BRINGING ATS LITIGATION INTO CONFORMITY WITH U.S. REFUGEE AND ASYLUM LAW

*Matthew E. Danforth**

I. INTRODUCTION

In the late 1960s, Rio Tinto, an Australian mineral resource company, began mining copper and gold in Bougainville, a small

* Matthew E. Danforth (Cornell University, J.D./LL.M; Duke University, B.A.) is an associate in the New York office of White & Case LLP. The author would like to thank Stephen Yale-Loehr, Professor of Law at Cornell Law School, for his invaluable guidance in the writing of this article. He is also grateful to the editors and staff of the Houston Journal of International Law for their dilligent editorial work.

island off the coast of Papua New Guinea (PNG).[1] In 1988, as the project began to displace villages and pollute drinking water, Bougainville's residents revolted by sabotaging the mines.[2] Unable to operate, Rio Tinto responded by threatening to abandon all investment in PNG and coerced its government into taking military action.[3] The PNG government sent in troops, which allegedly engaged in "in aerial bombardment of civilian targets, wanton killing and acts of cruelty, village burning, rape, and pillage."[4] A decade later, one of the victims, Alexis Holyweek Sarei, then a resident of California, brought a claim against Rio Tinto under the Alien Tort Statute (ATS).[5]

As the only statutory grant of universal jurisdiction in the world, the ATS enables aliens, like Sarei, to bring tort actions for the most heinous violations of international law.[6] However, the Ninth Circuit held that if Sarei had not exhausted possible legal remedies in PNG, he could not bring an ATS suit in the United States.[7] Alternatively, courts have also used the procedural doctrine forum non conveniens to dismiss ATS cases.[8] While the exhaustion requirement and forum non conveniens are likely inconsistent with the ATS generally, they also conflict with U.S. immigration law when the ATS plaintiff is an asylee or refugee. Under the Immigration and Nationality

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1. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 825 (9th Cir. 2008) (explaining that Rio Tinto built a mine for copper and gold in Bougainville in the late 1960s), *on reh'g en banc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

2. *Rio Tinto*, 550 F.3d at 825.

3. *Id.*

4. *Id.*

5. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1127 (C.D. Cal. 2002), *reh'g en banc* 550 F.3d 822 (9th Cir. 2008). The ATS, 28 U.S.C. § 1350 (2006), is also known as the Alien Tort Claims Act (ATCA). *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1311 (S.D. Fla. 2011).

6. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010) *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491) (noting that the ATS is "a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world.").

7. *See Rio Tinto*, 550 F.3d at 831 ("[I]n ATS cases where the United States 'nexus' 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.'").

8. *See, e.g.*, Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 497 (S.D.N.Y. 2005).

Act (INA), refugees and asylees are admitted into or allowed to remain in the United States because they have either experienced past persecution or have a well-founded fear of future persecution in their home countries.[9] Requiring refugees and asylees, like Sarei, to return home to bring tort claims would put them at a risk of harm that is inconsistent with the ATS and both refugee and asylum law.

This Article examines how courts should alter exhaustion and forum non conveniens requirements when an ATS plaintiff is a refugee or asylee. In such cases, it recommends presumptions favoring plaintiffs and court consideration of persecution. Part I describes the INA's persecution requirement for refugees and asylees and the international customary norm of *nonrefoulement*. Part II chronicles the progression of ATS content and jurisdictional limitations. Part III explores the current incoherence between the ATS and refugee law and advocates for reducing barriers for refugee and asylee ATS plaintiffs as a way to square the two laws. Part IV concludes the Article.

II. PERSECUTION AND *NONREFOULEMENT* IN REFUGEE AND ASYLUM LAW

Refugee and asylum cases frequently involve subtle and complicated issues of international law.[10] Because this Article focuses on a statutory refugee's and asylee's endemic difficulty in overcoming exhaustion and forum non conveniens, this section considers only the INA's persecution requirement and the *nonrefoulement* rationale underlying refugee law.[11]

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9. *See* Immigration and Nationality Act of 1952 §§ 101(a)(42)(A), 207, 8 U.S.C. §§ 1101(a)(42), 1157 (2010) (defining "refugee" and explaining the admission of refugees into the United States).

10. THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 828 (6th ed. 2008).

11. This Article uses the term "refugee" to mean any person who meets the statutory definition of refugee and has been given either refugee or asylum status. *See* Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2010) (defining "refugee"). The term "asylee" means any person who meets the statutory definition of refugee and has been granted asylum status. *See* Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158(b)(1)(A) (2010) (stating that persons eligible for asylum status include those whom the Attorney General has designated as

A. Refugee: Definitional Requirement

A noncitizen that seeks asylum status in the United States must first meet the INA's definition of a refugee,[12] which INA § 101(a)(42)(A) defines as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[13]

Thus, a refugee is not merely any person deprived of basic needs,[14] but rather someone whose past persecution or well-founded fear of future persecution (based on a protected ground) prevents him or her from returning home.[15] Persecution arises from the "sustained or systemic violation of basic human rights demonstrative of a failure of state protection."[16] For example, when the Burmese military imposed forced labor on a preacher and then tortured and killed his religious companion, the Ninth Circuit held that the preacher had a well-founded fear of future persecution.[17]

"refugees"). While there are clear distinctions between the two, because this Article focuses on the persecution requirement of both, the substantive recommendations for the ATS doctrines apply to both refugees and asylees.

12. Immigration and Nationality Act of 1952 § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2010).

13. Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2010). The president may also specify circumstances where the term "refugee" could include a person within the country of that person's nationality. Immigration and Nationality Act of 1952 § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2010). However, the term "'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

14. Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 282 (1985).

15. Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2010).

16. JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 104–05 (1991).

17. Khup v. Ashcroft, 376 F.3d 898, 903, 905 (9th Cir. 2004).

Under U.S. law, persecution represents extreme conduct that is more egregious than offensive, unjust, or even unlawful treatment.[18] Accordingly, "mere harassment, annoyance, and discrimination" and "minor inconvenience[s] or disadvantage[s]" do not constitute persecution.[19] "If no single incident is severe enough to constitute persecution," multiple incidents "viewed cumulatively, can still qualify as persecution, but such incidents . . . must be more than sporadic and isolated."[20]

Although findings of persecution require fact-specific inquiries and adjudicators differ as to the extent of harm a petitioner must undergo before he or she may rightly claim persecution, these jurisprudential variations lie outside the scope of this Article.[21] For the purposes of this discussion, it is sufficient to accept that any asylee or refugee in the United States has made the necessary showing of persecution as severe misconduct, as determined by administrative adjudicators or a federal court.

