

**ALIEN TORTS IN FOREIGN COURTS:
RESPONSIBLE RESTRICTIONS ON
EXTRATERRITORIAL APPLICATION OF
THE ALIEN TORT STATUTE**

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INTRODUCTION

This you may say of man—when theories change and crash, when schools, philosophies, when narrow dark alleys of thought, national, religious, economic, grow and disintegrate, man reaches, stumbles forward, painfully, mistakenly sometimes. Having stepped forward, he may slip back, but only half a step, never the full step back.

John Steinbeck¹

On a balmy summer's day in south Florida, attorneys and observers crowd into the courtroom. Papers shuffle, briefcase clasps snap to the ready, and Judge Cohn's gavel slams against the cedar sounding-block. Order! The awesome power of the American justice system cranks into gear. Outside the Miami courtroom's walls—just miles away—organized crime flourishes, sex trafficking rings strengthen, and drug pushers proliferate. Meanwhile, the court's full focus is on the present matter: nine Bolivian plaintiffs suing a Bolivian foreign official for atrocities occurring in Bolivia.²

Unfortunately, the United States District Court for the Southern District of Florida is not the only federal court hearing cases involving foreign plaintiffs, foreign defendants, and foreign torts. The situation is so common that human rights litigators have devised a pejorative short-form for it: "foreign-cubed."³ Attenuated exercises of jurisdiction have become the norm since the Alien Tort Statute (ATS)⁴ was resurrected in 1980.⁵

¹ JOHN STEINBECK, *THE GRAPES OF WRATH* 157 (Penguin Grp. 75th anniversary ed. 2014) (1939).

² *Mamani v. Berzaín*, 21 F. Supp. 3d 1353 (S.D. Fla. 2014).

³ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 283 n.11 (2010) (Stevens, J., concurring).

⁴ 28 U.S.C. § 1350 (2012). The ATS is sometimes erroneously called the "Alien Tort Claims Act," or "ATCA." For a comprehensive history of the ATS, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-31 (2004).

⁵ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, Paraguayan plaintiffs brought a wrongful death action against a Paraguayan national. Although the alleged "violation of the law of nations"—torture—occurred entirely in Paraguay, the Second Circuit found federal jurisdiction proper. In taking an expansive view of the ATS, the court advised, "whenever an alleged torturer is found and served

Lauded thirty years ago as a groundbreaking mechanism for preserving international human rights,⁶ the ATS has degenerated into the prime vehicle for litigation abuse in federal court.⁷ Its cavalier application has exacerbated foreign policy tensions, even among America's staunchest allies.⁸ As domestic human rights problems abound, the federal judiciary exhausts its resources resolving claims under the ATS that never should have reached federal court to begin with, and engenders international hostility.⁹

Adjudicating ATS cases involving foreign conduct, foreign defendants, and foreign torts diverts resources from ATS claims that *should* be heard.¹⁰ ATS plaintiffs with claims closely-connected to the United States, or who sued in a federal court as a last resort, are the true losers under the current regime.¹¹

with process by an alien within our borders, § 1350 provides federal jurisdiction." *Id.* at 878.

⁶ Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 539 (1986) ("The Alien Tort Statute is likely to become increasingly visible as a means for bringing international human rights cases into federal court.").

⁷ Ironically, in *Mamani*, the Eleventh Circuit cautioned that the ATS affords "no license for judicial innovation . . . the federal courts must act as vigilant doorkeepers and exercise great caution." *Mamani v. Berzaín*, 654 F.3d 1148, 1152 (11th Cir. 2011).

⁸ See Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 1-6, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No 10-1491), 2012 WL 2312825.

⁹ *Id.* Traditional American allies like Great Britain and the Netherlands attach great weight to restrained American exercise of civil universal jurisdiction. For instance, a headnote included in the above brief reads: "Allowing U.S. courts, at the behest of private plaintiffs, to exercise broad extraterritorial jurisdiction in Alien Tort Statute cases often interferes with the right of a nation to prescribe rules for and adjudicate disputes among its own nationals and residents that occur on its own territory." *Id.* at v.

¹⁰ This Comment does not argue that an ATS claim is "meritless" or "misplaced" merely because it involves foreign conduct, a foreign defendant, and a foreign plaintiff. Instead, this Comment proposes a plaintiff-centered approach. A federal district judge should decide whether to allow an ATS claim to survive 12(b)(6) dismissal based on the alien-plaintiff's interest in obtaining an otherwise elusive civil remedy. If the alien can demonstrate commencement of the action in the forum in the best position to resolve the dispute and an inability to pursue that action therein, then the ATS claim is "proper" or "meritorious" for the purposes of this Comment, regardless of whether it involves exclusively foreign defendants, foreign plaintiffs, and foreign torts.

¹¹ Some scholars criticize limiting ATS jurisdiction because it encourages corporate disregard for human rights. Unsurprisingly, many so inclined view attempts to cast the ATS efficiency problem in terms of the overlooked "true victim" as a smokescreen to shield corporations from responsibility.

On the other hand, furnishing a tort remedy for victims of egregious human rights violations serves important purposes.¹² As a matter of public policy, allowing meritorious tort suits to proceed deters future human rights abuses and compensates victims.¹³ On the global stage, providing an otherwise elusive forum for victims of heinous human rights abuses is consistent with the humanitarian self-image America seeks to promote, setting a valuable precedent for other aspiring nations.¹⁴

Above all else, offering a civil remedy for human rights violations is consistent with the American constitutional tradition.¹⁵ This Right-Remedy paradigm, since 1803, has guided judicial recognition of important human rights. Given America's historic commitment to pairing fundamental rights with concomitant remedies, the United States cannot persuasively argue that—absent such a remedy—it recognizes the value of human rights.¹⁶

This Comment argues that courts should re-interpret the ATS to provide a more limited basis of federal jurisdiction, using the familiar Right-Remedy paradigm as a guide. Specifically, at the Rule 12(b)(6) stage, judges should “read-in” three requirements to the statute as preconditions to the exercise of ATS jurisdiction: (1) commencement of an action (2) in the forum best suited to adjudicate the matter and (3) an inability to effectively pursue the action in that forum. A plaintiff's failure to allege the above should result in immediate 12(b)(6) dismissal.

Restricting the ATS jurisdictional scope according to this tripartite criteria curbs inefficiency and cools foreign policy

¹² See Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 808 (2005) (listing, among other benefits of the ATS, “hold[ing] corporations accountable as actors in . . . an integrated global community—one in which corporations should not be allowed to shirk responsibility for their actions”).

¹³ See Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 210 (2008) (stating that ATS claims “present the risk of large verdicts and serious harm to corporate reputation, and might force companies to alter the way they interact with repressive regimes or members of foreign militaries”).

¹⁴ *Id.* at 209.

¹⁵ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987).

¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

friction. At the same time, it ensures compliance with the Right-Remedy paradigm—the minimum standard of protection federal courts must afford human rights—thereby furthering global recognition of human rights.

Part I of this Comment explains the problems posed by the ATS in its current form. Part II argues that viewing the ATS in light of the Right-Remedy paradigm yields valuable insight into the minimum degree to which America is obligated to compensate victims of international human rights. Part III argues for a re-interpretation of the ATS that limits the statute’s jurisdictional reach, thereby addressing efficiency and comity concerns, but still affords a federal forum for deserving victims of human rights violations. Finally, Part IV of this Comment evaluates the proposed re-interpretation in terms of its practical and policy-based implications.

