exhaustion debate. In particular, this Part has two goals. The first is to demonstrate that the *Sosa* Court took notice of the exhaustion debate but declined to insert an exhaustion requirement into the ATS. The second is to explain the forum shopping phenomenon and the similarities between ATS litigation and the human rights litigation taking place under the international human rights petition system.

A. The Nature of ATS Litigation

For over 170 years, the ATS lay dormant among the provisions of the United States Code, providing jurisdiction in only two cases before 1980.¹⁰ Enacted as part of the First Judiciary Act of 1789,¹¹ the ATS, which grants federal district courts jurisdiction over “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,”¹² has become the fount of modern human rights litigation in U.S. courts.

Ever since *Filártiga v. Peña-Irala*,¹³ the case in which the Second Circuit first opened its doors to transnational human rights litigation, foreign victims have found U.S. courthouses a welcoming home for their claims of human rights abuse.¹⁴ While these petitioners face a number of practical hurdles to obtaining effective redress — for instance, the difficulty of enforcing a favorable judgment against a foreign government official¹⁵ — U.S. courts have at least provided a receptive audience. In the years between *Filártiga* and *Sosa*, ATS courts played host to claims arising out of the atrocities that occurred in Bosnia,¹⁶ the arbitrary detentions and torture committed by the Philippine

¹⁰ Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 357 n.203 (1997).

¹¹ Bradley, Goldsmith & Moore, *supra* note 2, at 887.

¹² 28 U.S.C. § 1350 (2000).

¹³ 630 F.2d 876 (2d Cir. 1980).

¹⁴ See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347, 2366 (1991) (describing *Filártiga* as the “*Brown v. Board of Education*” of “transnational public law litigation”).

¹⁵ See Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 *COLUM. L. REV.* 457, 459 n.16 (2007) (“Most individual ATS defendants are judgment proof . . . and attempts to sue them often run into jurisprudential obstacles such as sovereign immunity, the act of state doctrine, or nonjusticiability rules.”).

¹⁶ See *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

government,¹⁷ and the Guatemalan military's tactics of torture, detention, and summary execution.¹⁸ A few courts went further and suggested that domestic corporations could be held liable under the ATS for aiding and abetting the human rights abuses of foreign governments.¹⁹ However, nearly two decades after *Filártiga* was decided, a few scholars began questioning the legitimacy of ATS litigation,²⁰ sparking controversy over the proper interpretation of the ATS. Specifically, commentators and courts debated whether the First Congress intended the ATS as a mere jurisdictional grant, or whether it also intended to give a federal cause of action to foreign litigants who claimed violations of the "law of nations" or CIL.²¹

The Supreme Court unanimously resolved this debate in *Sosa*, holding that the ATS is a purely jurisdictional statute creating no new causes of action.²² However, the decision's impact on ATS litigation is rendered somewhat unclear by the Court's subsequent conclusion that the ATS's jurisdictional grant is best read as giving federal courts the power to recognize causes of action for a limited set of CIL violations.²³

Enter the issue of exhaustion. After emphasizing that courts should exercise "judicial caution"²⁴ when recognizing a claim based on the present-day law of nations, the Court narrowed the scope of CIL applicable in ATS cases by holding that all ATS claims must rest on a norm of CIL "accepted by the civilized world" and "defined with a specificity comparable to the features of the eighteenth-century paradigms"²⁵ recognized as cognizable under the ATS. More important for present purposes, the Court also introduced a prudential factor into the analysis, stating that recognizing a particular cause of action involves "an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."²⁶ With-

¹⁷ See *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

¹⁸ See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

¹⁹ See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

²⁰ See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

²¹ Compare *id.* (arguing for the jurisdictional construction), with *Kadic*, 70 F.3d at 241 (accepting the federal cause of action construction), and *Xuncax*, 886 F. Supp. at 179 (same).

²² See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–24 (2004).

²³ *Id.* at 724–31.

²⁴ *Id.* at 725. Despite *Sosa*'s call for caution, circuit courts appear to have retained their willingness to recognize novel causes of action. See, e.g., *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258, 260 (2d Cir. 2007) (per curiam) (holding that jurisdiction exists under the ATS to hear a novel claim of aiding and abetting liability against dozens of corporations for their role in South African apartheid).

²⁵ *Sosa*, 542 U.S. at 725. This Note refers to *Sosa*'s narrowing elements as the "acceptance" and "specificity" requirements.

²⁶ *Id.* at 732–33.

out defining what prudential considerations lower courts should apply in all cases, the Court made explicit mention of exhaustion:

[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 forums such as international claims tribunals. *We would certainly consider this requirement in an appropriate case.*²⁷

Thus, while the Supreme Court noted the question of exhaustion in *Sosa*, it declined to resolve the issue.

Left free to decide the question for themselves, lower courts have generally shown aversion to the idea of an exhaustion requirement.²⁸ First, courts have ignored *Sosa's* suggestion that complainants could be required to exhaust their international litigation options, and have focused exclusively on whether exhaustion of local remedies should be required.²⁹ Second, the hostility most courts have shown toward this narrower conception of exhaustion seems in part driven by their per-

²⁷ *Id.* at 733 n.21 (emphasis added) (citations omitted).

²⁸ Many courts have simply sustained jurisdiction under the ATS without addressing the question of exhaustion. *See, e.g.,* *Alperin v. Vatican Bank*, 410 F.3d 532, 544–58 (9th Cir. 2005). Others have expressly rejected imposing an exhaustion requirement. For example, the Ninth Circuit recently held that it would be “inappropriate, given the lack of clear direction from Congress . . . and with only an aside in a footnote . . . from the Supreme Court, now to superimpose on our circuit’s existing [ATS] jurisprudence an exhaustion requirement.” *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1223 (9th Cir. 2007). The Ninth Circuit has agreed, however, to vacate its judgment and rehear the case en banc. *Sarei v. Rio Tinto, PLC*, 499 F.3d 923 (9th Cir. 2007). *See also* *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) (“Plaintiffs asserting claims under the [ATS] are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred.”).

²⁹ This Note also sets aside the question raised in *Sosa* of whether litigants should be forced to exhaust their international remedies before bringing an ATS claim, and instead focuses on whether courts should incorporate an exhaustion of local remedies requirement into the ATS. However, it is worth briefly discussing whether ATS courts should require petitioners to exhaust their international litigation options. A rule requiring exhaustion of international remedies could take one of two forms: the rule could require exhaustion of both domestic and international remedies, or, perhaps more plausibly, could require exhaustion of international remedies in situations in which domestic remedies are unavailable or inadequate. The problem with either rule may be that international remedies could also be considered inadequate for purposes of exhaustion. For example, the treaty bodies that monitor the United Nations petition system are only capable of issuing nonbinding recommendations, *see* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1899 (2003), a feature that may render them inadequate. Conversely, the bodies that oversee the regional human rights systems, such as the European and Inter-American courts, do issue binding decisions, *see* Theodor Meron, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT’L L. 213, 217 n.21 (1990), but the barriers of access to such courts — for example, the immense caseload of the European Court that often prevents expeditious review, *see* Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN. ST. INT’L L. REV. 101 (2002) — may also make the remedy inadequate in a given case. For a general discussion of the international petition system, *see infra* section II.B.

