Abbreviated version: asterisks signal a part of the opinion that was omitted. This fractured opinion from the generally liberal Ninth Circuit illustrates the confusion that remains post-Sosa over the role of United States courts in international affairs.

ALEXIS HOLYWEEK SAREI; PAUL E. NERAU; THOMAS TAMAUSI; PHILLIP MIRIORI; GREGORY KOPA; METHODIUS NESIKO; ALOYSIUS MOSES; RAPHEAL NINIKU; GABRIEL TAREASI; LINUS TAKINU, LEO WUIS; MICHAEL AKOPE; BENEDICT PISI; THOMAS KOBUKO; JOHN TAMUASI; NORMAN MOUVO; JOHN OSANI; BEN KORUS; NAMIRA KAWONA; JOANNE BOSCO; JOHN PIGOLO; MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. RIO TINTO, PLC; RIO TINTO LIMITED, Defendants-Appellees.
No. 02-56256, No. 02-56390

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2008 U.S. App. LEXIS 25279

October 11, 2007, Argued and Submitted, San Francisco, California
December 16, 2008, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-11695-MMM. Margaret M. Morrow, District Judge, Presiding.
Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 2007 U.S. App. LEXIS 8430 (9th Cir. Cal., 2007)

COUNSEL: Steve W. Berman (argued), R. Brent Walton, and Nick Styant-Browne, Hagens Berman LLP, Seattle, Washington; Paul Luvera and Joel D. Cunningham, Luvera, Barnett, Brindley, Beninger & Cunningham, Seattle, Washington; and Paul Stocker, Mill Creek, Washington, for plaintiffs-appellants/cross-appellees.

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Robert M. Loeb (argued), U.S. Department of Justice, Washington, DC, for amicus curiae the United States of America.

JUDGES: Before: Mary M. Schroeder, Harry Pregerson, Stephen Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M. Margaret McKeown, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges. Opinion by Judge McKeown; Concurrence by Judge Bea; Dissent by Judge Ikuta; Concurrence by Judge Kleinfeld; Dissent by Judge Reinhardt.

OPINION BY: M. Margaret McKeown

OPINION

McKEOWN, Circuit Judge, joined by Judges SCHROEDER and SILVERMAN:

Current and [*2] former residents of Bougainville, Papua New Guinea ("PNG"), brought suit under the Alien Tort Statute ("ATS"), claiming that various war crimes, crimes against humanity, racial discrimination, and environmental torts arose out of Rio Tinto's mining operations on Bougainville. Plaintiffs allege Rio Tinto is liable not only for its actions that led to a civil war, but also vicariously for those of the PNG government, acting as Rio Tinto's agent or partner.

This case raises an important question of the role of exhaustion under the ATS, which bestows jurisdiction on United States courts for "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." *28 U.S.C. § 1350*. Although the ATS does not itself require an alien to exhaust local remedies before invoking the jurisdiction of our courts, the Supreme Court signaled in *Sosa v. Alvarez-Machain* that a prudential or judicially-imposed exhaustion requirement for ATS claims "would certainly [be considered] in an appropriate case." *542 U.S. 692, 733 n.21, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*. The application of *Sosa* to exhaustion under the ATS is a matter of first impression in this circuit, and we hold that [*3] this is "an appropriate case" to consider whether to invoke the exhaustion analysis.

Although we decline to impose an absolute requirement of exhaustion in ATS cases, we conclude that, as a

threshold matter, certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. [1] Where 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." Matters of "universal concern" are offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders." *Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995)* (citing *Restatement (Third) Foreign Relations Law of the United States § 404* (1987) ("*Restatement (Third)*")). Because the district court did not analyze exhaustion as a discretionary matter, we remand for the district court to address this issue in the first instance, using the framework outlined below.

* * *

BACKGROUND

[2] Bougainville is an island in the South Pacific located just off the main island of PNG. Rich in natural resources, including copper and gold, the island was targeted as a prime mining site by defendants Rio Tinto, [*5] plc, a British and Welsh corporation, and Rio Tinto Limited, an Australian corporation (collectively "Rio Tinto"). Rio Tinto is part of an international mining group that operates over sixty mines and processing plants in forty countries, including the United States. To operate a mine on Bougainville, Rio Tinto required and received the assistance of the PNG government. According to the complaint, beginning in the 1960s, Rio Tinto displaced villages, razed massive tracts of rain forest, intensely polluted the land, rivers, and air (with extensive collateral consequences including fatal and chronic illness, death of wildlife and vegetation, and failure of farm land), and systematically discriminated against its Bougainvillian workers, who lived in slave-like conditions.