I. THE ATS CONUNDRUM

For such a short statute, the ATS is replete with ambiguity. In its full form, the ATS provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.¹⁷

It is helpful to think of the ATS in terms of three elements. In order to state a cognizable ATS claim, the plaintiff must allege (1) that he is an alien (2) suing in tort (3) for a violation of the law of nations.¹⁸ Most ATS litigation focuses on the “violation of the law of nations” element.¹⁹

Since 1980, the Supreme Court has frequently attempted to make sense of these thirty-three words.²⁰ Through all of this

¹⁷ 28 U.S.C. § 1350 (2012).

¹⁸ *Kadic v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995).

¹⁹ *See, e.g.*, *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (genocide); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (detention); *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124 (D. Colo. 2004) (bribery).

²⁰ *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (In *Mohamad*, the Supreme Court specifically addressed the TVPA, which is part of the ATS.); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989).

litigation, a convoluted jurisprudence has emerged.²¹ Courts of Appeal continue to disagree about such fundamental questions as what constitutes a violation of the “law of nations,” whether corporations can be held liable under the ATS, and whether the ATS can be applied extraterritorially.²²

The Supreme Court recently²³ explored ATS jurisprudence in *Kiobel v. Royal Dutch Petroleum Co.*²⁴ In *Kiobel*, Nigerian plaintiffs sued Dutch, British, and Nigerian corporations under the ATS for extra-judicial killings and torture perpetrated in Nigeria.²⁵ In finding the plaintiffs’ claims jurisdictionally insufficient, the Supreme Court considered—but did little to clarify—two pieces of the ATS puzzle: the “presumption against extraterritorial application”²⁶ and the “violation of the law of nations.”²⁷ Reasoning that Shell’s alleged misconduct in Nigeria, directed towards Nigerian plaintiffs, did not bear sufficient connection to the United States to rebut the presumption against extraterritoriality, the *Kiobel* Court dismissed the plaintiffs’ claims.²⁸

The presumption against extraterritoriality is a canon of statutory interpretation.²⁹ It instructs that unless a statute specifically provides for extraterritorial application, then there is a rebuttable presumption against it.³⁰ This presumption is relevant to ATS litigation because 28 U.S.C. § 1350 makes no

²¹ See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2004) (recognizing the existence of a “considerable controversy” over whether the ATS is purely jurisdictional or creates a private cause-of-action).

²² “Extraterritorial” is a term of art in ATS jurisprudence. It typically means conduct that occurs outside the United States and involves non-citizens.

²³ The Supreme Court has more recently addressed the ATS in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

²⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁵ *Id.* at 1662-63.

²⁶ *Id.* at 1664.

²⁷ *Id.* at 1665.

²⁸ *Id.* at 1669.

²⁹ *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (explaining the presumption’s aim to “protect against unintended clashes between our laws and those of other nations which could result in international discord”).

³⁰ *Id.*

mention of international application.³¹ The statute is silent on the question of international reach.³²

Courts have struggled to articulate workable standards with regard to extraterritorial application of the ATS.³³ The *Kiobel* Court devised an exacting yet essentially meaningless test to gauge whether the presumption has been rebutted.³⁴ The Supreme Court reasoned that the presumption could be overcome if the tort “touch[ed] and concern[ed] the territory of the United States . . . with sufficient force.”³⁵ The test’s flexibility suggests that it was intended to apply only to ATS cases involving foreign plaintiffs, foreign defendants, and foreign torts.

The current barometer for the propriety of federal jurisdiction in ATS cases involving primarily foreign conduct is thus whether the alleged conduct “touches and concerns” the United States with “sufficient force.”³⁶ It is unclear what this entails.³⁷ Moreover, the Court failed to answer the question of whether foreign torts, committed on foreign soil, by a foreign defendant could *ever* “touch and concern” the United States with “sufficient force” to warrant extraterritorial application of the ATS.³⁸

Unfortunately, judicial interpretation of other ATS elements has not been much clearer. Turning to the second major piece of the ATS inquiry—the “violation of the law of nations”³⁹—the

³¹ 28 U.S.C. § 1350 (2012).

³² *Id.*

³³ See John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 5 (2009) (advising that “continued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits . . . First, whether the ATS applies extraterritorially”).

³⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that the ATS claims must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Mwani v. Laden*, 947 F. Supp. 2d 1, 4-5 (D.D.C. 2013). To the author’s knowledge, *Mwani* is the only post-*Kiobel* case, where the “touch and concern” test has been satisfied. The district court found that bombings of the American Embassy in Nigeria perpetrated by Afghani defendants “touched and concerned” the United States with “sufficient force” to rebut the presumption against extraterritorial application of the ATS.

³⁸ *Id.*

³⁹ 28 U.S.C. § 1350 (2012).

Supreme Court has developed an equally obscure legal test. Although derived from *Sosa v. Alvarez-Machain*,⁴⁰ federal district courts have since revised the test to find jurisdiction proper only when the alleged conduct violates “international law norms that are specific, universal, and obligatory.”⁴¹ Courts have struggled to channel the three adjectives into meaningful jurisprudence.⁴² No bright line rule delineates which human rights violations will satisfy the test.⁴³ Seemingly “automatic” qualifiers—clear violations of international humanitarian law—have been adjudged insufficient.⁴⁴

In short, ATS litigation has resulted in an exceedingly convoluted jurisprudence.⁴⁵ Inconsistent application of shortsighted rules promulgated by the Supreme Court has facilitated the ATS’ failures by creating problems of efficiency, comity, and victims’ compensation.

A. Inefficiency

Vague jurisprudence emboldens crafty litigators. Shifting standards incentivize rolling the jurisdictional dice. Currently, no procedural bar stops an ATS claim involving a foreign tort, foreign plaintiff, and foreign defendant from being brought in federal

⁴⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴¹ *Kiobel*, 133 S. Ct. at 1665 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)) (internal quotation marks omitted). The Court arrived at this test based on a historical analysis of offenses that would have been “violation[s] of the law of nations” in 1789. Citing Blackstone, the Court declared that the drafters of the Judiciary Act of 1789 intended the above phrase to refer to piracy, violation of safe conducts, and infringement of the rights of ambassadors. *Id.* at 1666.

⁴² Kontorovich, *supra* note 21, at 112.

⁴³ In *Sosa*, a multi-hour detention did not qualify as a “violation of the law of nations.” *Sosa*, 542 U.S. at 738.

⁴⁴ Incredibly, the Eleventh Circuit, in *Cardona v. Chiquita Brands Int’l, Inc.*, advised that torture did not qualify as a “violation of the law of nations” for ATS purposes. 760 F.3d 1185 (11th Cir. 2014). In contrast, another court determined that a single evangelical minister’s proliferation of hate-speech directed at the Ugandan gay community was a sufficiently severe violation to invoke federal jurisdiction via the ATS. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).