ception that the exhaustion debate is moot in most ATS cases since local remedies will often be inadequate.³⁰ Thus, before moving on to outline the international human rights petition system, it is worth noting that in a number of past ATS cases there was at least an arguable question of whether exhaustion of local remedies would have precluded jurisdiction.³¹ Also, recent practice under the exhaustion of local remedies requirement of the Torture Victim Protection Act³² (TVPA) — which grants a federal cause of action against anyone who, acting under actual or apparent authority of a foreign nation, subjects an individual to torture or extrajudicial killing³³ — supports the view that this exhaustion requirement will have a practical effect. Not only has exhaustion in the TVPA context acted as a meaningful jurisdictional bar,³⁴ but it has caused complainants to avoid its invocation by

³⁰ See *Rafael Saravia*, 348 F. Supp. 2d at 1158 (“As plaintiff’s claims for extrajudicial killing and crimes against humanity are brought under the [ATS] and customary international law, plaintiff need not show that plaintiff has exhausted remedies in El Salvador, which exhaustion has been determined to be futile.”); see also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003); cf. *Emeka Duruigbo, Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT’L L.J. 1245, 1251 & n.29 (2006) (noting the “tendency [of scholars] not to acknowledge the exhaustion doctrine as imposing an arduous task on plaintiffs”).

³¹ See, e.g., *Sosa*, 542 U.S. at 697–99 (case based on conduct that occurred in Mexico, a forum that might have offered an adequate alternative remedy); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 432 (1989) (same with regard to Argentina); *Sarei*, 487 F.3d at 1245–46 (Bybee, J., dissenting) (Papua New Guinea); *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 508–09, 523–26 (S.D.N.Y. 2006) (Turkey); *Doe I v. Israel*, 400 F. Supp. 2d 86, 97 (D.D.C. 2005) (Israel); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542–46 (S.D.N.Y. 2004), *vacated sub nom. Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (South Africa); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473, 476–79 (2d Cir. 2002) (Ecuador); *Jama v. INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998) (United States).

³² Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

³³ See *id.* § 2(a), 106 Stat. at 73.

³⁴ See, e.g., *Ruiz v. Martinez*, 2007 U.S. Dist. LEXIS 49101, at *24–25 (W.D. Tex. May 17, 2007) (“Until [plaintiff] exhausts the ‘adequate and available remedies’ of Mexico, the [TVPA] bars his torture claim in the United States, and the Court has no jurisdiction over this issue.” (quoting TVPA § 2(b), 106 Stat. at 73)). Before excusing exhaustion, the TVPA’s legislative history suggests that courts should require defendants to show that local remedies are “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.” S. REP. NO. 102-249, at 9–10 (1991). Courts interpreting this standard, however, have found it to impose a heavy burden of proof on parties seeking dismissal. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (stating that that the exhaustion requirement “was not intended to create a prohibitively stringent condition precedent to recovery under the statute”). Thus, in practice, courts have generally not held that local remedies were inadequate, but rather, in most instances, have relied on the failure of the party invoking the doctrine to provide any evidence of adequacy. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) (“The [defendant] has pointed to no evidence that it put forth even to raise the issue that Hilao had unexhausted remedies available elsewhere, let alone evidence sufficient to carry its burden.”).

artfully pleading their claims of torture under the less demanding ATS.³⁵

B. *The Nature of the Human Rights Petition System*

The ATS is not the only avenue through which victims can seek redress. Rather, many individuals have access to the international human rights petition system, in which a number of international courts and tribunals stand ready to adjudicate claims of abuse.³⁶ Emblematic of human rights law's trend away from state-to-state political disputes — in which the claims of individuals reached the international stage only by way of a state trumpeting the complaints of its citizens³⁷ — this system offers victims the ability to vindicate their rights against abusive states. This section begins by explaining the nature of the petition system and how it has led to the forum shopping phenomenon. It then concludes the background discussion by highlighting some of the similarities between ATS litigation and litigation at the tribunal level — setting the stage for Part IV, which argues that a model explaining the forum shopping of human rights petitioners that accounts for these similarities suggests courts should require exhaustion of local remedies as a prerequisite for bringing a claim under the ATS.

1. *The International Petition System.*³⁸ — Human rights law is not defined by any one, comprehensive treaty. Rather, it exists within a complex network of CIL and multinational, regional, and bilateral treaties, which often protect overlapping rights. Complicating matters

³⁵ See David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 277 (1996); see also Enahoro v. Abubakar, 408 F.3d 877, 884–86 (7th Cir. 2005) (holding that the petitioners' ATS claims of torture and extrajudicial killing were in fact TVPA claims and that the latter's exhaustion requirement applied).

³⁶ In order for an individual to have access to the international petition system, he or she must be subject to the jurisdiction of a state that either is a party to a regional human rights system or has recognized the power of one or more United Nations treaty bodies to receive individual complaints. See Helfer, *supra* note 7, at 299–300 & nn.41–42. While states have not universally subjected themselves to scrutiny under this system, participation is high. For example, as of March 5, 2008, 111 countries had authorized the United Nations Human Rights Committee to receive individual communications alleging abuse. See Office of the United Nations High Comm'r for Human Rights, Ratifications and Reservations, Optional Protocol to the International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/ratification/5.htm> (last visited May 12, 2008); see also Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 19, 1999, 999 U.N.T.S. 302 [hereinafter *Optional Protocol to the ICCPR*].

³⁷ See Bradley & Goldsmith, *supra* note 20, at 831–32.

³⁸ For an overview of this system, see Helfer, *supra* note 7, at 289–301. See also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (providing an overview of the European petition system and the petition system established by the Optional Protocol to the ICCPR, *supra* note 36).

is the fact that there is no supreme arbiter who decides the content of the norms contained within these texts; no mechanism is in place to ensure that this network of rights operates harmoniously. Instead, each individual treaty is superintended by an international entity — a court, tribunal, or treaty body (together, the “international tribunals”) — whose function is to monitor each state’s compliance with its international obligations.³⁹

It is this oversight function that works to endow individual victims of human rights abuse with an international forum in which to litigate their claims. In order to ensure that their supervising tribunals can effectively monitor state compliance, human rights treaties often establish individual petition procedures.⁴⁰ While the procedure varies among treaties, the petition mechanism generally allows a tribunal to hear allegations from victims that a state — which has both ratified the treaty and recognized the tribunal’s jurisdiction to receive individual petitions — has violated one or more of the victims’ treaty-protected rights.⁴¹ The tribunal receives written submissions from the individual petitioner and the state, and — after deciding whether the petitioner has satisfied the admissibility requirements including exhaustion of local remedies⁴² — attempts to resolve the matter in a judicial or quasi-judicial fashion.⁴³ And while not all tribunals issue legally binding decisions, “many [s]tates view [even nonbinding decisions] as highly persuasive and have implemented the recommendations they contain.”⁴⁴

³⁹ Helfer, *supra* note 7, at 298. Examples include the European Court of Human Rights, the Inter-American Court of Human Rights, and various United Nations treaty bodies, including the Human Rights Committee. *Id.* at 288.

⁴⁰ In the case of regional human rights systems, these procedures are mandatory. *See id.* at 300 n.41. In contrast, the petition procedures established by United Nations human rights treaties are optional for states to ratify. *See id.* at 300 n.42.

⁴¹ *See, e.g.*, Optional Protocol to the ICCPR, *supra* note 36, art. 1 (“A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”).