B. The Principle of Nonrefoulement

Protection against *refoulement*, the return of the refugee to persecution, is a refugee's or asylee's most basic need.[22] The 1951 Convention Relating to the Status of Refugees provides the fundamental legal framework for protecting the rights of refugees and outlines the refugee's right to *nonrefoulement*.[23] Article 33 of the 1951 Convention prohibits a country from expelling or returning a refugee in any manner to the country of persecution.[24] Adhering to this principle, the INA's *nonrefoulement* provision generally prevents the Attorney General from returning petitioners to a place where their lives

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18. 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04(2) (2012) (referencing Nelson v. INS, 232 F.3d 258 (1st Cir. 2000)).

19. *Id*. (quoting Vatulev v. Ashcroft, 354 F.3d 1207, 1210 (10th Cir. 2004) and Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)).

20. *Id*. (citing Toure v. Att'y Gen., 443 F.3d 310, 318 (3d Cir. 2006)).

21. *See id*.

22. *See* ALEINIKOFF ET AL., *supra* note 10, at 845.

23. *Id*. at 845–46.

24. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137.

or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.[25]

By recognizing the right of *nonrefoulement*, U.S. immigration law manifests a desire to shelter persecution victims from future harm.[26] Although a right against forced return differs from a right to bring a particular tort claim, this Article posits that the purposes of the ATS and asylee law would best be served by incorporating the idea of *nonrefoulement* in ATS cases with asylee plaintiffs.[27] After a brief summary of the ATS's history, with a focus on the statute's purpose and the types of claims a plaintiff can bring, this Article outlines forum non conveniens and exhaustion, the two elements of ATS litigation that present the greatest inconsistencies with the principle of *nonrefoulement*.

III. THE ALIEN TORT STATUTE

A. History and Content of the Statute

In 1789, Congress enacted the Alien Tort Statute as part of the First Judiciary Act to enable foreign citizens to attain justice for injuries caused by acts of piracy, which by their nature often occurred outside the territory of the United States and the victim's sovereign.[28] The statute's original language provided

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25. Immigration and Nationality Act of 1952 § 241(b)(3), 8 U.S.C. 1231(b)(3) (2010); *see also* U.S. Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822 (1998) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

26. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY & EXECUTIVE BRANCH VIEWS 2, 10 (2003) (discussing the history of the ATS and the theory of universal jurisdiction which allows a state to punish pirates under the ATS); Scott M. Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L. J. 357, 357–59, 366–70 (1983).

27. That is, to prevent future harm to refugees and asylees and allow human rights victims to be compensated for certain violations of international law.

28. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Anthony D'Amato, *The Alien Tort Statute*

"[t]hat the district courts shall have, exclusively of the courts of the several States, cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[29] The operative part of the ATS—that it grants jurisdiction only for torts in "violation of the law of nations or a treaty of the United States"—has generally remained unchanged.[30]

When Congress enacted the ATS, Blackstone's Treatise provided the substantive content of the "law of nations,"[31] the "system of rules . . . established by universal consent among the civilized inhabitants of the world; in order to decide all disputes . . . which must frequently occur between two or more independent states, and the individuals belonging to each."[32] For Blackstone, three main offenses constituted violations of the law of nations: violation of safe conduct, interference with ambassadors, and piracy on the high seas.[33] History shows that with the exception of piracy claims, plaintiffs rarely invoked the ATS.[34] However, in 1980, nearly 200 years after the ATS's enactment, the Second Circuit expanded ATS litigation with its landmark decision in *Filartiga v. Pena-Irala* by holding that acts of torture committed by individuals acting under official authority constituted a violation of the law of nations.[35]

In making this determination, the *Filartiga* court looked to "the sources from which customary international law is derived—the usage of nations, judicial opinions, and the work of

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and the Founding Of The Constitution, 82 AM. J. INT'L L. 62 (1988).

29. Federal Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (current version at 28 U.S.C. § 1350 (2010)).

30. 28 U.S.C. § 1350 (2010). *See also* Mark W. Wilson, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of* Jus Cogens *and Exhaustion*, 39 ENVTL. LAW 451, 455 (2009) (noting that the current wording of the ATS was enacted in 1911 by the Federal Judiciary Act of 1911).

31. *See* Wilson, *supra* note 30, at 458 (recognizing Blackstone's influence at the time of the 1789 statute's drafting).

32. 4 WILLIAM BLACKSTONE, COMMENTARIES *66, *available at* http://www.lonang.com/exlibris/blackstone/bla-405.htm.

33. *Id.* at *68.

34. *See* Wilson, *supra* note 30, at 455.

35. Filartiga v. Pena-Irala, 630 F.2d 876, 880–90 (2d Cir. 1980).

jurists."[36] Because those sources showed the "universal renunciation [of torture] in the modern usage and practice of nations," the Second Circuit held that the district court had subject matter jurisdiction under the ATS to hear the plaintiffs' action.[37]

In *Sosa v. Alvarez-Machain*, the Court accepted the Second Circuit's construction of the law of nations as customary international law.[38] Thus, ATS plaintiffs may only bring actions for the most egregious and universally accepted human rights violations, which now include torture, genocide, slavery, war crimes, and even aiding and abetting those violations.[39]

While providing an important remedial avenue for human rights victims, ATS litigation has domestic and external costs. As ATS cases grew in number and diversified once the Ninth Circuit contemplated the possibility of ATS corporate liability in 2002,[40] U.S. courts have heard cases with high levels of

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36. *Filartiga*, 630 F.2d at 884. In determining which sources were relevant to customary international law, the Second Circuit looked to *The Paquete Habana*, which reaffirmed that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who . . . have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* at 880–81 (citing *The Paquete Habana*, 175 U.S. 677, 701 (1900)).