⁴⁵ See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2010) (characterizing the ATS as “a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world”).

court. This low-stakes gambling leads to increased filings, and by extension, judicial waste.⁴⁶

The *Filartiga* decision signaled to potential human rights plaintiffs the availability of a federal forum.⁴⁷ It held out the ATS as a groundbreaking means of compensating victims of human rights abuses.⁴⁸ Perhaps seeking to exploit the loopholes created by the Second Circuit's speculative exercise of subject matter jurisdiction over a controversy so attenuated, foreign plaintiffs filed claims under the ATS en masse.⁴⁹ Some claims were meritorious; most were not.⁵⁰

This litigation lottery taxes valuable judicial resources.⁵¹ Federal courts can only hear so many cases. Dockets overwrought with questionable ATS claims divert precious resources—time and money—away from both legitimate ATS claims and non-ATS claims warranting immediate attention. The inadequacy of Supreme Court jurisprudence with respect to both the “violation of the law of nations” and “extraterritorial application” components of the ATS directly contributed to the logjam.⁵² Elastic standards

⁴⁶ 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 (2004).

⁴⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴⁸ See, e.g., *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982).

⁴⁹ Just one year after *Filartiga*, federal courts considered five major ATS cases. See *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981); *Cohen v. Hartman*, 634 F.2d 318 (5th Cir. 1981); *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980); *De Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980); *Trans-Continental Inv. Corp. v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980).

⁵⁰ Of the five claims litigated in the year following *Filartiga*, only *De Letelier* avoided dismissal for lack of subject matter jurisdiction. *De Letelier*, 502 F. Supp. at 266.

⁵¹ See Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2181 (2012) (“Compensation may be an important goal of the [ATS] . . . but civil litigation is an extremely expensive mechanism for shifting money around from one person’s pocket to another.”).

⁵² See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003). Hufbauer and Mitrokostas concur with regard to the symptoms of the ATS efficiency problems—an activist judiciary empowered by vague legal standards—but frame the efficiency problem in terms of its macro-effect on poor people, worldwide (stating the principal problem of the ATS as

like “touch and concern with sufficient force” and “specific, universal, and obligatory” mean whatever the trial judge wants them to mean.⁵³ These tests encourage judicial activism, and allow tenuous claims to escape 12(b)(6) dismissal, and even motions for summary judgment.

A recent decision, *Ben-Haim v. Neeman*,⁵⁴ illustrates the severity of the efficiency problem. The plaintiffs, United States citizens residing in Israel, sued a group of Israeli politicians under the ATS in what amounted to a family-law dispute.⁵⁵ The alleged violation of the law of nations was the “Israeli family courts['] elevat[ion of] the rights of mothers over the rights of fathers in a way that amounts to ‘crimes against humanity.’”⁵⁶ That such a patently misplaced claim reached the Third Circuit Court of Appeals should alarm anyone with a concern for judicial economy.⁵⁷

While courts expend valuable time and resources adjudicating cases like *Ben-Haim*, they cast aside meritorious ATS cases.⁵⁸ Consider *Al Shimari v. CACI Premier Technology*.⁵⁹ The plaintiffs in *Al Shimari* were prisoners at the infamous Abu Ghraib compound in Iraq.⁶⁰ They brought suit against an American corporation who had hired prison security personnel that allegedly tortured and abused the detainee-plaintiffs.⁶¹ Combatting alleged human rights abuses committed in an American compound by an American corporation is consistent with the intended scope and purpose of the ATS.⁶² It is a

causing “millions of impoverished people [to be] denied an opportunity to participate in global markets”). *Id.* at 2.

⁵³ See *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 56 (2d Cir. 2014) (Pooler, J., concurring) (quoting Justice Alito’s skeptical approach to the “touch and concern” test in *Kiobel*: “a formulation that obviously leaves much unanswered”).

⁵⁴ *Ben-Haim v. Neeman*, 543 F. App’x 152 (3d Cir. 2013).

⁵⁵ *Id.* at 153.

⁵⁶ *Id.* at 154.

⁵⁷ *Id.*

⁵⁸ See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).

⁵⁹ *Id.*

⁶⁰ *Id.* at 521.

⁶¹ *Id.* at 522.

⁶² 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, 464 (1989) (arguing that the ATS was a “straightforward response to what the Framers understood to be their duty under the law of nations”).

frightening prospect that federal courts shelve cases involving legitimate United States interests in favor of attenuated claims.⁶³

Unfortunately, federal courts have adjudicated overwhelmingly more *Ben-Haim*⁶⁴ cases than *Al Shimari*⁶⁵ cases since *Filartiga*.⁶⁶ Until the ATS incorporates clearer procedural rules that distinguish the former from the latter, efficiency problems will continue.

B. Comity

The second major problem with the ATS is that its extraterritorial application potentially infringes on national sovereignty.⁶⁷

Because the ATS does not have an exhaustion of remedies requirement,⁶⁸ plaintiffs pursuing a tort remedy for human rights violations committed in other nations or involving foreign defendants may circumvent domestic courts. Presented with the option of a United States forum, and lured by the potential application of comparatively liberal tort law,⁶⁹ international plaintiffs have no disincentive to rolling the dice and filing suit in a federal district court.⁷⁰

⁶³ See Thom Shanker, *6 G.I.'s in Iraq Are Charged with Abuse of Prisoners*, N.Y. TIMES, Mar. 21, 2004, at A14 (explaining the severity of the crimes committed at Abu Ghraib).

⁶⁴ *Ben-Haim v. Neeman*, 543 F. App'x 152 (3d Cir. 2013).

⁶⁵ *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).

⁶⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁶⁷ *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (recognizing “the danger of foreign citizens’ using the courts in situations . . . to obstruct the foreign policy of our government”).

⁶⁸ See Brief of the Governments, *supra* note 8, at 33 (arguing that *Kiobel* was “an appropriate case” to incorporate an exhaustion of local remedies requirement into ATS jurisprudence).

⁶⁹ See Sykes, *supra* note 51, at 2181 (“When a foreign tort plaintiff brings such an action, it typically does so because the U.S. legal system is more generous, favorable, or accessible to the plaintiff than is the plaintiff’s next best alternative.”).

⁷⁰ Brief of the Governments, *supra* note 8, at 5. The Brief recognized “[t]he attractiveness of the U.S. as a forum for foreign plaintiffs,” and argued, “[a]cceptance of such cases where there is no link to the forum concerned increases the risk of forum shopping by foreign plaintiffs.” *Id.* at 5-6.

Permitting international plaintiffs to bypass domestic courts via the ATS causes foreign policy problems.⁷¹ Offended by attenuated exercises of ATS jurisdiction over torts occurring within their borders—or involving their corporate defendants—foreign nations have regularly filed amicus briefs in major Supreme Court ATS cases to voice their concern.⁷²

In *Kiobel*, the governments of the United Kingdom and the Netherlands submitted what amounted to a thirty-six-page indictment of contemporary ATS practice in the context of international relations.⁷³ They expressed particular concern for “the efforts of U.S. litigators and judges to bypass the legal systems of other sovereigns,”⁷⁴ rendering it a foregone conclusion that “ATS cases . . . generate international disputes among sovereigns.”⁷⁵

Daimler engendered a similar response.⁷⁶ One group of amici representing European economic interests argued, “when a foreign plaintiff sues a foreign company for foreign conduct, the United States has no legitimate interest in the suit.”⁷⁷ As such, amici concluded that minimizing the extraterritorial reach of the ATS

⁷¹ Cf. Herz, *supra* note 13, at 208. Herz argues that American failure to furnish a federal forum for human rights abuses—rather than providing one—creates foreign policy problems. See *id.* (“The willingness of some U.S. multinational corporations to form partnerships with foreign governments that have poor human rights records has sparked . . . foreign policy disputes.”).