In November 1988, some Bougainville residents revolted; they sabotaged the mine and forced its closure. After Rio Tinto demanded that the PNG government quash the uprising, the government complied and sent in troops. PNG forces used helicopters and vehicles supplied by Rio Tinto. On February 14, 1990, the country descended into a civil war after government troops slaughtered many Bougainvillians in what has come to be [*6] known as the "St. Valentine's Day Massacre."

Unable to resume mining, Rio Tinto threatened to abandon its operations and halt all future investment in PNG unless the government took military action to secure the mine. In April 1990, the PNG government imposed a military blockade on the island that lasted almost a decade. The blockade prevented medicine, clothing, and other necessities from reaching the residents. Under further pressure from Rio Tinto, according to the complaint, the government engaged in aerial bombardment of civilian targets, wanton killing and acts of cruelty, village burning, rape, and pillage. As a result, an estimated fifteen thousand Bougainvillians, including many children, died. Of the survivors, tens of thousands are displaced and many suffer health problems. In March 2002, the PNG Parliament formalized a peace accord that ended the civil war.

In November 2000, nearly a year and a half before the civil war formally ended, plaintiffs filed this class action, raising numerous claims under the ATS: (1) crimes against humanity resulting from the blockade; (2) war crimes for murder and torture; (3) violation of the rights to life, health, and security of the person [*7] resulting from the environmental damage; (4) racial discrimination in destroying villages and the environment, and in working conditions; (5) cruel, inhuman, and degrading treatment resulting from the blockade, environmental harm, and displacement; (6) violation of international environmental rights resulting from building and operating the mine; and (7) a consistent pattern of gross violations of human rights resulting from destruction of the environment, racial discrimination, and PNG military activities. Plaintiffs also raised various non-ATS claims ranging from negligence to public nuisance.

The district court determined plaintiffs stated various cognizable ATS claims: war crimes, crimes against humanity, racial discrimination, and violation of the United Nations Convention on the Law of the Sea ("UNCLOS"). *Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1149, 1151, 1155, 1162 (C.D. Cal. 2002)*. Nonetheless, the district court dismissed the entire complaint as presenting nonjusticiable political questions. *Id. at 1198-99*. The court alternatively dismissed the racial discrimination and environmental tort claims under the act of state doctrine, *id. at 1193*, as well as the doctrine of [*8] international comity, *id. at 1207*. Finally, it also held that the ATS did not *require* exhaustion of local remedies, but did not address exhaustion as a prudential or discretionary issue. *Id. at 1132-39*.

After the plaintiffs filed their notice of appeal, the Supreme Court decided the landmark case of *Sosa*, which clarified that the ATS is a jurisdictional statute and held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when *§ 1350* was enacted." *542 U.S. at 732*. As noted, the Court also adverted for the first time to exhaustion under the ATS.

* * *

ANALYSIS

I. EXHAUSTION IN ATS CASES

As the Supreme Court directed in *Sosa*, exhaustion of local remedies should "certainly" be considered in the "appropriate case" for claims brought under the ATS. *542 U.S. at 733 n.21*. This is an appropriate case for such consideration under both domestic prudential standards and core principles of international law.

* * *

The parties, the district court, and the panel majority and dissent all analyzed the exhaustion question by initially asking whether the ATS *requires* exhaustion. The inquiry as to whether exhaustion is required by the statute leads with the wrong foot *post-Sosa*.

[2] Our starting point is the Court's explicit reference to exhaustion in *Sosa*:

> 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, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting the 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.

542 U.S. at 733 n.21 (internal citations omitted). *See also id. at 760* (Breyer, J., concurring in part and in the judgment) ("The Court also [*12] suggests that principles of exhaustion *might* apply . . . ." (emphasis added)). Thus, the Court appears to consider exhaustion a prudential "principle" *among others* that courts should consider beyond the initial task of determining whether the alleged violations of the ATS satisfy the "requirement of clear definition." *Id. at 733 n.21*. [3]

* * *

Approaching exhaustion as a prudential principle renders unnecessary our wading into the debate whether the Torture Victim Protection Act ("TVPA"), [*13] *28 U.S.C. § 1350*, which was adopted in 1991 and explicitly incorporates an exhaustion requirement, offers insight into Congress's intent to impose the same requirement in the context of the ATS, which was enacted in 1789. *See Sarei, 487 F.3d at 1215-19*; *id. at 1227-30* (Bybee, J., dissenting). [4] Not only does this TVPA comparison not particularly forward the discussion, *Sosa's* pronouncement relieves us of the need to engage in the comparison in the first place.