⁴² *See, e.g., id.* art. 2 (“[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”).

⁴³ *See Helfer & Slaughter, supra* note 38, at 341 & n.296 (describing the Human Rights Committee as taking on “quasi-judicial functions” when considering individual petitions).

⁴⁴ Helfer, *supra* note 7, at 300–01; *see also* Helfer & Slaughter, *supra* note 38, at 344–45 (discussing state compliance with the nonbinding decisions issued by the United Nations Human Rights Committee). The level of state compliance varies between petition systems. The European Court, for example, issues binding decisions that have traditionally been adhered to by states subject to its jurisdiction. *See id.* at 296 (noting the success of the European petition system in securing state compliance). In contrast, the Inter-American Court “has had trouble securing compliance with its decisions.” Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 41 (2005).

2. “*Forum Shopping for Human Rights.*” — This intricate web of tribunals and treaties has enabled some international human rights complainants to shop among human rights forums in order to maximize their chances at a favorable decision. According to Professor Laurence Helfer, who has termed this phenomenon “forum shopping for human rights,”⁴⁵ individuals are increasingly engaging in this practice.⁴⁶ To explain how forum shopping at the tribunal level can occur, Professor Helfer first notes that it is not uncommon for multiple treaties to protect many of the same rights.⁴⁷ But despite some similarities in their texts, treaties may provide varying levels of protection on the whole for individuals.⁴⁸ At the same time, identical treaty terms often receive different interpretations by their governing tribunals.⁴⁹ Thus, litigants with the ability to file their claims in multiple tribunals can petition the body that provides the greatest prospect of success.⁵⁰ When making this initial “choice of forum” decision, petitioners enjoy considerable freedom to select the tribunal in which to litigate their claims;⁵¹ claimants may also have the ability to submit their claims either “simultaneously” or “successively” to more than one tribunal.⁵²

⁴⁵ Helfer, *supra* note 7, at 285.

⁴⁶ *Id.* at 290.

⁴⁷ Compare International Covenant on Civil and Political Rights art. 7, adopted Dec. 19, 1966, 99 U.N.T.S. 171, 6 I.L.M. 368 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”) [hereinafter ICCPR], with European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

⁴⁸ See Helfer, *supra* note 7, at 297 (comparing the ICCPR, which protects “a broad catalogue of rights and freedoms,” with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, which is subject-specific and addresses only a narrow subset of human rights issues).

⁴⁹ Compare *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 32, 44–45 (1989) (holding that keeping capital defendants for an extended stay on death row — that is, the “death row phenomenon” — violates the European Convention’s prohibition on inhuman or degrading treatment or punishment), with *Pratt v. Jamaica*, U.N. Doc. CCPR/C/35/D/210/1986 & CCPR/C/35/D/225/1987 (U.N. Human Rights Comm., April 7, 1989) (holding that an extended stay on death row does not violate the ICCPR’s prohibition on inhuman or degrading treatment).

⁵⁰ There are, however, a few practical constraints on a petitioner’s ability to choose among forums. For example, petitioners must consider the “remedial and procedural” differences between tribunals — like the ability to issue legally binding rulings. See Helfer, *supra* note 7, at 303. Also, both treaty drafters and human rights tribunals have attempted to suppress forum shopping by specifying the conditions under which multiple petitions will be heard. However, the tribunals remain “divided over when an individual may cite differing levels of rights protection between two human rights treaties as a justification for avoiding a forum shopping bar.” *Id.* at 308.

⁵¹ See *id.* at 305.

⁵² *Id.* at 305–07. The ability to file simultaneous and successive petitions is constrained, to be sure. For example, with regard to simultaneous petitions, the ICCPR’s First Optional Protocol states that the Human Rights Committee “shall not consider any communication from an individual unless it has ascertained that: . . . The same matter is *not being examined* under another procedure of international investigation or settlement.” Optional Protocol to the ICCPR, *supra* note 36, art. 5(2)(a) (emphasis added). However, empirical evidence suggests that petitioners have been

Human rights commentators have not greeted this development with open arms. Rather, they tend to view petitioners' ability to seek duplicative review of their human rights claims as a facilitator for divergent interpretations of human rights norms⁵³ and a threat to the legitimacy of the tribunals.⁵⁴ Professor Helfer, however, is less critical. While noting that simultaneous or successive litigation of human rights claims can create both efficiency and finality concerns,⁵⁵ Professor Helfer suggests that a limited form of forum shopping provides benefits for both individual victims and the overall system of international human rights law. For example, from the perspective of the claimant, successive or simultaneous review by multiple tribunals may be "the only way that aggrieved individuals can receive a complete review of their claims under all applicable human rights treaties."⁵⁶ From an institutional perspective, forum shopping "encourages jurists to engage in a dialogue to elucidate and harmonize"⁵⁷ human rights norms — an effect that is particularly important because this dialogue has not developed through litigation of claims of similar issues by different petitioners.⁵⁸ These arguments should be kept in mind for Part IV as they play a distinct role in determining what forum shopping means for the exhaustion debate.

3. *Interaction Between ATS and International Human Rights Litigation.* — The ATS provides jurisdiction in only those cases in which the plaintiff is not a U.S. citizen,⁵⁹ and ATS defendants tend to be either domestic or foreign corporations or foreign government officials. Moreover, ATS suits nearly always involve claims growing from human rights abuses outside the United States.⁶⁰ Thus, like an interna-

able to surmount the legal obstacles to filing multiple petitions. See Helfer, *supra* note 7, at 326–40 (discussing three instances in which simultaneous and successive petitions led to the inconsistent development of human rights norms).

⁵³ See THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 236, 241 (1986).

⁵⁴ See YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 154–55, 161–64, 170–73 (2003) (discussing the arguments made against multiple proceedings at the international tribunal level); Marc-André Eissen, *The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence*, 22 BUFF. L. REV. 181, 189, 202 n.70 (1972).

⁵⁵ Helfer, *supra* note 7, at 346 ("All litigants seeking relief in a judicial or quasi-judicial forum would naturally prefer a rule that multiplies the chances to receive a favorable ruling. Yet no system of adjudication has deemed that preference, standing alone, as sufficient to justify endless relitigation of claims.")

⁵⁶ *Id.* at 292–93; see also *id.* at 346–49.

⁵⁷ *Id.* at 293; see also *id.* at 349–53.

⁵⁸ *Id.* at 350–53.

⁵⁹ See 28 U.S.C. § 1350 (2000) (granting jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations" (emphasis added)).

⁶⁰ See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 173–82 (2004).

tional tribunal, U.S. courts stand ready to apply the substantive principles of international human rights law to complaints of abuse from around the world. And like an international tribunal, U.S. courts in ATS cases operate outside the jurisdiction of the state whose practices are being scrutinized. Thus, U.S. domestic courts together with the international human rights petition system form the array of litigation venues available to many human rights complainants.