⁷² Brief of the Governments, *supra* note 8; Brief of *Amicus Curiae* the European Commission in Support of Neither Party, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036. *But cf.* Brief for the Government of the Argentine Republic as *Amicus Curiae* in Support of Petitioners at 3, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No 10-1491), 2012 WL 2165334 (arguing that straying too far from *Filartiga* would “undermine the international system for the protection of human rights that the foreign policy of the Argentine Republic seeks to uphold”).

⁷³ Brief of the Governments, *supra* note 8.

⁷⁴ *Id.* at 24.

⁷⁵ *Id.* at 32; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760-61 (2004) (Breyer, J., concurring) (“[C]ourts should give ‘serious weight’ to the Executive Branch’s view of the impact on foreign policy that permitting an ATS suit will likely have in a given case . . .”).

⁷⁶ Brief of Economiesuisse, the Swiss Bankers Association, ICC Switzerland, Association of German Banks, and the European Banking Federation as *Amici Curiae* in Support of Petitioner, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3421893.

⁷⁷ *Id.* at 7.

was “an essential element of the respect due to the judicial systems of other nations.”⁷⁸

The message from the international community is clear: curb ATS litigation abuse or face economic ostracism and reciprocally cavalier exercises of jurisdiction against American individuals and corporations.⁷⁹

C. Compensation

Despite the efficiency and comity concerns stemming from overbroad application of the ATS, it serves valuable humanitarian purposes.⁸⁰ Properly applied, the ATS compensates victims of human rights abuses that would otherwise go without a civil remedy.⁸¹ As such, constraining its scope to the point of virtual impotence has deleterious human rights affects.⁸²

Current human rights abuses occurring in Papua New Guinea⁸³ and Eritrea⁸⁴ evince the importance of developing a workable ATS over scrapping it in its entirety. Without it, victims of forced labor in Eritrea⁸⁵ and large-scale sexual abuse in Papua

⁷⁸ *Id.*

⁷⁹ See Transcript of Oral Argument at 27, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf (“We fear that if we say that a United States court can be open to try any accused law of nations violator for anywhere in the world regardless of the place of the conduct, the other nations of the world might seek to do the same to us.”).

⁸⁰ Uta Kohl, *Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute*, 63 INT’L & COMP. L.Q. 665, 688 (2014) (arguing that because of the “systemic weaknesses of the enforcement mechanisms of international human rights law . . . ATS litigation filled a significant gap in the human rights enforcement landscape.”).

⁸¹ The ATS also preserves the United States’ “interest in not becoming a safe harbor for violators of the most fundamental international norms.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring).

⁸² This Comment does not undertake an analysis as to the general value of affording civil compensation to victims of violations of international criminal law.

⁸³ HUMAN RIGHTS WATCH, GOLD’S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA’S PORGERA GOLD MINE 1-94 (2010) [hereinafter GOLD], available at <http://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf>.

⁸⁴ HUMAN RIGHTS WATCH, HEAR NO EVIL: FORCED LABOR AND CORPORATE RESPONSIBILITY IN ERITREA’S MINING SECTOR 1-29 (2013), available at <http://www.hrw.org/sites/default/files/reports/eritrea01134Upload.pdf>.

⁸⁵ *Id.* at 17. The report issued by Human Rights Watch alleges that a Canadian mining outfit, operating in Eritrea, wantonly disregarded international humanitarian norms when it hired Eritrean contractors who used forced labor.

New Guinea⁸⁶ might never obtain compensation due to the infirmity of the nations' respective judiciaries.⁸⁷

Though perhaps hard to believe in light of the litigation abuse outlined above, there are meritorious ATS claims that warrant a federal forum.⁸⁸ While repealing the ATS would alleviate efficiency and comity concerns, it is altogether inconsistent with the United States' constitutional tradition and assumption of the role of global humanitarian policeman.⁸⁹

There are thus three serious problems with the ATS: (1) economic waste caused by undisciplined exercises of jurisdiction; (2) foreign policy friction caused by freewheeling exercise of ATS jurisdiction over localized controversies; and (3) finding a way to reduce problems (1) and (2) without eviscerating the ATS.

II. HUMAN RIGHTS IN REMEDIAL TERMS

Abolishing or drastically reducing the scope of the ATS demeans global human rights and American constitutional law.⁹⁰ Absent its provision of a tort remedy for egregious violations of human rights, the United States cannot persuasively argue that it champions them.

While much scholarship has concentrated on the flaws inherent in the ATS—particularly ambiguities regarding the scope of corporate liability in light of *Kiobel*—few have argued for reinterpreting the statute to better reflect principles of

⁸⁶ GOLD, *supra* note 83, at 43. A Canadian gold supplier was implicated in allegations of gang rape in a Papua New Guinean gold mine. *Id.* at 9. The Human Rights Watch report pins culpability on the Canadian corporation based on its hiring of security personnel who actually committed the abuses in the mine. *Id.*

⁸⁷ See U.S. DEP'T OF STATE, ERITREA 2013 HUMAN RIGHTS REPORT 7 (2013), available at www.state.gov/documents/organization/220321.pdf (advising that “[j]udicial corruption remain[s] a problem,” and the “judiciary suffer[s] from lack of trained personnel, inadequate funding, and poor infrastructure”); U.S. DEP'T OF STATE, PAPUA NEW GUINEA 2013 HUMAN RIGHTS REPORT 1 (2013), available at www.state.gov/documents/organization/220434.pdf.

⁸⁸ See *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010) (dismissing an ATS claim brought by Liberian plaintiffs against American corporation for participating in slave labor in Liberia).

⁸⁹ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring) (“Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims . . .”).

⁹⁰ See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

constitutional law.⁹¹ When viewed through the lens of the familiar axiom, “a right without a remedy is not a right,” latent albeit realistic solutions to the ATS problem emerge.

A. Historical Roots

In the landmark case of *Marbury v. Madison*, Chief Justice John Marshall penned the oft-quoted phrase, “It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”⁹² Since 1803, jurists have struggled to make this promise a reality.⁹³ Marshall struggled with the same balancing inquiry in 1803 as that which judges face under the ATS today: weighing the ideal of providing all-encompassing remedies for every violation of a right against the realities of judicial economy and limited federal jurisdiction.⁹⁴

Perhaps this gulf seems purely academic. Some dispute what, if anything, the abstract principles encapsulated in “rights” and “remedies” mean in a practical sense.⁹⁵ While scholars have tried to describe the significance of available remedies to making rights “meaningful,” Professor Donald H. Zeigler best articulated the reason why the “right-remedy gap”⁹⁶ warrants attention: “[r]ights define social relations. . . . [t]hey secure the dignity and the

⁹¹ An analysis of corporate liability under the ATS, post-*Kiobel* is beyond the scope of this Comment. For more on the topic, see, e.g., William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT'L L. 1045 (2012); Gary Clyde Hufbauer, *Why Shouldn't Corporations Be Liable Under the ATS?*, 43 GEO. J. INT'L L. 1009 (2012); Nicole Erb & Owen Pell, *Kiobel's New Focus on Extraterritoriality Under the Alien Tort Statute Could Put Resolution of the Corporate Liability Issue Indefinitely Out of Reach*, 43 GEO. J. INT'L L. 1073 (2012).