* * *

[3] Prudential exhaustion also avoids another jurisprudential debate remaining in the wake of *Sosa*: whether exhaustion is a substantive norm of international law, to which the "requirement of clear definition" applies; or if it is nonsubstantive, [5] what source of law--federal common law or international law--illuminates its content. *See Sarei, 487 F.3d at 1221*. Though *Sosa* is vague on this broad question of methodology, it unambiguously states that the "requirement of clear definition" of an international [*14] norm is distinct from the consideration of *other factors* that might also serve to limit the relief available through the ATS. *542 U.S. at 733 n.21*. In the absence of any further comment by the Supreme Court, it is fair to assume (at least for the purposes of exhaustion) that we may freely draw from both federal common law and international law without violating the spirit of *Sosa's* instructions or committing ourselves to a particular method regarding other nonsubstantive aspects of ATS jurisprudence left open after *Sosa*.

* * *

III. THE EXHAUSTION OF LOCAL REMEDIES RULE IN INTERNATIONAL LAW

"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, [*17] unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." *Restatement (Third) § 713 cmt. f*; *see also id. § 703 cmt. d*; *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 29) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). [7] The rule is generally applied when one state pursues the cause of one of its nationals, whose rights another state has disregarded in violation of international law: "Before resort may be had to an international court in such a situation, it 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." *Interhandel*, 1959 I.C.J. at 27; *see also Restatement (Third) §§ 703 cmt. d, 713 cmt. f.*

* * *

Because sovereigns are co-equal in the international legal arena, one sovereign can exercise power over an-

other only through consent. *See United States v. Diekelman, 92 U.S. 520, 524, 23 L. Ed. 742, 11 Ct. Cl. 417 (1875)* ("[A sovereign's] own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed."). Even in the face of sovereigns' consent to the jurisdiction of international tribunals, principles of comity have dictated that exhaustion remains a requirement. Thus, for example, the treaties establishing international human rights courts have codified the exhaustion principle in their statutes [*19] as a general requirement for the admissibility of complaints. *See, e.g., The Matter of Viviana Gallardo et al*, Series A., No. G 101/81, Inter-Am. C.H.R., Nov. 13, 1981, P 26 ("[Exhaustion] is designed for the benefit of the State," because it "excuse[s] the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means."). [8]

* * *

Nonetheless, codification of the exhaustion requirement in international treaties is not in absolute terms. International law--both private [*20] and public--has long anticipated that local remedies might not always be adequate and that justice may be denied if claimants are forced to exhaust before being heard in an international forum. *Restatement (Third) §§ 703 cmt. d, 713, cmt. f.* A core element of the exhaustion rule is its futility, or denial of justice exception, which excuses exhaustion of local remedies where they are unavailable or inadequate. *Id.*

* * *

IV. CONSIDERATIONS ANIMATING EXHAUSTION

Though it is self-evident, it is worth remembering that in ATS adjudication, [*21] the United States courts are *not* international tribunals. With this in mind, the appropriateness of applying prudential exhaustion to some ATS cases only gains force; if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction.

Certain ATS cases, like this one, present United States courts with scenarios that simultaneously appeal to two divergent impulses that have traditionally played out in our country's international affairs and have been imported into our legal system. The first impulse is to safeguard and respect the principle of comity. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). The second is the American role in establishing collective security arrangements that support international institutions, including international [*22] tribunals. *See, e.g., Charter of the International Military Tribunal*, art. 1, Aug. 8, 1945 (The United States, along with the Allied powers, collectively establishing the Tribunal "for the just and prompt trial and punishment of major war criminals of the European Axis."). Both impulses draw from the recognition that we need a complement to our domestic system, because we are but one member in a community of nations. In that community, international law plays a substantive role.

But international law also imposes limits. The lack of a significant United States "nexus" to the allegations here stimulates the comity impulse. These claims involve a foreign corporation's complicity in acts on foreign soil that affected aliens (though at least one of them--Sarei--has enjoyed the status of a lawful permanent resident of this country for some time now). This situation thus lacks the traditional bases for exercising our sovereign jurisdiction to prescribe laws, namely nationality, territory, and effects within the United States. *See Restatement (Third) § 403(2) at cmt. d.* (stating jurisdiction is appropriately exercised with respect to activity outside the state that has or intends to have substantial [*23] effect within the state's territory). The lack of a significant U.S. "nexus" is an important consideration in evaluating whether plaintiffs should be required to exhaust their local remedies in accordance with the principle of international comity.

The nature of certain allegations and the gravity of the potential violations of international law also trigger the second impulse: our historical commitment to upholding customary international law. Some of the claims--torture, crimes against humanity, and war crimes--may implicate matters of "universal concern," generally described as offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders." *Kadic, 70 F.3d at 240* (citing *Restatement (Third) § 404*); *see also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 108 (2d Cir. 2000)* (holding "the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture" weighed against dismissing the action on *forum non conveniens* grounds).