37. *Filartiga*, 630 F.2d at 880–89. The Second Circuit further asserted in *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 242 (2d Cir. 2003), that there are three elements necessary to have a valid claim under the ATS: "plaintiffs must (i) be 'aliens,' (ii) claiming damages for a 'tort only,' (iii) resulting from a violation 'of the law of nations' or of 'a treaty of the United States.'"

38. Sosa v. Alvarez-Machain, 542 U.S. 692, 748 (2004). Specifically, the Court adopted the Ninth Circuit's "specific, universal and obligatory" customary international law standard. *Id.* at 747. It should be noted that in February and October 2012 the Supreme Court heard oral arguments concerning the scope of the ATS, particularly with respect to corporate liability. Lyle Denniston, *Argument recap: In search of an ATS compromise*, SCOTUSBLOG (Oct. 1, 2012), http://scotusblog.com/2012/10/argument-recap-3/ (referencing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491)).

39. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260, 273, 277 (2d Cir. 2007). *See also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12 (2d ed. 2008) (stating that ATS affords jurisdiction only for certain international law violations).

40. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 965, 968 (9th Cir. 2002) (considering whether a private entity doing business abroad could be held accountable for international law violations under the federal common law).

administrative inefficiency (i.e., ones with greater discovery costs, the absence of local evidence, or few ties to the United States).[41] Similarly, the courts, when considering the competence of foreign courts and dangerousness of political situations, risk damaging U.S. foreign relations and international comity.[42]

In considering these problems, U.S. courts have used the following theories to limit ATS jurisdiction: forum non conveniens,[43] exhaustion,[44] the act of state doctrine,[45] the political question doctrine,[46] and an actor-type predicate norm under customary international law.[47] Because the first two theories more seriously contemplate the circumstances surrounding a refugee, this Article does not address the latter three.[48] After explaining forum non conveniens and exhaustion in the context of international cases, this Article analyzes how the requirements imposed by these doctrines might change when refugees or asylees bring ATS claims.

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41. *See* Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 32–33 (2004).

42. *See* PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d. 65, 73 (2d Cir. 1998).

43. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 189 (2d Cir. 2009).

44. *See, e.g.*, Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008).

45. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005).

46. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1079 (9th Cir. 2006), *overruled by* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008).

47. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 139 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491) (holding that because there was no predicate norm of corporate liability, a corporate actor could not be held liable under the ATS even if it violated a norm of customary international law).

48. It is undisputed that refugees and asylees, as resident noncitizens, would meet the statutory meaning of an "alien." *See* Richard Herz & Lorraine Leete, *An Alien by Any Other Name: Debunking a New Attempt to Re-Write the Original Language of the Alien Tort Statute*, 7 BERKELEY J. OF INT'L LAW PUBLICIST 1, 5–6 (2011), *available at* http://bjil.typepad.com/publicist/2011/01/-an-alien-by-any-other-name-debunking-a-new-attempt-to-re-write-the-original-language-of-the-alien-t.html (providing a more in depth discussion of refugees and asylees as "aliens").

B. Forum Non Conveniens

Forum non conveniens is the common law doctrine that a court should decline jurisdiction when the "ends of justice strongly indicate that the controversy may be more suitably tried elsewhere."[49] The Supreme Court first established the factors relevant to forum non conveniens dismissals in *Gulf Oil Corp. v. Gilbert*.[50] In reasoning that the case warranted dismissal on forum non conveniens grounds, the Court set forth discretionary factors of public and private interest for future courts to consider.[51] The Court named the following private interests as relevant considerations: the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the relative advantages and obstacles to fair trial, and other practical problems that make trial of a case easy, expeditious and inexpensive.[52] The Court further cautioned that unless the balancing strongly favored the defendant, a court should not disturb the plaintiff's choice of forum.[53] On the public interest side, the Court named administrative difficulties arising from litigating at congested centers instead of at its origin, burden on a jury to decide a case that has nothing to do with the local community, local interest in deciding localized controversies at home, and avoiding conflict of law problems.[54]

The Supreme Court later extended *Gilbert* analysis to cases

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49. Universal Adjustment Corp. v. Midland Bank, Ltd., 184 N.E. 152, 158 (Mass. 1933).

50. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947).

51. *Id.* at 508–09.

52. *Id.* at 508. Other factors included the possibility of view of premises, if view would be appropriate to the action and questions as to the enforceability of a judgment. *Id. See also* Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518, 527 (1947) (holding that the need to delve into the internal affairs of a foreign corporation does not automatically require dismissal).

53. *Gilbert*, 330 U.S. at 508; *see also Koster*, 330 U.S. at 524 (holding that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum).

54. *Gilbert*, 330 U.S. at 508–09. At the federal level, 28 U.S.C. § 1404 supplements the *Gilbert* analysis. *See* 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

of international character. In *Piper Aircraft v. Reyno*, Scottish plaintiffs sued a U.S. corporation in the United States because of a higher possible recovery and the availability of strict liability, disallowed by Scottish courts.[55] In dismissing the plaintiffs' case under *Gilbert* balancing, the Court also distinguished international cases from purely domestic cases by eliminating the presumption towards upholding the plaintiffs' choice of forum for international plaintiffs.[56] Finally, although the Court conceded that an unfavorable change in law was sometimes a relevant consideration for forum non conveniens, it held that a substantial reduction of recovery amount or the absence of a recovery theory could not bar dismissal so long as the new forum would not altogether deprive plaintiffs of recovery or treat them unfairly.[57]

After *Piper*, courts began to apply forum non conveniens to ATS cases. Within the Second Circuit, forum non conveniens became a dismissal tool in a series of cases where Nigerian plaintiffs sued Pfizer, Inc., a U.S. corporation, for allegedly engaging in human medical experimentation without patient consent.[58]

In *Adamu v. Pfizer, Inc.*, the Southern District of New York analyzed the case facts under *Gilbert's* parameters.[59] When the defendants moved to dismiss to Nigerian courts, the court first looked to *Gilbert's* public interest factors, which it found inconclusive.[60] The court reasoned that Nigeria's interest in hearing a claim alleging experimentation in Nigeria on Nigerian

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55. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 235 (1981).