⁹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

⁹³ John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). Professor Jeffries coined this problem the “Right-Remedy gap.” *Id.* He explained, “[t]he distance between the ideal and the real means that there will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies.” *Id.*

⁹⁴ *Id.*

⁹⁵ See David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1200 (“[R]ights may exist on paper as a matter of court decision or legislation, but their viability, indeed their very essence, depends in large part on the effectiveness of remedial and enforcement measures.”).

⁹⁶ Jeffries, *supra* note 93, at 87.

integrity of human beings.”⁹⁷ Moreover, failing to redress violations of individual rights sets a dangerous precedent.⁹⁸ The implicit message is that the right is not sufficiently important in the first instance, or that it may not be a right at all.⁹⁹

The practical impossibility of furnishing a remedy for the violation of each right does not render pursuit of Chief Justice Marshall’s goal futile.¹⁰⁰ Nor does it mean that this maxim of American constitutional law is irrelevant in an international context.¹⁰¹ Marshall’s skepticism of rights absent concomitant remedies applies equally to the troubling relationship between international human rights and their respective civil remedies.¹⁰²

B. The Right-Remedy Paradigm & the ATS

The Right-Remedy framework is especially instructive in the global context because it establishes individual states’ responsibility to enforce humanitarian norms.¹⁰³ It promotes an understanding that human rights first hinge on the domestic state’s provision of a remedy, and secondarily—when the domestic remedial framework fails—on the international community. It

⁹⁷ Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678-79 (1987). Professor Zeigler argues that the correlation between rights and available remedies is so important that federal courts should entertain a “presumption in favor of enforcement of legal rights.” *Id.* at 682.

⁹⁸ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 875 (1990) (“Because rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights . . . is virtually to terminate those rights.”).

⁹⁹ Zeigler, *supra* note 97, at 679 (“If the legal system tells a person that it is acceptable for his rights to be violated, the implicit message is that the person lacks worth.”).

¹⁰⁰ Jeffries, *supra* note 93, at 88. “Unredressed . . . violations may have to be tolerated, but they should not be embraced, approved, or allowed to proliferate.” *Id.* at 89.

¹⁰¹ Reisman, *supra* note 98, at 875.

¹⁰² See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992). Professor Vázquez recognizes as tenable the proposition that human rights exist, as such, only to the extent that “the domestic law of the offending state” furnishes a remedy. *Id.* at 1159.

¹⁰³ *Id.* at 1160. The absence of a remedy for violations of international law leads to “the conclusion that the individual does not have a right under international law.” *Id.* This, in turn, implicates the community of nations committed to enforcement of global norms, upon whom “the remedy depends.” *Id.*

prioritizes certain states' control over suits concerning international human right violations.¹⁰⁴ Moreover, as a limiting principle, it stems efficiency and comity problems.¹⁰⁵ In the ATS arena, the Right-Remedy paradigm also clarifies the scope of the United States' duty to enforce international human norms by providing a federal forum for human rights abuses.¹⁰⁶

Viewing the ATS quandary in light of a Right-Remedy approach sets clear guidelines for when the United States is and is not obligated to confer jurisdiction under the statute. Specifically, the United States must furnish a federal forum when circumstances indicate that a prospective ATS plaintiff would otherwise lack adequate means of civil redress.¹⁰⁷ This is the "jurisdictional floor" of the re-interpreted ATS because failure to act under such circumstances would exacerbate the Right-Remedy gap.¹⁰⁸ Inaction in such a case implies that the human right, because a remedy does not accompany its breach, is not truly a right.¹⁰⁹ Any other exercise of ATS jurisdiction above this "floor," however, is purely discretionary. In cases where circumstances suggest the ATS plaintiff will have a civil remedy without the federal judiciary's help, federal courts should decline jurisdiction for reasons of efficiency and comity.

The first consequence of viewing the problem in light of *Ubi Jus Ibi Remedium* is the abolition of the ATS is not an option. To eliminate its grant of original jurisdiction—or to constrain it so

¹⁰⁴ Part III of this Comment sets forth a "Premier Forum" analysis to determine how the pecking order of an ATS plaintiff's choice of forums should be determined.

¹⁰⁵ Though most discussions of the Right-Remedy paradigm focus on expanding remedies to recognize extant rights, this Comment argues that the same principle yields valuable insight into the minimum amount of remedial protection that must be afforded a right in order to ensure its maintenance.

¹⁰⁶ Professor David Rudovsky's claim that the gulf between legal rights and their corresponding remedies could be used as a "standard against which to gauge the nation's commitment to the protection of rights and liberties," applies equally well to the United States. Rudovsky, *supra* note 95, at 1201-02. From a purely propagandistic standpoint, America has a compelling interest in maintaining its appearance of being a great vindicator of human rights.

¹⁰⁷ Part III of this Comment explains in greater detail how this standard is measured. The author describes a workable test for judges considering ATS claims to decide the answer to the question, and thereby assure compliance with the Right-Remedy paradigm.

¹⁰⁸ See Jeffries, *supra* note 93, at 87.

¹⁰⁹ Reisman, *supra* note 98, at 875.

severely that it is practically abolished—would render questionable the status of “human rights,” insofar as no means of redress are available. From a theoretical humanitarian standpoint, abolishing the ATS and the corresponding limitation of the extant remedy undermines the international human rights at stake.¹¹⁰ It follows the familiar pattern outlined in American constitutional law: when a remedy contracts, so too does the right.¹¹¹ Further, it would be bad policy for the United States.¹¹² Eliminating the ATS as a means of domestically enforcing human rights obligations implies a lukewarm attitude towards such fundamental human rights.¹¹³ It impairs America’s ability to garner international support and foreign policy power by contrasting itself from the reputed “bad guys” of Russia and China.

Second, adopting the Right-Remedy approach articulates a bright-line limit on ATS jurisdiction. It clarifies the scope of civil liability in federal court for human rights violations. A Right-Remedy model explains the needlessness of unlimited corporate liability, and other cavalier exercises of ATS jurisdiction. Moreover, it instructs that such overbroad applications of the ATS are just as inconsistent with constitutional principles as abolition. Viewing the ATS in Right-Remedy terms illustrates the minimum level of protection America must afford victims of international human rights violations in order to comply with its constitutional obligation. The idea is simple. If a human right is violated—and a plaintiff cannot obtain a civil remedy—then a federal court should hear the case.

The propriety of ATS jurisdiction should turn not on legal abstractions,¹¹⁴ but human realities: whether, absent a federal

¹¹⁰ When rights are “inadequate[ly] enforce[ed] . . . [t]he dignity of the individual is diminished.” Zeigler, *supra* note 97, at 679.

¹¹¹ *Id.* at 678 (“[A] right without a remedy is not a legal right; it is merely a hope or a wish.”).

¹¹² Vázquez, *supra* note 102, at 1159.

¹¹³ See *A Giant Setback for Human Rights*, N.Y. TIMES (Apr. 17, 2013), www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html (articulating *Kiobel*’s negative consequences).