To be sure, domestic courts differ from the international tribunals in a number of respects. From the perspective of foreign governments, the most notable difference is that the jurisdiction of international tribunals is legitimized by state consent.⁶¹ And while states have voluntarily opted into the international human rights petition system, no nation has agreed to let a U.S. court scrutinize all of its human rights practices.⁶² For victims, differences in jurisdiction and procedure often make U.S. courts more appealing than their international counterparts.⁶³ Thus, while *Sosa's* acceptance and specificity test narrows the set of CIL claims cognizable under the ATS, and while states may object to being haled into a U.S. court, the fact remains that ATS litigation is viewed by some petitioners as a complement to, and, in some instances, a substitute for, litigation at the tribunal level. In other words, victims who have access to the international petition system are

⁶¹ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 184 (2004). One could argue that the doctrine of universal jurisdiction — a controversial principle of international law that permits a state with no connection to the underlying human rights abuse to exercise jurisdiction based solely on the nature of the offense — grants ATS proceedings their legitimacy. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring) (arguing that whether international law recognizes universal criminal jurisdiction over the CIL norm at issue should be relevant in the decision to accept that norm as cognizable under the ATS). The *Sosa* Court, however, implicitly rejected the idea that ATS courts are exercising universal jurisdiction. See David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 48 n.251 (2006). Moreover, “[u]nlike all other forms of international jurisdiction, the universal kind is not premised on notions of sovereignty or state consent.” Kontorovich, *supra*, at 184. On this latter point, however, it may be that to the extent universal jurisdiction is a principle in CIL, there is at least implicit state consent.

⁶² Foreign states have supported ATS litigation in a small number of cases. See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 498 n.11 (9th Cir. 1992) (noting that the Philippine government did not object to ATS litigation against its former president, Ferdinand Marcos).

⁶³ See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 10–17 (2002). For example, the rules applicable in U.S. litigation concerning damages, attorney's fees, discovery, and costs all work to make ATS litigation an attractive option. *Id.* at 14–16. And while few plaintiffs actually receive compensation, the value of the ATS remedy to victims goes beyond financial gain. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 233–38 (1996) (“[P]laintiffs in these cases are concerned about much more than money. They take tremendous personal satisfaction from filing a lawsuit, forcing the defendant to answer in court or to abandon the United States, and creating an official record of the human rights abuses inflicted on them or their families.”).

free to file their case in a U.S. court or an international tribunal so long as their claims meet the respective jurisdictional and procedural requirements.

The notion that U.S. courts applying the ATS are a de facto part of the international architecture in which victims of human rights abuses seek redress should perhaps inform the development of legal doctrines at both the international and domestic level. There remains, however, little discussion of the relationship between these two intertwined systems. Part IV of this Note attempts to break that mold, and seeks to use the interaction between ATS and international human rights litigation, and the forum shopping phenomenon, to inform the exhaustion debate introduced in *Sosa*. First, however, this Note asks whether the ATS clearly addresses the issue of exhaustion, for if it does, policy considerations are inapposite.

III. EXHAUSTION AS A MATTER OF LAW

The Court has made clear that congressional intent is of “paramount importance”⁶⁴ in determining whether a statute requires exhaustion of alternative remedies. Only when Congress has not made its intentions explicit may a court exercise discretion.⁶⁵ This Part begins an attempt to resolve the exhaustion debate by asking whether domestic law *requires* that exhaustion be incorporated into the ATS, or, alternatively, whether Congress has mandated that no such requirement exist.

In analogous contexts, the Court has determined Congress’s intent concerning exhaustion under a particular statute by examining the statute’s language, legislative history, and relationship to other relevant congressional activity.⁶⁶ The ATS, unfortunately, is far from a model of clarity, and ever since *Filártiga*, courts have struggled with its interpretation. In its current form, the statute states only that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,”⁶⁷ and no one has argued that the ATS *explicitly* re-

⁶⁴ *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982); *see also id.* at 502 & n.4, 516.

⁶⁵ *See McGee v. United States*, 402 U.S. 479, 483 & n.6 (1971); *see also* Bradley, Goldsmith & Moore, *supra* note 2, at 921 (noting that “statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law”).

⁶⁶ *See, e.g., Patsy*, 457 U.S. at 502 & n.4 (“[I]n deciding whether we should . . . require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.”).

⁶⁷ 28 U.S.C. § 1350 (2000).

quires exhaustion.⁶⁸ As for legislative history, “there is no record even of debate on the section.”⁶⁹

Likewise, congressional activity, both recent and at the time the ATS was enacted, provides few, if any, answers. Five years after enacting the ATS, the United States entered into the Jay Treaty with Great Britain, which created an international arbitration procedure for pre-Revolutionary War debts claimed by British creditors against American debtors.⁷⁰ The arbitration procedure could only be invoked, however, if “by the ordinary course of judicial proceedings, the British creditors [could not] obtain, and actually have and receive full and adequate compensation.”⁷¹ In deciding that it would not be appropriate to recognize an exhaustion of local remedies requirement for the ATS, the Ninth Circuit, in *Sarei v. Rio Tinto, PLC*,⁷² relied on the Jay Treaty’s reference to “ordinary . . . judicial proceedings” to conclude that the United States had an early understanding that exhaustion of local remedies could be required as a condition precedent to interna-

⁶⁸ See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 647 (2002) (stating that the ATS is “notable for the many important issues it does not address,” including whether claims brought under it “are subject to various restrictions such as . . . exhaustion requirements”). Some have suggested that while the ATS may not explicitly speak to the issue of exhaustion, its grant of jurisdiction over torts in violation of the “law of nations” implicitly incorporates the CIL norm of exhaustion. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1232–35 (9th Cir.) (Bybee, J., dissenting), *vacated & reh’g granted*, 499 F.3d 923 (9th Cir. 2007). The argument rests on the notion that exhaustion is a substantive element of any CIL cause of action, and thus is necessarily a condition precedent to any ATS case. See *id.* at 1234 (discussing the argument that exhaustion of local remedies is substantive). Among international legal theorists, however, controversy remains over the precise nature of the exhaustion of local remedies norm. See Karl Doehring, *Exhaustion of Local Remedies*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 238, 240 (Rudolf L. Bindschelder et al. eds., 1997) (“As long as the local remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question of whether the rule forms a part of procedural law or whether it operates as a part of substantive law.”). Thus, it seems as though one can at most conclude that the phrase “law of nations” yields no conclusive answer for the exhaustion debate. However, exhaustion might be incorporated even if it is procedural, as a few scholars have noted that precedent exists for the incorporation of procedural rules together with substantive international doctrine into U.S. law. See Bradley, Goldsmith & Moore, *supra* note 2, at 925 n.294. Professors Bradley, Goldsmith, and Moore argue that in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Court held that a statute that allowed for trial of offenses under international law implicitly incorporated a number of international procedural limitations, and thus “[t]he ATS’s authorization of civil claims for certain international law violations should also be read as incorporating international law limitations on such claims.”

⁶⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004). There is, however, general agreement that one purpose of the ATS was to keep the nation out of international conflict by ensuring that the United States complied with its international legal obligation to provide a remedy for certain violations of the law of nations. See Bradley & Goldsmith, *supra* note 10, at 360–61. An exhaustion requirement — which would limit the number of ATS cases and thus domestic courts’ involvement in the nation’s foreign relations, see *infra* section III.A.1 — seems at least consistent with the purpose of avoiding international conflict.

⁷⁰ See Treaty of Amity, Commerce and Navigation, U.S.–Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

⁷¹ *Id.* art. VI.