56. *Id.* at 255–56 (reasoning that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

57. *See id.* at 254–55. Forum non conveniens analyses typically proceed in three stages: determining the level of deference to the plaintiff, determining whether an adequate alternative forum exists, and balancing the *Gilbert* factors. Iragorri v. United Tech. Corp., 274 F.3d 65, 70–75 (2d Cir. 2001) (breaking the analysis into three steps).

58. *See, e.g.*, *Abdullahi*, *supra* note 43, at 168–69, 189.

59. *Adamu*, *supra* note 8, at 504–06.

60. *Id.* at 505 ("[T]he *Gilbert* public interest factors do not strongly support either forum over the other.").

citizens counterbalanced the local interest of regulating Pfizer, a U.S. corporation that developed the drug within the district.[61] Although the district court dismissed the case for lack of subject matter jurisdiction, it stipulated that even if there were subject matter jurisdiction, it would have dismissed the case based on the private factor balancing because witnesses crucial to the factual inquiries of the case were located in Nigeria.[62]

On appeal, the Second Circuit provided further guidance about adequate alternative fora in the ATS context.[63] There, the court found dismissal inappropriate when "an adequate and presently available alternative forum does not exist."[64] Although adequate fora generally permit litigation of the dispute where defendants are amenable to service of process, a forum "may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute," is not presently available, or "provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all."[65] In accordance with *Piper*, the Second Circuit accepted a low level of deference for the foreign plaintiff's choice of forum, but did acknowledge that the burden of proof of an adequate alternative forum rested with the defendant.[66]

C. Prudential Exhaustion

Along similar lines as the adequate alternative forum requirement under forum non conveniens, exhaustion requires an ATS claimant to first exhaust any remedies available in his or her domestic legal system,[67] "unless such remedies are clearly sham or inadequate or their application is unreasonably

61. *Id.*

62. *Id.* at 505–06.

63. Abdullahi, *supra* note 43, at 189 ("Although we are not now called upon definitively to review the district court's application of *forum non conveniens*, in view of the frequency with which this issue has arisen and remained unsettled in this case, we offer additional guidance to assist the parties and the district court.").

64. *Id.*

65. *Id.*

66. *Id. See Piper Aircraft Co.*, 454 U.S. at 255–56 (giving a low level of deference for a forum chosen by a foreign plaintiff).

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

prolonged."[68] Exhaustion can be either mandatory or prudential.[69] Mandatory exhaustion requires an ATS plaintiff to always exhaust all adequate and available remedies, but prudential exhaustion allows courts to consider on a case-by-case basis whether to require exhaustion.[70] In *Sosa,* the Supreme Court decided on prudential exhaustion for ATS cases.[71] While not explicitly requiring the plaintiff to first pursue local remedies, the Court advised that it would "certainly" consider exhaustion "in an appropriate case."[72]

In a split decision in *Sarei v. Rio Tinto, PLC*, the Ninth Circuit became the first circuit court to consider the meaning of an "appropriate ATS case."[73] In that case, PNG villagers sued Rio Tinto, an international mining corporation, for war crimes and crimes against humanity.[74] After villagers protested the pollution and destruction of their land, Rio Tinto allegedly responded by enlisting the aid of the government and inciting a small-scale civil war.[75] The *Rio Tinto* plurality noted that ATS cases often present U.S. courts with scenarios that implicate two divergent "impulses" in the U.S. legal system—first, to safeguard and respect the principle of comity, and second, to further the U.S. role in establishing collective arrangements that support international institutions.[76] Because the plaintiffs' action lacked the traditional bases for exercising prescriptive jurisdiction, thereby triggering the international comity impulse, the court found the absence of a significant U.S. nexus to be highly relevant in determining the application of

68. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1987) [hereinafter RESTATEMENT].

69. Sarei v. Rio Tinto, PLC, 550 F.3d 822, 827 n.3 (9th Cir. 2008).

70. *Id.* at 832–33 n.10. Mandatory exhaustion is referred to as statutory exhaustion when required by statute. *See id.* Prudential exhaustion "originated in habeas corpus cases to serve a gatekeeping function preventing 'unnecessary conflict between [federal and state] courts equally bound to guard and protect rights secured by the [C]onstitution.'" *Id.* at 828 (quoting *Ex parte* Royall, 117 U.S. 241, 251 (1886)).

71. *Sosa*, 542 U.S. at 733 n.21.

72. *Id.*

73. *Rio Tinto*, 550 F.3d at 824.

74. *Id.* at 824–25.

75. *See id.* at 825.

76. *Id.* at 830.

prudential exhaustion.[77]

The *Rio Tinto* plurality then set the framework for evaluating exhaustion triggered by a weak nexus in ATS cases.[78] Once the defendant shows that the plaintiff has not exhausted remedies abroad, "the burden shifts to the plaintiff to rebut by showing that local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."[79] The ultimate burden of proof and persuasion on the issue of exhaustion of remedies lies with the defendant."[80] However, to "exhaust," it is not sufficient that a plaintiff merely initiate a local suit.[81] Instead, "[a] plaintiff must obtain a final decision of the highest court . . . in the legal system at issue, or show that the [applicable] law or availability of remedies would make further appeal futile."[82] The court also held that remedies must be available and effective.[83] Ultimately, the Ninth Circuit remanded the case to the district court,[84] and the plaintiffs dropped their claims that were not "of universal concern."[85]

The *Abdullahi* and *Rio Tinto* cases illustrate that although the language of the ATS permits aliens to sue for violations of the law of nations, they face substantial obstacles in doing so.[86]

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77. *Id.* at 831. The lack of nexus is particularly relevant when cases do not involve matters of universal concern. *Id.* at 824, 831. Claims that are of "universal concern" are the ones that involve *jus cogens* norms of customary international law. *See id*. at 824–25; *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (stating the right to be "free from official torture is fundamental and universal," and "a norm of *jus cogens*."). The main bases for prescriptive jurisdiction are nationality, territoriality, and effects. RESTATEMENT, *supra* note 68, § 403(2) cmt. d. Even though one of the plaintiffs (Sarei) was a lawful permanent resident, the claims involved a foreign corporation's complicity in acts on foreign soil that affected aliens. *Rio Tinto*, 550 F.3d at 831.