¹¹⁴ ATS jurisprudence has yielded some of the most obscure legal abstractions to date. While perhaps useful for judges because of their malleability, they mean whatever the presiding judge wants them to mean. The test for rebutting the presumption against extraterritorial application of the ATS—to “touch and concern”

forum, the alleged victims would go uncompensated. If answered affirmatively, adherence to the Right-Remedy principle requires the United States to furnish a federal forum. If answered negatively, then America has nonetheless complied with its constitutional obligation, and in consideration of principles of comity and efficiency, should decline to exercise jurisdiction.

III. REINTERPRETING THE ATS

Solving the ATS problem requires a doctrinal overhaul. Specifically, federal courts should re-interpret the ATS—reading-in additional requirements—to afford a more limited basis of federal jurisdiction.¹¹⁵ The re-interpreted ATS reflects the intersection of two doctrines: the emerging principle of “Forum of Necessity”¹¹⁶ and the already-prevalent “exhaustion of local remedies”¹¹⁷ requirement.¹¹⁸

On its face, the doctrinal linkage is counterintuitive. “Forum of Necessity” typically expands jurisdiction while an “Exhaustion of Local Remedies” requirement limits it. The former is popular in

and to do so “with sufficient force”—and that for evaluating what qualifies as a “violation of the law of nations” under the statute, “specific, universal, and obligatory,” are prime examples. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹¹⁵ This Comment acknowledges that the jurisdictional scope of the ATS may be limited by means other than procedural mechanisms like those proposed. For instance, defining a list of human rights abuses qualifying as a “violation of the law of nations” under the statute would restrict its jurisdictional reach.

¹¹⁶ See Tracy Lee Troutman, Note, *Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of Our Courts*, 21 VAND. J. TRANSNAT'L L. 401 (1988) (describing the doctrine of “forum of necessity” as applied to personal jurisdiction); see also John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1748 (2013) (arguing for the use of jurisdiction by necessity because “allowing this type of jurisdiction by necessity is a better system than closing off the courts entirely to citizens injured in other countries”).

¹¹⁷ See Regina Waugh, Comment, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555, 570 (2010) (explaining the concept of exhaustion as applied to the ATS, and concluding that imposing such a requirement would “likely make little difference.”).

¹¹⁸ Many proponents of a form of necessity-style approach to the ATS argue for wholesale renovation of personal jurisdiction jurisprudence. They would permit the provision of a federal forum, when circumstances deem it “necessary” (however defined), notwithstanding personal jurisdiction constraints. This Comment rejects that approach, and argues that personal jurisdiction jurisprudence must continue to apply under the proposed ATS re-interpretation.

Europe,¹¹⁹ while the latter currently applies in America to the extraterritorial application of certain federal statutes.¹²⁰ Nations applying a “Forum of Necessity” concept will hear certain cases with sufficient connection to the nation if the plaintiff demonstrates that his case cannot be heard elsewhere.¹²¹ Although similar, the doctrine of exhaustion is less flexible.¹²² Most variations of the exhaustion principle allow defendants to assert non-exhaustion—failure to try to bring the suit in the proper forum—as an affirmative defense.¹²³

Practically, the new interpretation will permit the exercise of federal jurisdiction under the ATS only in circumstances where, but for the provision of a federal forum, victims of international human rights violations would have no means of adequate civil compensation. This interpretation addresses the efficiency and comity problems, yet comports with the traditional constitutional imperative requiring legitimate rights to have corresponding remedies.¹²⁴

A. “Reading-In” Requirements

Judges interpreting the ATS should “read-in” three additional requirements:

- (1) The alien has commenced or attempted to commence the action;

¹¹⁹ Chilene Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30 *UTRECHT J. INT'L & EUR. L.*, no. 78, 2014, at 24.

¹²⁰ The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350), is one example of Congress’s attempt to limit jurisdiction via an exhaustion clause.

¹²¹ See Civil Code of Québec, S.Q. 1991, c. 64, art. 3136 (Can.), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C/CQ_1991/CCQ1991_A.html.

¹²² This is due, at least in part, to exhaustion’s longstanding prevalence as a procedural doctrine in American law. Practitioners’ pre-existing familiarity with the concept—whether in the form of habeas proceedings or administrative exhaustion—shapes their understanding of the doctrine as applied in the ATS context. As the United States has no “forum of necessity” doctrine, it is less familiar, and thus may be more flexibly proposed.

¹²³ *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831-32 (9th Cir. 2008) (“The defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.”).

¹²⁴ See Jeffries, *supra* note 93, at 87.

- (2) in the forum best suited to adjudicate the matter; and
- (3) the action cannot be effectively pursued in that forum.

The re-interpreted ATS provides additional guidance with regard to the statute's limited jurisdictional scope. This Comment does not propose a statutory amendment. Rather, it argues that an interpretative overhaul of the ATS is practically superior to proposals for a statutory amendment.¹²⁵ Given the ATS' longevity, a legislative amendment is highly unlikely.¹²⁶ The three "read-in" requirements limit access to the federal courts to human rights plaintiffs who would not be accorded relief, but for the availability of an American forum.

The oft-litigated "violation of the law of nations" aspect of the statute, and its other quirks, remain. Although vague, as customary international law develops, different crimes will qualify under the language.¹²⁷ Incorporating a list of qualifying crimes¹²⁸ might provide temporary certainty, but it would frustrate the flexible application of the statute while providing little to no benefit in terms of realizing judicial economy.¹²⁹ As international

¹²⁵ Cf. Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119 (2007); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881 (1999); Randall, *supra* note 6.

¹²⁶ The ATS was part of the Judiciary Act of 1789. See Judiciary Act of 1789, 1 Stat. 73. Despite its revival in 1980, an amendment over two and a quarter centuries post-hoc is highly unlikely.

¹²⁷ Terrorism is the best example. Courts are currently split over its status as sufficiently "specific, universal, and obligatory" to qualify as a "violation of the law of nations" under the ATS. See, e.g., *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1321 (S.D. Fla. 2011). Some courts have reasoned that, because there is no universal agreement as to its definition, it cannot satisfy the test, while less theoretically inclined courts have tended to reach the opposite conclusion. See *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981).

¹²⁸ See Dhooge, *supra* note 125, at 141-156 (arguing that the ATS should be amended to include a list of the following crimes that automatically satisfy the "violation of the law of nations" component: extrajudicial killing, torture, genocide, and slavery).

¹²⁹ See LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23(4) (2014) (Spain). Article 23 of the Organic Law of Judiciary Power is a Spanish statute that permits the exercise of universal jurisdiction over certain specified crimes such as: genocide, terrorism, piracy, and drug trafficking.

norms change, so, too, should ATS jurisprudence on what constitutes a “violation of the law of nations.”¹³⁰

There are three constituent parts to the re-interpretation: (1) commencement, (2) in the “premier forum” and (3) inability. Judges should “read-in” the above requirements when evaluating Rule 12(b)(6) motions.¹³¹ If an ATS plaintiff cannot demonstrate each element, then he has failed to state a prima facie ATS claim, and the trial judge should dismiss the action.