Nonetheless, simply because universal jurisdiction *might* be available, does not mean that we should exercise it. Indeed, the basis for exercising universal [*24] *civil* jurisdiction, such as under the ATS, is not as well-settled as the basis for universal *criminal* jurisdiction.

See Sosa, 542 U.S. at 761-63 (Breyer, J., concurring in part and in the judgment) (noting the lack of "similar procedural consensus supporting the exercise of jurisdiction" in ATS cases as obtained to piracy in the 18th century or the contemporary exercise of universal *criminal* jurisdiction over matters of universal concern). [9] Even the few courts that have exercised some form of universal *criminal* jurisdiction over matters of "universal concern" have done so cautiously. *See* Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*, 19 Crim. L.F. 153, 155-73 (2006) (surveying decisions by Austria, Belgium, France, Germany, and Spain).

> 9 *See Sosa, 542 U.S. at 762-63* (Breyer, J., concurring in part and in the judgment) (citing *Brief Amicus Curiae the European Commission in Support of Neither Party*, filed in *Sosa*, 2004 WL 177036, at *17-22).

This caution counsels that in ATS cases where the United States "nexus" is weak, courts should carefully consider the question [*25] of exhaustion, particularly--but not exclusively--with respect to claims that do not involve matters of "universal concern." With these underlying principles in place, we suggest a framework for evaluating exhaustion.

V. A FRAMEWORK FOR EVALUATING EXHAUSTION

[4] To begin, exhaustion under the ATS should be approached consistently with exhaustion principles in other domestic contexts. The defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies. *See Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 919, 166 L. Ed. 2d 798 (2007)* ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense."). Although the plaintiff may rebut this showing with a demonstration of the futility of exhaustion, the ultimate burden remains with the defendant. *See, e.g., Honig v. Doe, 484 U.S. 305, 325-29, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)* (allowing plaintiffs to by-pass administrative process where exhaustion would be futile or inadequate).

This same burden-shifting analysis is invoked under the TVPA:

> [O]nce 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, [*26] 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.

S.Rep. No. 102-249, at 9 (1991); *accord Hilao, 103 F.3d at 778 n.5* (quoting TVPA Senate Report). While the TVPA is not dispositive of the question of whether exhaustion is *required* by the ATS, the TVPA nonetheless provides a useful, congressionally-crafted template to guide our adoption of an exhaustion principle for the ATS. *See Enahoro v. Abubakar, 408 F.3d 877, 890 (7th Cir. 2005)* (Cudahy, J., dissenting) ("[W]hile not directly applicable to the ATS, the TVPA scheme is surely persuasive.").

[5] As a preliminary matter, to "exhaust," it is not sufficient that a plaintiff merely initiate a suit, but rather, the plaintiff must obtain a final decision of the highest court in the hierarchy of courts in the legal system at issue, or show that the state of the law or availability of remedies would make further appeal futile. Chitharanjan Felix Amerasinghe, *Local Remedies in International Law* 181 (2d ed. 1990); *see also Interhandel*, 1959 I.C.J. at 26-27 (analyzing, in determining whether remedies had been exhausted, [*27] the stage of litigation plaintiff had reached in United States courts).

[6] Another basic element is that the remedy must be available, effective, and not futile. *Restatement (Third) §§ 703 cmt. d, 713 cmt. f*; *see generally* Amerasinghe, *supra*, at 166-71, 187-207. To measure effectiveness, a court must look at the circumstances surrounding the access to a remedy and the ultimate utility of the remedy to the petitioner. *Restatement (Third) §§ 703 cmt. d, 713 cmt. f.* In addition, "[w]hen a person has obtained a favorable decision in a domestic court, but that decision has not been complied with, no further remedies need be exhausted." *Id. § 713 cmt. f.* A judgment that cannot be enforced is an incomplete, and thus ineffective, remedy. The adequacy determination will also necessarily include an assessment of any delay in the delivery of a decision. Amerasinghe, *supra*, at 203-06.

Conclusion

[7] We remand to the district court for the limited purpose to determine in the first instance whether to impose an exhaustion requirement on plaintiffs. [10]

> 10 Six judges concur in a limited remand for the district court to consider exhaustion. Because prudential exhaustion is a narrower ground of exhaustion [*28] than statutory exhaustion--a statutory exhaustion analysis must be applied in every case but a prudential exhaustion analysis only in some cases--the plurality's prudential exhaustion

requirement controls. *See Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).*

Remanded for proceedings consistent with this opinion.