78. *See Rio Tinto*, 550 F.3d at 831.

79. *Id.* at 832.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 825.

85. *See* Sarei v. Rio Tinto, PLC, 650 F. Supp. 2d 1004, 1032 n.71 (C.D. Cal. 2009).

86. In fact, after over a decade of litigation, the plaintiffs in *Rio Tinto* still do not have an answer. *See* Sarei v. Rio Tinto, PLC, 625 F.3d 561, 562 (9th Cir. 2010) (ordering mediation); Abdullahi, *supra* note 43.

The ATS requirements are particularly burdensome for refugees and asylees, who by definition would face persecution if forced to first sue in their home countries.[87]

IV. RECOMMENDATIONS

The principle of *nonrefoulement* in U.S. refugee law mandates that the government refrain from returning refugees or asylees to countries of persecution.[88] Yet the procedural barriers facing ATS plaintiffs, who often allege egregious international law violations, require such return.[89] Although the right against *refoulement* itself does not bestow additional rights,[90] it is inconsistent to enact a law enabling human rights victims to redress past global persecution in U.S. courts while requiring a dangerous return home to do so. Because *nonrefoulement* is an undisputed tenet of refugee and asylum law, refugees or asylees should not need to first return home to sue under the ATS. Therefore, ATS procedural barriers must relax for refugees and asylees so that refugee law and the ATS coherently coexist.[91] This Article proposes alterations to forum non conveniens and exhaustion that will allow ATS litigation to adhere to the *nonrefoulement* norm.[92]

A. Refine Forum Non Conveniens Analysis

1. Recommendation One: Reinstate Piper's Presumption of

87. *See* Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) (2010).

88. *See* ALEINIKOFF ET AL., *supra* note 10, at 845.

89. *Cf. Rio Tinto*, 550 F.3d at 824. (discussing the requirement of exhaustion in certain ATS cases after declining to impose an absolute exhaustion requirement in all ATS cases).

90. *See* ALEINIKOFF ET AL., *supra* note 10, at 846 (noting that *nonrefoulement* does not require states to provide further rights).

91. Here, it is assumed that the reasons underlying *nonrefoulement* in asylum law and the ATS are sound. That is, asylees should not be forced to return to persecution and that the United States should have a grant of universal jurisdiction for certain types of human rights victims.

92. This Article takes the position that courts should adopt all of these recommendations together. The forum non conveniens recommendations are ordered according to the corresponding stage of forum non conveniens analysis that each addresses.

Upholding the Plaintiff's Choice of Forum for Refugee or Asylee ATS Plaintiffs in Forum Non conveniens Analysis

Because refugees and asylees often come to the United States as a last resort rather than by volition, the *Gilbert* presumption of leaving the plaintiff's choice of forum undisturbed should extend to them.[93] *Piper* eliminated this deference for foreign plaintiffs and reasoned:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[94]

However, the foreign/domestic plaintiff distinction becomes less useful in refugee and asylee cases. Because it is not reasonable for refugees to return to their home countries,[95] their home is likely more properly seen as the United States. As the greatest deference should be given when a plaintiff chooses his home forum,[96] courts should the disregard the *Piper* instruction for refugees who bring ATS claims.[97]

Additionally, *Piper's* concern about forum shopping to receive a higher award[98] is likely absent from refugee and asylee ATS cases. Given the INA's persecution requirement for refugees and asylees,[99] it is serious concerns about personal and family safety that precipitate refugee and asylee migration, not

93. *See* Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947).

94. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981).

95. Immigration and Nationality Act (INA) § 241(b)(3), 8 U.S.C. 1231(b)(3) (2011).

96. *See* Iragorri v. United Tech. Corp., 274 F.3d 65, 71 (2d Cir. 2001).

97. Courts have recently moved away from the *Piper* distinction. *See id.* (reasoning that "a foreign resident's choice of a U.S. forum should receive less consideration, as representing consistent applications of a broader principle under which the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations."). This Article argues that the refugee or asylee's situation warrants deference.

98. *Piper Aircraft Co.*, 454 U.S. at 255.

99. Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2010).

the substance of U.S. tort law.[100]

Granting deference to refugees and asylees, by avoiding future harm, also comports with the spirit of the ATS. Without deference to refugees and asylees, forum non conveniens would undermine the jurisdiction granting purpose of the ATS and harm the U.S. interest in hearing cases that violate the law of nations.[101]

2. Recommendation Two: Allow Courts to Consider Threat of Persecution at the Adequate Alternative Forum Stage in Forum Non conveniens Analysis

As previously noted, a U.S. court will not grant a motion to dismiss under forum non conveniens if no adequate and presently available forum exists.[102] Unless a plaintiff makes an initial showing of inadequacy, comity considerations preclude a U.S. court from adversely judging the quality of foreign justice systems.[103] Again, inadequate fora are those that do not permit the reasonably prompt adjudication of a dispute, that are not presently available, or that provide a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.[104] Thus, this step of forum non conveniens analysis considers both the procedural and substantive inadequacy of the alternative forum, likely the plaintiff's home country in an ATS case.[105] The risk of persecution facing asylees adds another

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100. *See* ARISTIDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 271 (1989) (making the point that helping victims of structural violence in their own country comes before assisting them in migrating and seeking asylum).

101. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99–100 (2d Cir. 2000) (describing a strong U.S. interest in hearing cases that violate international law).

102. *See* Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 159 (2d Cir. 2005). This analysis occurs before application of the Gilbert factors. *Iragorri*, 274 F.3d at 73–74.

103. *See* PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998).

104. Abdullahi, *supra* note 43, at 189.

105. *See Norex*, 416 F.3d at 159 (analyzing whether a RICO-like suit could be brought under Russian antifraud law); *cf. Piper Aircraft Co.*, 454 U.S. at 255 (rejecting the plaintiff's argument that a significantly smaller award rendered an alternative forum inadequate).

dimension to adequacy analysis.