⁷² 487 F.3d 1193.

tional litigation. Thus, the court suggested that the treaty's explicit exhaustion requirement provided support for the claim that Congress knew of exhaustion and purposefully decided to leave it out of the ATS.⁷³ But the legal context in which the ATS was enacted suggests that the two situations are not analogous. Scholars agree that the First Congress intended the ATS to ensure the United States complied with its international legal obligations by providing a forum to foreigners injured in the United States that would allow them to seek redress for a limited set of eighteenth-century international law violations.⁷⁴ Thus, there would have been *no need* for an exhaustion requirement as U.S. courts were the only judicial venue available to these individuals.⁷⁵ For Jay Treaty claims, however, there were two available forums: "ordinary" judicial proceedings and the international arbitration procedure established by the document. It makes sense that Congress would refer to exhaustion in the latter and not the former, and thus the Jay Treaty appears to have little relevance for the current debate.

An analysis of more recent congressional activity provides similarly unhelpful results. For example, the TVPA, as noted earlier, contains an explicit exhaustion of local remedies requirement: "A court shall decline to hear a claim under [the TVPA] if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."⁷⁶ It is not clear, however, what inferences can be drawn from this explicit exhaustion provision. The obvious inference is that the modern Congress knows how to mandate exhaustion if it so desires, and it could have easily amended the ATS to accord with the requirements of the TVPA.⁷⁷ Conversely, the interaction between the TVPA and the ATS is somewhat anomalous if only the former requires exhaustion. By passing the TVPA and subjecting claims of state-sponsored torture and extrajudicial killing to an exhaustion of local remedies requirement, Congress would have

⁷³ See *id.* at 1215 (arguing that the Jay Treaty "suggests that the First Congress was aware of the principle of exhaustion" and that the absence of explicit language in the ATS may have been purposeful).

⁷⁴ See Bradley & Goldsmith, *supra* note 10, at 360-61; see also *Sosa*, 542 U.S. at 724 (holding that the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time"); *id.* at 720 (specifying the eighteenth-century paradigms as offenses against ambassadors, violations of safe conduct, and actions arising out of prize captures and piracy).

⁷⁵ See *Sosa*, 542 U.S. at 715-20.

⁷⁶ Pub. L. No. 102-256, § 2(b), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

⁷⁷ Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (alteration in original) (internal quotation marks omitted))).

made it *more* difficult to bring these claims if it understood the ATS as lacking a similar requirement.⁷⁸ Given that torture and extrajudicial killing are *ius cogens* norms — principles of international law so fundamental that no state may violate them or derogate from them through treaty⁷⁹ — subjecting these causes of action to harsher treatment seems, if nothing else, contrary to common sense.⁸⁰ Thus, while the TVPA can be used by both sides to support their position, Congress’s understanding of the ATS when it passed the Act seems uncertain. The question then becomes whether courts should craft a rule of federal common law that incorporates the CIL norm of exhaustion into the ATS.⁸¹

IV. EXHAUSTION AS A MATTER OF JUDICIAL DISCRETION

After concluding that the text, history, and context of the ATS are ambiguous, and that Congress has neither mandated that ATS complainants exhaust their local remedies nor precluded courts from imposing such a requirement, one must ask whether ATS courts should require exhaustion as a matter of judicial discretion. One purpose of this Note, however, is to use this policy debate as a jumping-off point to discuss the interaction between ATS litigation and human rights litigation within the broader international system. Part II made two observations about the current structure of the global human rights litigation system. First, international law has created a vast, multi-

⁷⁸ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1228 (9th Cir. 2007) (Bybee, J., dissenting), *vacated & reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *Enahoro v. Abubakar*, 408 F.3d 877, 889–90 (7th Cir. 2005) (Cudahy, J., dissenting).

⁷⁹ See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; RESTATEMENT (THIRD), *supra* note 3, § 102 cmt. k.

⁸⁰ One could respond by arguing that the availability of these causes of action is narrowed only if the TVPA preempts aliens from bringing their claims of torture and extrajudicial killing under the ATS — a question yet to be definitively resolved. *But see Enahoro*, 408 F.3d at 884–86 (holding that the TVPA preempts aliens from bringing claims alleging torture under the ATS, arguing that the TVPA “occup[ies] the field” and finding it “hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations”). But if the TVPA does not preempt the ATS, another anomaly becomes apparent: because the ATS only grants a cause of action to aliens, whereas the TVPA grants a cause of action to both U.S. citizens and aliens, allowing aliens to circumvent the TVPA’s exhaustion requirement by pleading under the ATS would unequally burden the claims of U.S. citizens who have suffered torture or the extrajudicial killing of their relatives abroad.

⁸¹ It is possible to argue that lower courts have the authority to craft a federal common law rule of exhaustion based on *Sosa*’s command to consider “the practical consequences of making [a certain cause of action] available to litigants” when determining if “a norm is sufficiently definite,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004). While considering whether to adopt an exhaustion requirement based on policy rationales is consistent with this directive, the footnote in *Sosa* expressly referencing exhaustion may undermine this position as the Court made clear that exhaustion, if required, would be a “principle limiting the availability of relief” apart from the “clear definition” requirement. *Id.* at 733 n.21.

faceted petition system in which individual victims can litigate their claims of abuse. This petition system, while playing a vital role in both elucidating the human rights norms embodied in international law and giving these norms practical effect, has also created the potential for claimants to shop for favorable decisions. Second, the ATS has become a component of this broader architecture for redressing human rights violations, and thus the concept of forum shopping should be extended to include this additional venue. This Part goes one step further and attempts to determine what role, if any, these observations should play in the exhaustion debate.

A. *Forum Shopping and Exhaustion*

The fact that a subset of potential ATS complainants can choose between litigating in at least one international tribunal and bringing an ATS suit⁸² has direct implications for the exhaustion debate. As explained earlier, failure to exhaust adequate local remedies precludes complainants from petitioning an international tribunal for redress. Thus, as the ATS currently exists, petitioners seeking to litigate their claims of abuse outside of their domestic jurisdiction can either exhaust their domestic remedies in anticipation of litigating at the tribunal level, or proceed directly to a U.S. court, forgoing the domestic remedy option.⁸³ All else being equal then, ATS litigation stands as a “cheaper” mode of litigation for these victims, making it more likely that they will file their claims in the United States.⁸⁴ Those critical of ATS litigation will no doubt find this effect troubling. Yet proponents of ATS litigation should also hesitate before championing this approach, as declining to impose a unified exhaustion of local remedies requirement — that is, a requirement of exhaustion akin to the one that exists in international law — imposes a number of externalities on the international human rights system.

⁸² See *supra* pp. 2116–17 and note 36 (explaining how a petitioner can gain access to the international human rights petition system, and noting the requirement that the petitioner be subject to the jurisdiction of a state that has recognized the power of an international tribunal to receive individual complaints). Conversely, if the plaintiff does not have the option of filing a petition to an international tribunal, the plaintiff, by definition, lacks the ability to forum shop at the international level. Thus, the implications for the exhaustion debate drawn from the forum shopping phenomenon are not relevant to this person’s case.

⁸³ Presumably, petitioners can elect to litigate domestically and then pursue ATS litigation if their domestic claims fail. For example, in *Filártiga* itself, there is some evidence that the complainants attempted to exhaust their local remedies. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (noting that Dr. Filártiga commenced a criminal action in Paraguayan courts that was “apparently still pending” at the time the Second Circuit rendered its decision).