CONCUR BY: BEA; KLEINFELD

CONCUR

BEA, Circuit Judge, concurring, joined by Judge CALLAHAN:

The plurality opinion holds judicial prudence requires the district court to consider whether Sarei exhausted his local remedies before filing his action in the United States. I concur in the plurality's conclusion that the district court erred by failing to conduct an exhaustion analysis, [1] and I agree a limited remand is the preferable solution. However, I think the Alien Tort Statute ("ATS"), *28 U.S.C. § 1350*, and not mere judicial prudence, requires the district court to consider exhaustion, and I write separately to explain why.

* * *

I read *Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*, differently than does the plurality. In *Sosa*, the United States Supreme Court explained the ATS is a jurisdictional statute that does not create any substantive law; it simply provides a forum for hearing existing causes of action that arise under the law of nations, if such causes of action exist. *See id. at 712* [*30] ("[W]e think that at the time of enactment the jurisdiction [conferred by the ATS] enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."). Thus, the ATS does not create any cause of action of its own, but merely incorporates causes of action that exist in "the present-day law of nations" and fit into "18th-century paradigms," *Sosa, 542 U.S. at 725*, as if they were expressly written into the statute. [2]

* * *

The plurality's reasoning seems to be that although the ATS incorporates causes of action recognized by the law of nations, it does not incorporate required limitations on those causes of action also recognized by the law of nations. This doesn't seem logical to me. Rather, it makes more sense to interpret the ATS as incorporating the whole of the law of nations: the rights it grants *and* the limitations [*31] it places on those rights. * * *

As Judge Bybee carefully demonstrates in his dissent from the merits panel's majority opinion, "[e]xhaustion is a well-established principle of international law, recognized by courts and scholars both here and abroad. It is so well entrenched that one scholar has written that 'the 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' . . . ." *Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1231 (9th Cir. 2007)* (Bybee, J., dissenting) (citation omitted). [3]

* * *

Indeed, as the *Sosa* Court observed, there are boundaries other than a "clear definition" of an "international law norm" that may "limit[ ] the availability of relief in the federal courts [under the ATS] for violations of customary international law . . . ." *Id. at 732-33* & n.21. The Court mentioned two expressly:

(1) "[T]he European Commission argues . . . that basic principles of international law *require* [exhaustion of local remedies]. We would certainly [*36] consider this *requirement* in an appropriate case." *Id. at 733 n.21* (emphasis added).

(2) "Another possible limitation . . . is a policy of *case-specific* deference to the political branches." *Id.* (emphasis added).

A careful reading of this passage reveals the key words to be "consider this requirement in an appropriate case." The *Sosa* Court did not *reject* the European Commission's suggestion that exhaustion is one of the "basic principles of international law"; exhaustion simply had not been raised in that case. [5] But if exhaustion *is* raised, and so the case *is* appropriate, it would seem *Sosa* indicated the Court would consider exhaustion as a *requirement*. "Deference to the political branches," on the other hand, is not required, but only "*possible*," and then only on a case-specific--i.e., prudential--basis.

* * *

This distinction matters: because a district court has discretion to waive a prudentially required exhaustion requirement, but not a statutorily required one, *see, e.g., Acevedo-Carranza v. Ashcroft, 371 F.3d 539, 541 (9th Cir. 2004)*, the plurality's rule [*37] would permit a single district court judge to interject the judiciary into ongoing international disputes and crises of foreign affairs. *See Sarei, 487 F.3d at 1242-45* (Bybee, J., dissenting).

* * *

It is important to note that the exhaustion doctrine, which I think is incorporated into the ATS, itself includes exceptions to the requirement that a plaintiff ex-

haust his local remedies --for instance, where prosecuting an action locally would be futile or ineffective. Logically, these exceptions must also be incorporated into the ATS. *See* Laura Niada, *Hunger and International Law: The Far-Reaching Scope* [*38] *of the Human Right to Food, 22 Conn. J. Int'l L. 131, 194 (2006)* ("[T]he principle of exhaustion of domestic remedies demands that these remedies have primacy in the enforcement of international law. When a State, however, is not willing or able to provide ordinary access to justice, the international arena may be called in support.").

* * *

I wish to make clear that a statutory exhaustion requirement does not mean a plaintiff must prove in every case that he *has* exhausted his local remedies. Rather, it means a district court must conduct a two-step exhaustion analysis, in the process considering whether first, local remedies exist, and second, whether local exhaustion would be futile, [6] unduly prolonged, or subject to one of the other exceptions [*39] recognized in customary international law. If so, local exhaustion requirements may be excused. But this is different from the plurality's prudential exhaustion doctrine, which grants district courts discretion to decide whether or not to consider exhaustion in the first place.