Persecution arises from the sustained or systemic violation of basic human rights "demonstrative of a failure of state protection."[106] Yet, under the above model, the same state that failed the asylee or refugee would also adjudicate the victim's claim.[107] This outcome proves particularly alarming in ATS cases, where the plaintiff's injuries often result from some kind of state action.[108] The link between persecution and state action directly bears on the plaintiff's ability to have his or her case fairly heard. In asylee and refugee ATS cases, courts should examine this correlation in forum non conveniens analysis. Where state action is the primary cause of the plaintiff's persecution, it is unlikely that the home forum is adequate. Where persecution results mainly from a failure of state protection, persecution, by itself, should not render the home forum inadequate, but instead should be considered as a factor at the *Gilbert* balancing stage.

In addition to forwarding the *nonrefoulement* norm,[109] this approach, by echoing the sentiment of the U.S. asylum or refugee decision maker, also largely avoids exacerbating the comity problems inherent in forum non conveniens.[110] Instead of passing additional judgment on the procedural or substantive merits of a foreign legal system, courts would rely on the initial finding of persecution by immigration adjudicators or another court. After a U.S. decision maker has already held that a state persecuted or punished in a manner "our country does not recognize as legitimate,"[111] it is unlikely that comity would be further damaged by a U.S. court concluding that the same state would likely not offer an impartial trial.

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106. HATHAWAY, *supra* note 16, at 104–05.

107. *Id.*

108. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 467 (2011).

109. Immigration and Nationality Act of 1952 § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2011).

110. *See* PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d. 65, 73 (2d Cir. 1998) (discussing the comity implications of forum non conveniens).

111. Osaghae v. U.S.I.N.S., 942 F.2d 1160, 1163 (7th Cir. 1991).

3. Recommendation Three: Explicitly Consider Persecution in the Private Interest Factors for Refugees and Asylees

If an adequate alternative forum nevertheless exists, a court must conduct the analysis set out in *Gilbert*, even if the plaintiff's choice is given great deference.[112] As *Adamu* and *Abdullahi* demonstrate, the traditional analysis usually results in dismissal in ATS cases.[113] The private interest factors usually favor the defendant because evidence is likely located abroad and no means exist to compel unwilling witnesses.[114] Similarly, both the administrative burden of having juries decide cases that have little to do with the local community and the foreign interest in deciding the case tilt the public interest factors towards the defendant.[115] This result seems equitable under the facts of *Piper*, but contradictory when generally applied to ATS cases.

The ATS, as a statutory grant of universal jurisdiction,[116] manifests the U.S. interest in providing a domestic opportunity to hear cases of victims of the most widely condemned human rights violations.[117] Because only "aliens" can sue under the ATS, [118] ATS litigation will inherently involve evidence located abroad and little connection to the U.S. forum. More specifically in asylee and refugee cases, the plaintiff has a demonstrable interest, sanctioned by immigration authorities, in avoiding future persecution caused by return.[119]

Therefore, because the balancing will favor dismissal and the plaintiff cannot return home, the traditional *Gilbert* analysis de facto eviscerates the ATS for asylees and refugees.

Rather than applying the traditional *Gilbert* balancing test,

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112. *Iragorri*, 274 F.3d at 73.

113. *See Abdullahi*, *supra* note 43, at 170–71.

114. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

115. *See id.* at 508–09.

116. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

117. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99–105 (2d Cir. 2000).

118. *See* 28 U.S.C. § 1350 (2010).

119. *See* ZOLBERG, *supra* note 100, at 271 (describing the risks, posed by economic, political, and structural violence, faced by of fleeing refugees returning to their home country).

when looking at the private factors, the courts should take persecution into account. When considering the private factors, courts are already "necessarily engaged in a comparison between the hardships the defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country."[120] Requiring the courts to explicitly consider persecution in asylee and refugee cases logically extends this comparison and preserves the purpose of the ATS. While administrative efficiency would favor the defendants, courts should not dismiss cases to fora where an asylee or refugee faces future persecution.

4. Brief Consideration of Eliminating Forum Non conveniens for Refugee and Asylee ATS Plaintiffs

It should be noted that these three recommendations will almost always prevent a forum non conveniens dismissal of an asylee or refugee plaintiff's case. The conceptual conflict between the ATS and forum non conveniens has actually led some scholars to argue that forum non conveniens should never apply to ATS cases.[121] However, reforming forum non conveniens through presumptions and added factors rather than blanket inapplicability offers the flexibility needed in two possible cases where forum non conveniens dismissal may be appropriate.

First, instead of precluding the defense, allowing the defendant to challenge either deference or the plaintiff's current threat of persecution enables a court to consider whether conditions have changed in the petitioner's home country.[122] In cases where the refugee's country has undergone drastic transformation such that persecution is no longer probable, it

120. *Iragorri*, 274 F.3d at 74.

121. *See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1003 (2001) (stating that the issue of ATS cases being immune from forum non conveniens has been raised in recent scholarship).

122. This idea is consistent with the federal immigration regulation that allows for the denial of asylum if conditions in the applicant's country fundamentally change. *See* 8 C.F.R. § 208.13(b)(1)(i)(A) (2010).

may be reasonable to dismiss the tort case to the home forum, so long as it is adequate. Second, the flexible approach permits the court to consider dismissal where an adequate third forum would be the most convenient. The existence of a third forum is most likely to arise in cases with corporate defendants.[123] Where a refugee or asylee in the United States was injured in his home country by a defendant from a third country, balancing the *Gilbert* factors could yield the third country's courts as the proper forum.

Of course, more ambiguity will likely arise from a court pondering the level of persecution than excluding forum non conveniens altogether.[124] Nonetheless, forum non conveniens remains an important tool for dismissal in the above situations. In sum, greater deference to a refugee or asylee ATS plaintiff's choice of forum and jurisprudential consideration of persecution not only remedies the shortcomings of forum non conveniens with respect to the ATS and the law of asylum, but also generally preserves the doctrine's function.