⁸⁴ Making ATS litigation even more likely are the substantive and procedural differences that make U.S. courts a more attractive venue for human rights complainants, see *supra* note 63, the fact that U.S. court decisions are binding on defendants, and the delay associated with exhausting local remedies.

1. *Respect for State Sovereignty.* — By allowing foreign sovereigns the opportunity to correct their own mistakes and provide redress to human rights victims, an exhaustion requirement would avoid “embroil[ing] the nation in a kind of judicial ‘imperialism’ that suggests the United States does not respect or recognize a foreign government’s ability to administer justice.”⁸⁵ From a perspective focused on U.S. interests, this argument should carry particular weight: While aspects of the First Congress’s intent remain unclear, it is generally accepted that one purpose of the ATS was to “*reduce* foreign relations friction with other nations.”⁸⁶ The human rights litigation now taking place under the ATS, however, often affects the United States’ foreign relations,⁸⁷ and a reading of the statute that makes it easier for the U.S. judiciary to review a foreign government’s conduct within its own borders before that sovereign has the opportunity to redress the harm in its own courts is thus inconsistent with this purpose.

From a global or systematic perspective, U.S. courts’ declining to impose an exhaustion requirement on ATS plaintiffs can exacerbate the tensions among nations — particularly those between developed, Western states and poor, developing countries engaged in, or emerging from, a period of transitional justice. ATS litigation is likely to tread on the raw nerves of these developing countries,⁸⁸ even when they agree with the universality of the underlying substantive norms, because this human rights litigation can be perceived by these nations as

⁸⁵ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1239–40 (9th Cir.) (Bybee, J., dissenting), *vacated & reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *see also* David R. Mummery, *The Content of the Duty To Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 391 (1964) (noting that through the exhaustion of local remedies principle “intervention of outsiders is avoided . . . and it is possible to avoid the publication of the dispute to the world at large, which often causes exacerbation”); *cf. Sosa*, 542 U.S. at 761 (Breyer, J., concurring) (“I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations . . .”).

⁸⁶ Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 462 (2001); *see also* Bradley & Goldsmith, *supra* note 10, at 361 (arguing that the “ATS was designed . . . as part of a larger effort by the United States to avoid foreign relations controversies”).

⁸⁷ *See Sosa*, 542 U.S. at 733 n.21 (discussing the possible impact that ATS litigation concerning South African apartheid may have on foreign policy and the South African government’s attempts to reconcile and reconstruct its nation); *see also* Marc E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, 16 ST. THOMAS L. REV. 627, 638 (2004) (“Rapid expansion of ATS litigation is also an insult to foreign legislatures, courts and judges. In fact, U.S. judicial intrusions into areas perceived by other governments as infringing on sovereignty can — and have — provoked strong negative reaction . . .”).

⁸⁸ *See* M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1147 (1999); *see also id.* at 1139 (noting that individual rights claims “invariably seem to arise from the most contested political conflicts in the Third World”).

a vehicle for interfering with the unique cultures, politics, and economics of their societies.⁸⁹

This element of human rights litigation — from the U.S. perspective, perhaps a “judicialization” of its foreign relations — becomes even more apparent after considering the effect ATS litigation can have on the unique approaches states may take to address their human rights violations. The South African government, for example, has embarked on an innovative effort to remedy the abuses that occurred during its apartheid regime.⁹⁰ Whether or not the ATS litigation growing out of apartheid⁹¹ actually undermines the South African approach⁹² is tangential to the fact that foreign and international human rights litigation is viewed by the South African government as not only interfering with the nation’s post-apartheid reconciliation process⁹³ but

⁸⁹ See *id.* at 1147; see also *id.* at 1134–48 (discussing the extraterritorial effects of transnational human rights litigation).

⁹⁰ Specifically, South Africa established what is now considered the paradigmatic example of a Truth and Reconciliation Commission (TRC) to function in tandem with its local judiciary. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 3 (1998) (characterizing the TRC as “an innovative and promising effort to combine an investigation into what happened, a forum for victim testimony, a process for developing reparations, and a mechanism for granting amnesty for perpetrators who honestly tell of their role in politically motivated violence”). The Rwandan *gacaca* courts provide another example of a unique dispute resolution mechanism established to provide justice in the wake of a recent genocide. Finding that a formal judicial approach or a TRC would be ill-suited to putting most of the nation on trial, the government opted to use a more “traditional” dispute resolution mechanism — grounded in local custom — to try the hundreds of thousands of suspected *genocidaires*. See Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transnational Justice*, 79 TEMP. L. REV. 1, 3 (2006).

⁹¹ See, e.g., *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *vacated sub nom.* *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

⁹² One could argue that the legal framework — that is, the justice system, police, and social fabric — in countries like South Africa that employ an alternative post-conflict approach may be too weak to fully “investigate, try, convict and punish . . . those charged with humanitarian law crimes,” Benjamin N. Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission*, in *POST-CONFLICT JUSTICE* 325, 328 (M. Cherif Bassiouni ed., 2002), and that ATS litigation can help overcome the de facto amnesty granted to those perpetrators whom the justice system cannot prosecute, see *id.* at 332 (“In many cases, truth commissions were empanelled precisely because of the weakness and corruption of legal systems.”). While this argument has its appeal, it remains true that many countries view ATS litigation as an imperialistic imposition and an obstacle to a successful reconciliation process. See *infra* note 93. Similarly, “[t]rials that address only a few perpetrators or minor ones . . . fall short in countering immunity,” Schiff, *supra*, at 339, and the development and promotion of human rights law in general is likely to suffer when a judicial resolution is imposed on a situation that requires a political compromise.

⁹³ Thabo Mbeki, President of South Africa, Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003), available at <http://www.anc.org.za/ancdocs/history/mbeki/2003/tmo415.html> (“[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.”).

also infusing South Africa's transition process with a distinctly Western version⁹⁴ of justice. An ATS exhaustion of local remedies requirement modeled on the international norm would prevent this overreaching by U.S. courts in the first instance as exhaustion would, at a minimum, signal respect for these societies' positions within the international order.⁹⁵

2. *Respect for Domestic Institutions.* — The vital role domestic legal systems play in the global human rights regime also weighs in favor of a unified exhaustion of local remedies requirement. The importance of these domestic remedies is twofold. First, recent developments in international criminal law have brought to the fore several problems inherent in international justice mechanisms. Both individual victims of human rights abuse and victim societies as a whole tend to seek not only justice and compensation, but also a forum in which they can satisfy their needs for vengeance and forgiveness.⁹⁶ Experience shows that international litigation alone is incapable of promoting these objectives. For example, the remoteness of the International Criminal Tribunals for Yugoslavia and Rwanda — that is, the physical and psychological distance that exists between these courts and the locus of the human rights abuse — has worked to hinder the reconciliation process for victims and their families.⁹⁷ Thus, while international tribunals may help establish accountability, their failure to, among other things, uncover the fate of loved ones, provide a historical account of the abuse, and offer victims a voice in the aftermath of such atrocities, has led to the conclusion that, unaided, they are unable to promote reconciliation.⁹⁸ ATS litigation suffers from the same problems. The remote, isolated, and detached nature of a U.S. forum means that, despite providing individual victims a faint prospect of compensation, ATS cases will not, nor are they intended to, offer com-

⁹⁴ See MINOW, *supra* note 90, at 81.