* * *

7 I see four possible holdings: (1) exhaustion is never required; (2) as a matter of prudence, district courts have discretion to determine whether to conduct an exhaustion analysis; (3) as a matter of prudence, district courts have discretion to determine whether to conduct an exhaustion analysis, but under these facts it would be an abuse of that discretion not to conduct an exhaustion analysis, and (4) a district court is required by the ATS statute to conduct an exhaustion analysis. Judge Reinhardt's dissent adopts position (1), I adopt position (4), and I believe the plurality adopts position (2), as it directs the district court to "determine whether to impose an exhaustion requirement."

Thus, the position of the merits panel majority, echoed by Judge Reinhardt's dissent--that a court may address an ATS claim on the merits without ever even approaching the question of exhaustion of local remedies--is no longer good law in this circuit. Unfortunately, it appears the plurality holds the district court here has discretion not to conduct a two-step exhaustion [*43] analysis should it find one unnecessary due to prudential considerations. If the district court chooses to take the plurality up on this faulty offer, we may see this case again quite soon.

KLEINFELD, Circuit Judge, concurring:

I concur in the result reached by Judge McKeown's opinion, limited remand for consideration of whether exhaustion should be required. I do so because we must provide some clear direction to the district court, and only a result adopted by a majority can do so.

In my view, Judge Ikuta's dissent is correct, and I join in it fully. Even so, failure to exhaust is an additional reason for dismissal and need not conflict with the reasons for dismissal stated by Judge Ikuta. [1]

* * *

DISSENT BY: IKUTA; REINHARDT

DISSENT

IKUTA, Circuit Judge, with whom Judge KLEINFELD joins, dissenting:

I write separately because I would affirm the dismissal of this case on the ground that we lack subject matter jurisdiction. Although I agree with the majority that in light of *Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*, a district court may consider whether to dismiss claims brought under the Alien Tort Statute (ATS), *28 U.S.C. § 1350*, on the ground that the plaintiffs failed to exhaust remedies in the appropriate forum, I see no basis for holding that the district court here erred by failing to consider exhaustion before the other threshold issues on which it relied to dismiss this case (e.g., political question, act of state, and subject matter jurisdiction). The [*45] Supreme Court has made clear that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits,'" and there is no mandatory sequencing of non-merits grounds for disposing of a case. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007)* (quoting *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999), Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 100-01 n.3, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).*

Rather than return this case to the district court for consideration of this discretionary preliminary issue, I would affirm the dismissal of this case on the ground that we exceed the authority granted by Congress and the limits imposed by the Constitution's separation of powers

by applying the ATS to a dispute not involving United States territory or citizens.

* * *

Rather, plaintiffs ask us to adjudicate a dispute that falls far outside the realm of any historical ATS case, and to sit in judgment over interactions that took place on foreign soil among a foreign company, a foreign government, and foreign citizens. Such an exercise of authority would encroach too far upon the province of the political branches, thrusting us into a situation rife with "risks of adverse foreign policy consequences," *Sosa, 542 U.S. at 728*, where we are asked to judge, rather than vindicate, [*52] the interests of a foreign sovereign. *See also id. at 733 n.21*. We are not entitled to read such an expansive grant of jurisdiction into the ATS, given Congress's presumed intent to honor the structural constitutional principle that "[t]he conduct of foreign relations of our government is committed by the Constitution to the executive and legislative -- 'the political' -- departments of the government." *Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918)*. We are thus bound to embrace a limited interpretation of the ATS--one that facilitates, rather than disrupts, our participation in the international state system.

In sum, in the absence of direction from Congress, we cannot read the ATS as authorizing an extension of jurisdiction to disputes lacking any nexus to United States territory, citizens, or interests. *See Sosa, 542 U.S. at 726* ("[T]he general practice [for the Supreme Court] has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.").

In light of the narrow scope of Congress's [*53] grant of authorization in the ATS, as informed by constitutional separation of power principles, I would conclude that recognizing the torts in this case exceeds the power we have to recognize causes of action under the ATS, and we therefore lack jurisdiction to entertain these claims.

REINHARDT, Circuit Judge, dissenting, joined by Judges PREGERSON, BERZON, and RAWLINSON:

The plurality opinion remands this action to the district court to consider whether this is a case in which prudential exhaustion analysis should be applied, and, if so, whether plaintiffs should be required to exhaust their remedies in Papua New Guinea before proceeding further in the district court. I note first that neither the Supreme Court nor any circuit court has ever imposed an exhaustion requirement, prudential or otherwise, on a case brought under the Alien Tort Statute (ATS), which was enacted in 1789. Because I do not think that the Supreme Court "counseled" us to adopt such a requirement, that there is anything about this case that makes it "an appropriate case" in which to consider doing so, or that we should require an exhaustion analysis in ATS cases when Congress has not included such a requirement [*54] in the statute, I dissent.