B. Increase Defendant's Burden in Exhaustion

1. Recommendation Four: Eliminate Exhaustion Requirement for Refugee and Asylee ATS Plaintiffs or at Least Alter the Burden Shifting

While forum non conveniens chiefly inquires into administrative costs and benefits, exhaustion functions as a safeguard to comity.[125] To prevent a U.S. court from encroaching on foreign courts, exhaustion requires a plaintiff to first pursue local remedies, unless such remedies are "clearly sham or inadequate, or their application is unreasonably prolonged."[126] As a preliminary matter, it may be helpful to explore two

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123. The current status of corporate liability under the ATS is uncertain. *Compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491) (holding that corporations could not be held liable under the ATS), *with* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (holding that corporations are not immune from liability under the ATS).

124. *See supra* text accompanying notes 120–23.

125. *See Rio Tinto*, PLC, 550 F.3d. at 831.

126. RESTATEMENT, *supra* note 68, § 713 cmt. f.

tensions left unaddressed by the Ninth Circuit in *Rio Tinto*. The first tension, between exhaustion and the ATS generally, shows that a court's focus on prescriptive bases as nexus, possibly misplaced in the ATS context, could render exhaustion inappropriate for all ATS litigation.[127] The second tension, between exhaustion and ATS refugee and asylee plaintiffs particularly, likely reveals that exhaustion is "inappropriate" for such plaintiffs.[128]

First, the *Rio Tinto* court framed the exhaustion issue as a matter of nexus, which according to the court requires one of the traditional bases for exercising prescriptive jurisdiction.[129] However, the ATS does not purport to establish any of these bases. Rather, it bestows jurisdiction based on the content of customary international law as a grant of universal jurisdiction.[130] The Restatement (Third) of U.S. Foreign Relations permits such granting because "a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . . even where none of the [traditional] bases of jurisdiction . . . [are] present."[131] Because the ATS circumvents the traditional prescriptive bases, it may be more logical to instead inquire into contacts and foreign interests to determine the proper venue.[132] Therefore, the ATS statutory language strongly supports the proposition that exhaustion is inappropriate for all ATS cases.[133] However, even if *Rio Tinto's*

127. *Compare* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting that the Court would consider exhaustion in the appropriate case), *with* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (McKeown J., plurality) ("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 . . . .").

128. *See Sosa*, 542 U.S. at 733 n.21.

129. *Rio Tinto*, 550 F.3d at 831. These bases are nationality, territoriality, and effects. *Id.;* RESTATEMENT, *supra* note 68, § 402.

130. *Kiobel*, 621 F.3d at 115–16.

131. RESTATEMENT, *supra* note 68, § 404.

132. This end could be accomplished through the doctrine of international comity. *See, e.g.*, *Rio Tinto*, PLC, 456 F.3d 1069, 1100 (9th Cir. 2006).

133. *See* 28 U.S.C. § 1350 (2010) (giving district courts original jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States).

exhaustive nexus framework is accepted, it remains arguably inappropriate to require exhaustion for ATS refugee and asylee plaintiffs.

Second, unlike many of the *Rio Tinto* plaintiffs who stayed in PNG, refugees and asylees admitted to the United States have established domicile in this country.[134] While domicile does not equate to nationality (a prescriptive basis), international law has "increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence, rather than nationality, especially in regard to 'private law' matters such as the law of wills and succession, divorce and family rights, and, in some cases, *liability for damages for injury*."[135] Exercising such jurisdiction makes particular sense in cases with refugees or asylees for whom the United States has already granted protection. Because refugees and asylees can apply to become permanent residents after one year, most will have established permanent residence in the United States at the time of the suit, and the government cannot expel them to their previous home.[136] Hence, the domicile nexus of asylees and refugees, even if weak, when combined with the principle of *nonrefoulement*, should be sufficient to avoid categorization as an "appropriate case" that triggers prudential exhaustion.

Yet, irrespective of whether U.S. courts adopt this logic, the current burden shifting in the ATS refugee/asylee context makes little sense. To shift the burden to the plaintiff to show that local remedies were "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile," the ATS defendant must merely show that the plaintiff has not pursued available local

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134. *Rio Tinto*, 550 F.3d at 824; *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47–48 (1989) (explaining that domicile is undefined in statutes and established in case law by "physical presence in a place in connection with a certain state of mind concerning one's intent to remain there.").

135. RESTATEMENT, *supra* note 68, § 402 cmt. e (emphasis added).

136. *See* Immigration and Nationality Act of 1952 § 208(c)(1)(A), 8 U.S.C. § 1158(c)(1)(A) (2010) (ensuring that an alien granted asylum status will not be returned to his home country and allowing asylees to engage in employment in the United States). *See also* U.S. CITIZENSHIP & IMMIGRATION SERVS.: GREEN CARD THROUGH REFUGEE OR ASYLEE STATUS, http://www.uscis.gov/portal/site/uscis (last visited Oct. 7, 2012) (stating that both refugees and asylees may apply for permanent residency one year after they either enter the United States or are granted asylum status).

remedies.[137] That is, the defendant need not first make any assertion as to the local remedies' timeliness or quality.[138] Because a U.S. decision maker has already found persecution or a well-founded fear of persecution in the refugee's or asylee's home country, usually due to a lack of state protection, local remedies in ATS refugee and asylee cases should be presumed "unobtainable."[139] To require otherwise would be inconsistent with *nonrefoulement* because neither U.S. courts nor the defendant should have expected the refugee to pursue local remedies to conclusion.[140] The defendant could likely only overcome this presumption by showing that the conditions in the plaintiff's home country have improved such that persecution is no longer likely.[141]

Under the assumptions that a prior finding of persecution is valid and persecution makes a remedy unobtainable, the plaintiff should not have the burden of showing that persecution still exists.

2. Broader Scope of Exhaustion: International Remedies

So far this Article has considered exhaustion in the context of local remedies, but has not addressed exhaustion of international remedies. Because of the wide array of obstacles facing an ATS plaintiff, U.S. courts have yet to expressly rule on whether a plaintiff must first exhaust international remedies in ATS cases, but many courts have interpreted *Sosa* as allowing

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137. *Rio Tinto*, 550 F.3d at 832.

138. *See id.*

139. This is not to say that the principle of *nonrefoulement* should always trump U.S. procedural barriers, but rather that in the context of the ATS, which aims to provide remedies for human rights violations, both the ATS and refugee law would be better served by this order.