⁹⁵ Cf. H.R. REP. NO. 102-367, at 5 (1991), as reprinted in 1992 U.S.C.C.A.N. 84, 87 (“[The TVPA’s exhaustion] requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred.”). It is possible that an exhaustion requirement could itself interfere with state sovereignty since the doctrine will, in some cases, require U.S. courts to ask whether a foreign nation’s local remedies are adequate and effective. And like ATS litigation, this adequacy determination has the potential to upset international relations. This argument, however, may prove too much. If carried to its logical conclusion, the state sovereignty argument would counsel in favor of complete deference to a foreign state on the question of adequacy, or perhaps even eliminating ATS litigation altogether. Yet state sovereignty should not present a dogmatic bar to international human rights litigation. Instead, it is one concern to be weighed against many others, including the right to redress of those who have suffered human rights abuses.

⁹⁶ MINOW, *supra* note 90, at 9–24.

⁹⁷ See Rosanna Lipscomb, Note, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 196 (2006).

⁹⁸ See *id.* at 195 (arguing that purely international courts cannot adequately address “issues related to transitional justice, domestic legal reformation, and the needs of . . . victims”).

plete reparations to those whose human rights have been violated. Rather, additional mechanisms, such as well-functioning national courts and truth commissions, are needed.⁹⁹

Second, the development of effective domestic legal systems is critical to creating a global human rights regime that not only provides effective redress to victims, but also instills the necessary conditions for social stability and peace within developing countries. Human rights advocates tend to view the exhaustion requirement as a burdensome obstacle to a more effective mechanism for handing out justice.¹⁰⁰ Similarly, it seems somewhat Janus-like to grant individuals rights against their governments but to require those alleging torture or persecution by their home country to engage their local judicial systems. However, these arguments only underscore the fact that human rights abuses have domestic roots. Allowing victims to bring claims against their governments in a foreign or international tribunal in the first instance may prevent countries transitioning from violence to peace from developing the machinery necessary to become effective protectors of individual rights.¹⁰¹

For the promotion of peace, democracy, and stability, there is no substitute for inculcating the rule of law domestically: “[I]t is maintaining effective judicial systems and stabilizing the rule of law, not ending

⁹⁹ See MINOW, *supra* note 90, at 2–4 (discussing alternative responses to atrocities).

¹⁰⁰ See, e.g., Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT’L L. 559, 591 (1993). *But see id.* at 592 (noting that while burdensome, the exhaustion requirement may be necessary to prevent intrusions on state sovereignty and ensure that states respond to potential human rights abuses within their borders).

¹⁰¹ See Chibundu, *supra* note 88, at 1140 (“[Foreign] courts purporting to apply ‘universal’ law may . . . deprive the local courts in strife-ridden countries [of] the opportunity to develop and internalize those very same norms.”); see also STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 160 (2d ed. 2001) (“Although the international legal process has elaborated a corpus of law providing individual criminal responsibility for various atrocities in peace and war, domestic legal systems remain the primary fora for holding individuals accountable for these acts.”). In order to ensure that local courts are supplied the caseload necessary to their development, *cf.* Helfer & Slaughter, *supra* note 38, at 301–03 (explaining the importance of caseload for developing effective international human rights tribunals), U.S. courts should lower their standards for finding foreign courts adequate substitutes. While a justified fear of reprisal and corruption will render local remedies inadequate, *see Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1134–35 (E.D. Cal. 2004), the mere fact that local justice mechanisms are underfunded, involve delay, or perhaps amount to uncertain forums for justice, while all questions of degree, should not render them necessarily inadequate. Likewise, the mere fact that foreign states have employed an alternative system intended to promote reconciliation rather than individual compensation should not make their proffered remedies automatically ineffective. *Cf. Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at *55–58 (S.D.N.Y. Feb. 22, 2002) (finding, in part, that because the “chief purpose” of the available local remedies was “not to ‘remedy’ such violations, but to promote reconciliation,” there was no need to dismiss plaintiffs’ claims for failure to exhaust). U.S. courts will do well to remember that if local justice fails, complainants can relitigate in the United States.

impunity, that enables nations emerging from conflict to establish orderly systems that ensure the protection of individual rights, promote economic development, and prevent nations from sliding back into conflict.”¹⁰² The international system should focus not on directly regulating nation-states but rather on engaging domestic institutions by “strengthening [them], backstopping them, and compelling them to act.”¹⁰³ As shown by the requirements of complementarity¹⁰⁴ and exhaustion, international tribunals already recognize the importance of this mode of engagement. U.S. courts would be wise to do the same.¹⁰⁵

3. *Development of International Human Rights Law.* — Those in favor of broadening the scope of human rights law and pushing its norms in novel, rights-protective directions should also fear a doctrine that structures the choice of forum decision such that litigation is pushed into U.S. federal courts.¹⁰⁶ The nature of ATS litigation dic-

¹⁰² Lipscomb, *supra* note 97, at 184.

¹⁰³ Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006).

¹⁰⁴ Complementarity, a safeguard built into the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, requires the ICC to dismiss a case under domestic investigation “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” *Id.* art. 17. The premise of the complementarity provision is that “international justice is, other things being equal, not preferable to local or national justice.” Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 CORNELL INT'L L.J. 753, 771 (2005).

¹⁰⁵ Cf. H.R. REP. NO. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88 (noting that the TVPA's exhaustion requirement “can be expected to encourage the development of meaningful remedies in other countries”). One could argue that an exhaustion requirement is not necessary to address this concern, or any other for that matter, because federal courts can still employ the traditional forum non conveniens doctrine to avoid hearing ATS cases. See Duruigbo, *supra* note 30, at 1286 (arguing that the forum non conveniens doctrine may render an exhaustion requirement a “redundancy that does not perceptibly alter the position of the parties in a good number of cases”). While it is true that a critical issue in both forum non conveniens and exhaustion is whether there is an adequate alternative forum, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981), there are reasons to reject forum non conveniens as an acceptable substitute. First, the existence of an alternative forum is only a threshold issue in forum non conveniens, which requires courts to balance a number of convenience factors before dismissing a case. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). In the ATS context, courts have generally undertaken this analysis in a way that does not create a meaningful bar to litigation. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100-08 (2d Cir. 2000). *But see* *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476-80 (2d Cir. 2002) (upholding dismissal on grounds of forum non conveniens, holding that Ecuador was the appropriate forum). Second, the adequate alternative forum requirement of forum non conveniens does not require that the alternate venue be located in the state where the abuse occurred, meaning that in many cases, the respect for state sovereignty and domestic court objectives will remain unfulfilled. See, e.g., *Wiwa*, 226 F.3d at 107 (discussing the alternative forum that existed not in Nigeria, where the human rights abuses were suffered, but in the United Kingdom, where the defendant corporations were incorporated).