In sum, to survive a motion to dismiss for failure to state a claim, the party seeking to invoke ATS jurisdiction must first demonstrate “commencement” or “attempted commencement” of the action. Second, the actual or attempted commencement must occur in the “forum best suited to adjudicate the matter.” Third, the party must demonstrate that the action cannot be effectively pursued in that forum. A trial judge analyzing the ATS claim must dismiss the action if the plaintiff fails to plausibly plead any of the “read-in” requirements.

B. Practical Application & Feasibility

The re-interpreted ATS is both a practical and realistic solution to the ATS dilemma. It is simple for judges to apply because it builds on developed case law and sets forth bright-line standards. It is realistic because the Supreme Court and others have suggested that “reading in” requirements to the ATS might be appropriate in certain circumstances.

1. Applying the Re-Interpreted ATS

The proposed re-interpretation is triggered at the 12(b)(6) stage of litigation. Once an ATS defendant challenges the sufficiency of an ATS plaintiff’s complaint via a Rule 12(b)(6)

¹³⁰ Terrorism, though inconsistently defined today, is the prime candidate. As general agreement over its definition develops, it should qualify as a “violation of the law of nations” under the ATS. See Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 468 (2008) (noting a strong trend towards clearer definitions of terrorism under international law: “a much greater consensus about the contours of the international prohibition against terrorism exists today”).

¹³¹ See Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177 (2008) (arguing that *Twombly*’s plausibility pleading requirements should apply in ATS suits).

Motion to Dismiss, the judge evaluating the motion should view the ATS to require (1) commencement (2) in the premier forum, and (3) inability to pursue the claim in that forum.

The three “read-in” requirements suggested in this Comment supplement the pleading requirements already incorporated into the ATS by virtue of *stare decisis*. Thus, a judge evaluating an ATS complaint will continue to consider whether the plaintiff is (1) an alien; (2) suing in tort; (3) for a “violation of the law of nations.”

In keeping with current 12(b)(6) jurisprudence, if a trial judge decides that the ATS plaintiff has not plausibly alleged the six elements mentioned above, the claim should be dismissed. Claims that survive the rigor of this new interpretation will thus have been “filtered” for their merit because they implicate the United States’ commitment to the Right-Remedy paradigm.

2. Feasibility of the Re-Interpreted ATS

Much ATS scholarship sounds fantastic in theory, but rings hollow in practice. Many proposed solutions have zero chance of actually being implemented because they are either too radical or simply inconsistent with Supreme Court jurisprudence. Asking a trial judge to incorporate “read-in” requirements when evaluating an ATS claim at the 12(b)(6) stage is realistic because the Supreme Court has consistently hinted that it might accept a similar approach.

In *Sosa*, the Supreme Court advised that principles of exhaustion could be “read-in” to the ATS.¹³² During oral argument in *Kiobel*,¹³³ Justices Alito,¹³⁴ Breyer,¹³⁵ Sotomayor,¹³⁶ and

¹³² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (“We would certainly consider this requirement in an appropriate case.”); *see also id.* at 760 (Breyer, J., concurring) (“The Court also suggests that principles of exhaustion might apply . . .”).

¹³³ *See* Transcript of Oral Argument at 27, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No 10-1491), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf.

¹³⁴ *Id.* at 16.

¹³⁵ Justice Breyer questioned plaintiff’s counsel as follows: “Couldn’t you just say . . . to add a requirement that if the State Department says that it interferes with foreign relations it doesn’t fall within the statute . . . That would get rid of this problem, wouldn’t it?” *Id.* at 11.

¹³⁶ Justice Sotomayor surmised that ATS cases involving foreign plaintiffs, foreign defendants, and foreign torts should be heard “only so long as . . . the alien has

Ginsburg¹³⁷ suggested that incorporating an exhaustion-type requirement was a distinct possibility. When pressed by Justice Ginsburg, counsel for the plaintiffs even conceded the foreign policy benefits of incorporating preconditions to exercising ATS jurisdiction.¹³⁸

Asking a trial judge to “read-in” three requirements as preconditions to jurisdiction under the ATS is a realistic solution because scholars and Supreme Court Justices opining on the issue have said as much. Moreover, the approach is easy to apply practically because it builds on extant ATS jurisprudence, and as outlined below, firmly embedded concepts such as *forum non conveniens* and exhaustion of local remedies.

C. The Commencement Requirement

“Commencement” is the first requirement that judges should “read-in” to the ATS. Judges evaluating ATS claims should first assess whether the alien-plaintiff has commenced or attempted to commence the action. Of the three proposed read-in requirements to confer ATS jurisdiction, this is the most straightforward. The filing of a complaint in the forum best suited to adjudicate the matter, for instance, clearly qualifies as “commencement” under this interpretation.

The analysis is a bit more complex when the plaintiff must demonstrate “attempted commencement” because actually filing suit is not possible. The prong is nevertheless satisfied when the plaintiff’s factual allegations indicate that filing a domestic complaint would be “futile.”¹³⁹ For the concept of futility, the doctrine of “exhaustion of local remedies,” as interpreted under

exhausted both domestic and international avenues for relief, a sort of forum by necessity, which apparently most countries have.” *Id.* at 13. When plaintiff’s counsel struggled to respond to the suggestion, Justice Sotomayor defended the approach as “a fairly simple set of rules clearly defined and limiting the application of this statute in a way that sort of makes sense.” *Id.*

¹³⁷ In questioning plaintiff’s counsel about the propriety of federal jurisdiction in *Kiobel*, Justice Ginsburg interjected, “[y]ou didn’t mention exhaustion of administrative remedies.” *Id.* at 8.

¹³⁸ *Id.* at 8 (“[E]xhaustion of local remedies would be an additional safeguard . . .”).

¹³⁹ See *Honig v. Doe*, 484 U.S. 305, 327 (1988) (permitting “bypass [of] the administrative process where exhaustion would be futile or inadequate”).

the Torture Victim Protection Act (TVPA), administrative agency law and habeas jurisprudence is instructive.¹⁴⁰

The TVPA requires, as a precondition to the exercise of jurisdiction, “exhaust[ion of] adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”¹⁴¹ Federal courts have not required a strong showing with respect to a prospective plaintiff’s commencement of the action in the locus in quo.¹⁴² Rather, there is general agreement that, “[a]s in the international law context, courts in the United States do not require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or *obviously futile*.”¹⁴³ Courts liberally construe the exhaustion requirement, “assum[ing] that the . . . requirement has been met.”¹⁴⁴

Exhaustion is a familiar feature of American law. In administrative law, plaintiffs are generally required to bring their claim to the appropriate administrative agency before seeking outside relief.¹⁴⁵ This “exhaustion of administrative remedies” doctrine is similar to the “commencement” requirement. Just as the re-interpreted ATS operates deferentially to respect national sovereignty, exhaustion of administrative remedies “protects administrative agency authority. . . . [by] giv[ing] an agency an opportunity to correct its own mistakes.”¹⁴⁶ Indeed, exhaustion of administrative remedies shares policy ends with the re-interpreted ATS.¹⁴⁷ It “promotes efficiency” because “[c]laims generally can be resolved much more quickly and economically” if first brought “before an agency.”¹⁴⁸ The re-interpreted ATS recognizes that the same concept applies internationally: domestic

¹⁴⁰ See *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (rejecting defendant’s exhaustion defense under the TVPA).