140. *See* Rio Tinto, 550 F.3d at 832 (reasoning that "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 legal system at issue, or show that the [applicable law] or availability of remedies would make further appeal futile.").

141. This idea is consistent with the provision that asylum could be denied if fundamental circumstances in the home country change. *See* 8 C.F.R. 208.13(b)(i)(1)(A) (2012). While refugee status may not be revoked, it is not inconsistent with refugee law to require a refugee to return home to prosecute a tort case if danger of persecution no longer exists.

such a requirement.[142] Although *Sosa*'s instruction provided uncertain guidance,[143] U.S. courts should not require exhaustion of international remedies to bring ATS cases. Admittedly, such a requirement could better serve *Rio Tinto's* second comity impulse, but would also unnecessarily burden international bodies and likely fail to make the plaintiff whole.[144]

The *Rio Tinto* court recognized "the American role in establishing collective security arrangements that support international institutions, including international tribunals" as a driving force behind exhaustion.[145] The argument for requiring exhaustion of international remedies exploits this "one member in a community" idea by contending that allowing pursuit of foreign remedies in the United States weakens the efficacy of international institutions.[146] Nevertheless, the *Rio Tinto* court also recognized the U.S. "historical commitment to upholding customary international law" and conceded that the crimes creating ATS liability were offenses for which states had jurisdiction to punish without regard to territoriality or nationality of the offenders.[147] The fact that customary international law permits universal jurisdiction, when combined with efficiency and equity concerns, makes exhaustion of international remedies less sensible.[148]

International courts or tribunals should be used only as a last resort, in the event that other efforts prove inadequate.[149] For example, Article 17 of the Rome Statute, which established the International Criminal Court (ICC), provides that the court

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142. *See, e.g.*, Altman v. Republic of Austria, 335 F. Supp. 2d 1066, 1069 (C.D. Cal. 2004) (reasoning that the *Sosa* Court suggested that one day the Supreme Court would consider whether a plaintiff must exhaust "international remedies before filing an action in a foreign state.").

143. *See Sosa*, 542 U.S. at 733 n.21 (2004) ("We would certainly consider this requirement in an appropriate case.").

144. *Cf. Rio Tinto*, 550 F.3d at 830–31 (noting that simply because universal jurisdiction might be available does not mean it must be exercised).

145. *Id.*

146. *See id.*

147. *Id.* at 831.

148. RESTATEMENT, *supra* note 68, § 404.

149. Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1069 (2011).

should exercise jurisdiction only when a state is "unwilling" or "unable" to prosecute it.[150] Thus, the ICC and other similar courts should not take a case where other bodies can ably adjudicate the dispute. Refugees and asylees in ATS cases animate this efficiency concern. As refugee and asylee ATS cases involve lawful residents of a country willing hear cases of universal concern, resorting to international institutions is unnecessary.[151]

Finally, the ATS likely provides the only way to make victims whole. Individual plaintiffs often lack standing to bring cases in international bodies against their tortfeasors or have limited accessibility due to location.[152] Other institutions possess only the power to issue nonbinding recommendations.[153] These shortcomings may actually make international bodies inadequate in the context of exhaustion.[154] Therefore, a blanket requirement would be self-contradictory. Moreover, few international human rights courts allow for civil penalties,[155] while most are aimed at criminal prosecution.[156] Although criminal punishment could provide the victim with a sense of justice, civil compensatory liability may allow substantive recovery.[157] Given that a U.S. authority has already determined

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150. Rome Statute of the International Criminal Court, art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

151. Even if asylees and refugees were not residents, they could still sue under the ATS. Herz & Leete, *supra* note 48, at 4 (quoting Rasul v. Bush, 542 U.S. 466, 484 (2004)).

152. *See, e.g.*, Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1005.

153. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1899 (2003) (referencing treaty bodies that monitor the United Nations).

154. Note, *The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm*, 121 HARV. L. REV. 2110, 2114 n.29 (2008).

155. For example, The Inter-American Court of Human Rights is one of the only international institutions that awards civil penalties for human rights violations. Organization of American States, American Convention on Human Rights, art. 63, Nov. 22, 1969, O.A.S.T.S. No. 36, *available at* http://www.unhcr.org/refworld/docid/3ae6b36510.html.

156. *See, e.g.*, Rome Statute of the International Criminal Court, *supra* note 150, art. 5 (establishing jurisdiction and the scope of criminal liability).

157. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 152 (2d Cir. 2010)

that the refugee or asylee has an objective fear of persecution,[158] avoiding international tribunals would likely pose no additional harm to comity or institutional efficacy, while also forwarding the U.S.'s commitment to uphold customary international law.[159]

V. CONCLUSION

To safeguard comity and limit judicial inefficiency, U.S. federal courts employ the doctrines of exhaustion of local remedies and forum non conveniens in ATS cases.[160] In application, both frequently require the plaintiff to return to his home country to bring the suit.[161] On a similar note, the U.S. government has allowed refugees and asylees to enter or remain in the United States, in part because the petitioners have faced or would face persecution in their home countries.[162] Thus, refugee and asylee ATS plaintiffs cannot return to their countries of origin to satisfy those doctrinal requirements.[163] Because the statutory grant of universal jurisdiction and principle of *nonrefoulement* are firmly established in U.S. law, the doctrinal requirements for such plaintiffs in ATS cases should relax to accommodate the plaintiffs' right against return. Presumptions and additional considerations rather than doctrinal inapplicability would allow the ATS to comport with the INA, while duly considering the efficiency and comity functions of forum non conveniens and exhaustion.

(Leval, J., concurring), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

158. Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2010).

159. *See Rio Tinto*, 550 F.3d at 831.

160. *See* Regina Waugh, Exhaustion of Remedies and the Alien Tort Statute, 28 BERKELEY J. INT'L L. 555, 556 (2010); Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1220 (9th Cir. 2006).

161. *See* Gretchen C. Ackerman, *An Analysis of Whether Aliens Should Be Required to Exhaust Local Remedies Before Suing in the United States Under the Alien Tort Statute*, 7 WASH U. GLOB. STUD. L. REV. 543, 552 n. 66 (2008).

162. *See* Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2010).

163. *Id.*