A.

The plurality's starting point is a footnote in *Sosa v. Alvarez-Machain*, in which the Supreme Court alluded to the issue of exhaustion of local remedies and stated: "We would certainly consider this requirement in an appropriate case." *542 U.S. 692, 733 n.21, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*. The exhaustion argument had not been raised prior to the time that *Sosa* reached the Court, and even there it had not been raised except in an amicus brief. Contrary to the plurality's assertion, the footnote stating that the Court would consider the argument when it was properly raised certainly does not "signal" anything as to what the Court's ultimate position will be when the issue of exhaustion is properly before it.

* * *

1 I would also not parse the words in the sentence as carefully as Judge Bea does and conclude that the Supreme Court would consider exhaustion as a requirement rather than a prudential case-specific inquiry. I doubt that the Court meant to infuse as much meaning into the one sentence as the plurality or the concurrence would like.

* * *

As the plurality recognizes, there is a well-settled exception to the exhaustion requirement when the alternative local remedy is unavailable, ineffective, or futile. *See* Plurality op. at 16458-59. No rule of domestic or international law requires plaintiffs who are alleging serious violations of human rights to exhaust [*58] local remedies when there is evidence that plaintiffs would further risk their lives by doing so. * * * In fact, exhaustion is not a very high bar to suit for victims of human rights abuses: even in specifically requiring exhaustion under the TVPA, Congress explained that "in most instances the initiation of litigation under this legislation will be virtually [*59] prima facie evidence that the claimant exhausted his or her remedies in the jurisdiction in which the torture occurred" and that "courts should approach cases brought under the [TVPA] with this assumption." S. Rep. No. 102-249, at 9-10 (1991). Because, given their fears of retaliation, it is clear that plaintiffs would not need to exhaust their

remedies in Papua New Guinea even under the TVPA, this is not an "appropriate case" to determine whether we should apply an exhaustion analysis in ATS cases. In fact, it may well be one of the least appropriate cases in which to do so.

B.

* * * There are many reasons why courts should be reluctant to transplant the exhaustion principle onto ATS, a statute that provides jurisdiction in United States courts for violations of international human rights norms that are specific, universal, and obligatory. *See Sosa, 542 U.S. at 732* (citing *In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994))*.

Exhaustion of local remedies is a rule of customary international law that developed in the arena of diplomatic protection in order to protect the sovereignty of states at a time when international law recognized only the rights of states to protect its own citizens. *See* Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* 22-42 (2d ed. 2004). The scope of the exhaustion rule is less settled, however, in the realm of international human rights, where the law recognizes the primacy of the fundamental rights of individuals and the interest of states other than the victims' own in guaranteeing such universal human rights. *See id. at 67* ("[I]t would seem logically to follow from the recognition of the fact that individuals have fundamental human rights . . . that . . . there should be a presumption [*61] that violations of such rights should be susceptible of examination at an international level without the need for the exhaustion of local remedies."). [3] It may be, for example, that exhaustion is not required in the human rights context when a treaty does not specifically mandate it. *See* Amerasinghe, *supra*, at 66-68.

* * *

The exhaustion principle is even less established in the enforcement of international human rights norms in domestic courts against individuals and corporations, than in supranational tribunals against states. Exhaustion under international law governs the *vertical or hierarchical* relationship of courts -- such as the relationship of international tribunals like the International Court of Justice and the Inter-American Court of Human Rights to domestic courts. *See Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 29) ("The rule that local remedies must be exhausted before *international proceedings* may be instituted is a well-established rule of customary international law.") (emphasis added); Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation, 29 Fordham Int'l L. J. 1245, 1275 (2006)* ("Ordinarily, the rule of local remedies applies [*63] as a conflict rule; it is used to resolve conflicts of jurisdiction between municipal courts and international tribunals. So the rule usually applies in a vertical exercise of jurisdiction between national and international tribunals."). And when a case is brought in such international tribunals, the defendant is often the state. *See The Matter of Viviana Gallardo et al*, Series A., No. G 101/81, Inter-Am. C.H.R., Nov. 13, 1981, P 26 ("[Exhaustion] . . . excuse[s] *the State from having to respond to charges before an international body* for acts imputed to it before it has had the opportunity to remedy them by internal means.") (emphasis added).