¹⁰⁶ From a purely domestic perspective, incorporating an exhaustion requirement into the ATS would also seem to make sense. In addition to harmonizing the statute with the TVPA, see *supra* pp. 2123-24 and note 80, such a requirement would bring the ATS into line with basic practice in public international law, see *supra* note 9. As a general matter, harmonizing the procedural law

tates that American judges are likely to give narrow interpretations to human rights norms in order to avoid the problems raised by most ATS cases. This argument does not suggest that these judges have an inherent bias against human rights — in fact, a few have made clear that they are in favor of expanding its reach.¹⁰⁷ Yet *Sosa*'s command that judges exercise “judicial caution when considering the kinds of individual claims that might implement [ATS] jurisdiction,”¹⁰⁸ and the tools of avoidance courts often apply to steer clear of difficult cases, may work to limit the reach of human rights law.¹⁰⁹

For example, ATS cases can impact the foreign affairs of the United States, and in any given case, a federal court may decide that the prudent course of action requires it to avoid ruling on the abuses of a foreign government. However, rather than stating its prudential reasoning, the court may sidestep the potential political problem by holding that the norms at issue are insufficiently accepted or definite to provide for a cause of action. Had the case arisen in one of the tribunals, however, the opposite conclusion might have been reached. And while a narrow construction in one case may not hinder the overall development of human rights, a systematic shift of human rights litigation into U.S. courts could work over time to constrain the protection offered to victims of abuse and inhibit the development of human rights case law. This narrowing effect may become particularly pronounced if the tribunals begin giving consideration to the views of U.S. courts expressed in ATS cases.¹¹⁰

applicable in ATS cases with the procedural law applied at the international level has an intuitive appeal. This intuition, combined with the fact that the Supreme Court has repeatedly affirmed the principle that domestic law should accord with international law when possible, *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), suggests that fashioning a federal common law rule of exhaustion is appropriate.

¹⁰⁷ *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

¹⁰⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

¹⁰⁹ *But see Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258, 260 (2d Cir. 2007) (*per curiam*) (accepting jurisdiction under the ATS to hear a controversial cause of action involving corporate aiding and abetting liability).

¹¹⁰ This possible interaction between the tribunals of the global system provides another reason why U.S. courts should favor exhaustion. Successive or simultaneous forum shopping provides an opportunity for U.S. courts to engage in “dialogue” with the tribunals to promote the “evolution of a coherent jurisprudence,” Helfer, *supra* note 7, at 349, and an opportunity to participate in the elucidation and development of human rights norms. But because this dialogue has not adequately developed through litigation of similar issues by different parties, *see id.* at 350–53, an exhaustion requirement is necessary to ensure that a litigant who brings an ATS claim is not also precluded from bringing a second claim to an international tribunal. It remains to be seen, however, whether a tribunal would give persuasive weight to the decision of a U.S. court. *See id.* at 351 (noting that “human rights tribunals reference and consider precedents from outside their own legal systems far less habitually than do judges in common law jurisdictions”).

B. The Interests of Victims and Exhaustion

Some may object to the arguments posited in favor of exhaustion thus far on the ground that they relegate the victims of human rights abuse to a secondary level of attention, brushing aside the needs of individual litigants in order to achieve what is best for the overall system of international human rights. To be sure, arguments for state sovereignty, establishing domestic rule of law values, or broadening the scope of human rights law often occur in a vacuum, devoid of concern for those who have suffered actual abuse. However, while the immediate interests of individual petitioners are important, all individuals — including the victims of human rights abuse — are entitled to see the realization of their human rights in the long run.¹¹¹ To the extent that ATS litigation unencumbered by an exhaustion requirement imposes the externalities previously discussed on human rights protection, it is counterproductive.

The key then is to strike the appropriate balance between providing immediate and effective redress to victims of abuse and ensuring that the international human rights regime is structured in such a way as to produce the greatest possible recognition of human rights.¹¹² Without an exhaustion of local remedies requirement, the latter half of this balance is completely forgotten.

In addition, both the systemic values addressed above and the individual remedial goals of the international human rights litigation system may weigh in favor of incorporating exhaustion into the ATS. If a petitioner exhausts his or her local remedies, there exists the possibility to undertake successive or simultaneous litigation in a second international forum.¹¹³ And, as Professor Helfer argued in the tribunal forum shopping context, duplicative review is often desirable in human rights law given that petitioners can only obtain complete review of

¹¹¹ Cf. Arjun Sengupta, *The Human Right to Development*, in DEVELOPMENT AS A HUMAN RIGHT 9, 14 (Bård A. Andreassen & Stephen P. Marks eds., 2006) (describing the internationally recognized “right to development [as] the right to a process of development, consisting of a progressive and phased realization of all the recognized human rights . . . as well as a process of economic growth consistent with human rights standards”).

¹¹² Cf. Chibundu, *supra* note 88, at 1141 (arguing that whatever the “benefits may be to specific individuals in the short run,” ineffective human rights litigation works ultimately to deprive victims of a society in which individual rights can “flourish”).

¹¹³ See *supra* pp. 2118–19 (discussing simultaneous and successive forum shopping). This complementary litigation, however, is precluded for litigants who proceed via the ATS without exhausting their local remedies because all other international forums impose an exhaustion requirement. That said, a successive petition may remain available if, after the conclusion of ATS proceedings, the petitioner returns to exhaust his or her local remedies and is not time-barred by the local statute of limitations. This possibility seems remote, however, given the resource constraints of most human rights victims and the prolonged nature of ATS litigation.

their allegations by petitioning multiple human rights forums.¹¹⁴ This argument is magnified when the ATS is included within the forum shopping framework. While victims may prefer the ATS route, *Sosa*'s narrowing of the class of cognizable causes of action, combined with the fact that litigants are generally unable to determine whether they have cognizable claims *ex ante*, means that victims opting for the ATS route before exhausting their local remedies may abandon claims that are viable in an international tribunal. This abandonment is problematic, as "minimiz[ing] the erroneous denial of fundamental rights [by allowing duplicative review] . . . weighs heavily against finality and efficiency concerns."¹¹⁵

V. CONCLUSION

While *Sosa* may have resolved disputes over the precise nature of the ATS, it energized the debate concerning exhaustion. Unfortunately, like the Court's opinion itself, the ATS does not speak clearly on the subject. The Court's seeming willingness, however, to structure ATS doctrine in harmony with the "basic principles of international law"¹¹⁶ provides both scholars and jurists with an opportunity to explore the relationship between ATS litigation and international human rights law. Foreign victims of human rights abuses see the ATS as inserting U.S. federal courts into the array of litigation options that allow them to take their claims of abuse to the international stage. Yet this additional forum, while arguably beneficial for individual litigants, can impose negative externalities on the human rights protection offered to all individuals if not structured in a way that seeks to promote the best interests of international human rights law. To date, ATS doctrine has not been developed with such interests in mind. The exhaustion of local remedies debate provides the ideal vehicle for reversing this trend.

¹¹⁴ Helfer, *supra* note 7, at 346. Professor Helfer concedes that "no system of adjudication . . . [can] justify endless relitigation of claims." *Id.* Instead, he advocates for reform to the current human rights petition system in a way that will minimize the complex and conflicting institutional and normative concerns while accounting for the "additional administrative and financial burdens" caused by forum shopping. *Id.* at 363. The need to petition multiple human rights forums is "a product of the disaggregated nature of the petition system, in which only one tribunal is authorized to adjudicate claims by individuals arising under any given treaty" and thus "a petitioner with distinct claims arising under multiple human rights treaties may not consolidate all of her treaty claims in a single forum." *Id.* at 346-47.

¹¹⁵ Helfer, *supra* note 7, at 347-48. This argument, however, may be somewhat paternalistic in the sense that it argues for exhaustion because such a requirement would prevent litigants from abandoning their valid claims. Perhaps instead we should trust petitioners and their lawyers to decide for themselves whether it makes sense to take the risk associated with ATS litigation.

¹¹⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).