In adjudicating ATS claims, however, United States courts sit in *horizontal*, not vertical, relationship with courts of other countries that might exercise its jurisdiction over the same questions of international law as against individual defendants. The more appropriate point of comparison is therefore whether courts of other nations have imposed such a requirement before exercising universal jurisdiction. It appears that, for the most part, they have not. *See* Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle*, 19 Crim. L.F. 153, 175 (2008) [*64] (studying the principle of "subsidiarity" -- in which a third-party state exercises universal jurisdiction only when the state with a traditional basis of jurisdiction is unable or unwilling to investigate and prosecute an international crime -- and concluding that "the absence of a conviction on the part of States that subsidiarity has the compelling force of law probably leads to the inevitable conclusion that the subsidiarity principle is not a norm of customary international law."). [4]

> 4 Although the plurality argues that we should be careful about exercising jurisdiction because the basis for universal *civil* jurisdiction is not as well-settled as the basis for universal *criminal* jurisdiction, international law does not preclude "the application of non-criminal law on [the basis of universal jurisdiction.]" *Restatement (Third) of Foreign Relations § 404 cmt. b.* The plurality overstates the difference between the two types of jurisdiction, as in many countries "universal criminal jurisdiction necessarily contemplates a significant degree of tort recovery as well." *See Sosa, 542 U.S. at 762-63* (Breyer, J., concurring).

Our prior cases reflect that the exhaustion principle is not an [*65] accepted limitation on a litigant's ability to bring international law claims in the United States courts. Indeed, we have always resolved the question of competing jurisdiction with foreign courts through the forum non-conveniens analysis -- not exhaustion.

* * * The forum non conveniens doctrine grants courts the discretion to dismiss the case

in consideration of the balance of private and public interests. *See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)*. It applies to ATS cases and was addressed and rejected by the district court in this case. *See Sarei, 221 F. Supp. 2d at 1164-78*; *see also, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 108 (2d Cir. 2000)*. I see no reason to deviate from our practice just because a principle of exhaustion exists in the international law of diplomatic protection or because some human rights treaties explicitly require exhaustion prior to bringing claims in international tribunals.

Nor do I accept [*66] the view that prudential considerations favor the imposition of the exhaustion requirement, for many of the reasons already articulated by the panel majority. Most important, the individual and institutional interests in an ATS case weigh heavily against requiring exhaustion. ATS recognizes jurisdiction only for violations of "a norm of international character accepted by the civilized world" and "defined with a specificity" comparable to the 18th century norm prohibiting piracy. *Sosa, 542 U.S. at 725*. These are heinous offences like genocide, crimes against humanity, and war crimes. *Sosa, 542 U.S. at 762* (Breyer, J., concurring). Individuals have an interest in obtaining a remedy for such injustices and the United States has an interest in punishing the "*hostis humani generis*, an enemy of all mankind," *Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)*.

The exercise of ATS jurisdiction may, of course, at times trigger institutional concerns regarding sovereignty and comity. But we have an arsenal of judicial doctrines that protect the sovereignty interests of other countries or the foreign policy and comity interests of this country from judicial intervention: political question, [*67] act of state, sovereign immunity, and international comity, for example. In fact, one survey of the cases in 2004 found that approximately 80% of the human rights cases brought under ATS and TVPA since 1980 have been dismissed on the bases of these and other similar doctrines. *See* K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness, 40 Tex. Int'l L.J. 1, 2* & n.6 (2004). Many of these doctrines have been raised in this case as well. I do not think that we need to create a new requirement of exhaustion in order to further restrict the availability of jurisdiction that Congress has granted.

Moreover, in this lawsuit, like many others, the defendants are not a sovereign state, or even officials of the state, but corporations based in the United Kingdom and Australia that are "part of an international group operating mines and processing plants in forty countries, including the United States." Plurality op. at 16446. In such a case, the concern for sovereignty and comity is less pressing. [5] This brings us back to the point that even if the exhaustion analysis were to be applied, the plaintiffs here would not be required to exhaust their claim in Papua New Guinea, given all [*68] the circumstances, including those discussed in section A, *supra*.

> 5 This would also explain why Congress specifically required exhaustion under the TVPA, but not under ATS. TVPA imposes liability only when the individual acts "under actual or apparent authority, or color of law, of any foreign nation." *28 U.S.C. § 1350* note. Under ATS, however, private parties may be held liable so long as their conduct violates a well-established norm of international law -- even if they are not state actors. *See Sosa, 542 U.S. at 732 n.20*; *Kadic, 70 F.3d at 239*.

I dissent for these reasons and for others set forth in the panel majority's opinion. *See Sarei, 487 F.3d at 1213-24*. In the context of ATS, there are persuasive reasons why "the balance [of interests] tips against judicially engrafting an exhaustion requirement onto a statute where Congress has declined to do so, and in an area of international law where the Supreme Court has called for the exercise of judicial caution rather than innovation." *Sarei, 487 F.3d at 1219*.