¹⁴¹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350).

¹⁴² *Enahoro v. Abubakar*, 408 F.3d 877, 891 n.9 (7th Cir. 2005) (“[I]n most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred.” (quoting S. REP. NO. 102-249, at 9-10 (1991))).

¹⁴³ *Id.* (quoting S. REP. NO. 102-249, at 9-10 (1991)) (emphasis added).

¹⁴⁴ *Id.* at 892.

¹⁴⁵ *Woodford v. Ngo*, 548 U.S. 81, 88 (2006).

¹⁴⁶ *Id.* at 89 (internal quotation marks omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

fora will always be in a better economic position than federal district courts to resolve disputes involving conduct within that nation and plaintiffs and defendants from that nation.

As with the “commencement” requirement of the re-interpreted ATS, exhaustion of administrative remedies has been modified to “to deal with parties who do not want to exhaust.”¹⁴⁹ To combat forum shopping between administrative agencies and federal courts, the Supreme Court has required “proper exhaustion” in select circumstances.¹⁵⁰ Under this more demanding exhaustion regime, a person seeking access to the federal courts cannot claim exhaustion if it results from a “deliberate strategy” to bypass the administrative agencies.¹⁵¹ The “commencement” prong of the re-interpreted ATS functions similarly. An ATS plaintiff will not satisfy its requirements if circumstances demonstrate that the plaintiff has half-heartedly pursued domestic remedies in the hopes of establishing faux commencement and thereby procuring a federal forum.

Habeas proceedings are equally instructive.¹⁵² In habeas cases, criminal defendants must exhaust state avenues of appeal before being afforded a federal forum.¹⁵³ The underlying rationale is to “give the state courts an opportunity to act on [a prisoner’s] claims before he presents those claims to a federal court.”¹⁵⁴ The proposed ATS re-interpretation applies the same concept, albeit vis-à-vis foreign judiciaries and those of the United States.¹⁵⁵ A potential ATS plaintiff should give the “premier forum” a chance to resolve the dispute before seeking relief from a United States District Court.

¹⁴⁹ *Id.* at 90. A similar problem will likely occur under the re-interpreted ATS. Potential ATS plaintiffs, given the favorability of American tort law, might half-heartedly pursue domestic remedies in order to claim exhaustion, and satisfy “commencement.”

¹⁵⁰ *Id.* at 88.

¹⁵¹ *Id.*

¹⁵² *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999). In *O’Sullivan*, the Supreme Court held that a prisoner who had not presented his appeal to the Illinois Supreme Court for discretionary review had not “exhausted” available state remedies. *Id.* at 848.

¹⁵³ *Id.* at 839.

¹⁵⁴ *Id.* at 842.

¹⁵⁵ *Id.* at 851 (Stevens, J., dissenting) (“If the applicant currently has a state avenue available for raising his claims, a federal court, in the interest of comity, must generally abstain from intervening.”).

Courts should treat the commencement provision of the revised ATS more like habeas proceedings than TVPA proceedings. Satisfying the “commencement” requirement should not require an unduly burdensome showing by the plaintiff, but must be strict enough that judges can quickly determine whether the plaintiff has satisfied it. Thus, though it should not be a high-threshold, searching inquiry, it should be a bright-line decision involving minimal subjectivity. Either the plaintiff has brought the action (or attempted to bring it), or not. There is little gray area for judges to fashion exceptions or carve out novel interpretations.¹⁵⁶

Some argue that actions where commencement is most difficult to prove because of specific defects in domestic law or judicial administration thereof (e.g., corruption, unwillingness to adjudicate or inability to adjudicate) are the exact type of case that the revised ATS is designed to hear.¹⁵⁷ While a valid point, it approaches Professor Zeigler’s pipe dream of pairing a remedial partner with each violation of a right.¹⁵⁸ It simply is not feasible.¹⁵⁹ In order to further the principles of efficiency and comity, the re-interpreted ATS must limit jurisdiction. Something must give. Under the above commencement analysis, ATS jurisdiction may be limited without robbing potential human rights plaintiffs of civil compensation.

Strictly interpreting the commencement requirement will further the interest of judicial economy because it will allow a trial judge to quickly dispose of facially inadequate claims at the 12(b)(6) stage.¹⁶⁰ Indeed, the three-step inquiry under the revised ATS requires a heightened showing at each successive step. After establishing commencement, a plaintiff must still satisfy the higher-threshold test of “inability” to pursue the action in the

¹⁵⁶ See *Escarria-Montano v. United States*, 797 F. Supp. 2d 21, 25 (D.D.C. 2011) (requiring, contrary to established TVPA law and Senate Report No. 102-249, the plaintiff to demonstrate exhaustion).

¹⁵⁷ See Mark W. Wilson, Comment, *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. L. 451, 478 (2009).

¹⁵⁸ Zeigler, *supra* note 97, at 678-79.

¹⁵⁹ Jeffries, *supra* note 93, at 87 (“[T]here will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies.”).

¹⁶⁰ See Nichols, *supra* note 131.

chosen forum. As such, claims of potential ATS plaintiffs will be “filtered” such that only the most meritorious claims will survive to adjudication on the merits.¹⁶¹

D. The Premier Forum Requirement

The second proposed “read-in” requirement asks a trial judge to consider whether the ATS plaintiff has brought the case in the “premier forum.” The case’s attempted or actual commencement must occur in the forum best suited to adjudicate the matter. Courts should look to established principles of forum non conveniens to decide the forum best suited to resolve the dispute.¹⁶² The extensive development of forum non conveniens jurisprudence in the United States—particularly the careful weighing of “private interest” and “public interest” factors outlined in *Gulf Oil*¹⁶³ and *Piper Aircraft Co.*¹⁶⁴—makes for predictable and efficient resolution of choice-of-forum inquiries in the ATS context.¹⁶⁵

1. Private Interest Factors

First, a court should examine the “private interest factors” in support of adjudication in a particular forum.¹⁶⁶ Guided by well-settled forum non conveniens jurisprudence, such factors include (1) accessibility of evidence; (2) availability of witnesses; and (3) the cost to litigants of proceeding in plaintiff’s chosen forum.¹⁶⁷

In the ATS context, the private interest inquiry will be particularly revealing. Jurisdictions where violations of

¹⁶¹ The revised statute should permit courts to entertain valid claims such as in *Al Shimari*. See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).

¹⁶² This Comment does not address the merits of forum non conveniens as a procedural device for efficient disposal of ATS cases. Rather, this Comment contends that the factors within the conventional forum non conveniens analysis should be used to decide which forum has the best claim to the litigation. 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 (2001), for an in-depth discussion of the merits of vigorous application of forum non conveniens in ATS litigation.

¹⁶³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹⁶⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹⁶⁵ Short, *supra* note 162, at 1023 (“The ATS and forum non conveniens have developed over time to a point of relative stability in today’s federal court practice.”).

¹⁶⁶ *Gulf Oil Corp.*, 330 U.S. at 508.

¹⁶⁷ *Id.*

international humanitarian norms typically occur are ill equipped to transfer and maintain pertinent evidence.¹⁶⁸ Moreover, because of financial difficulties of the parties themselves or the greater administrative apparatus, such jurisdictions will rarely be able to effectively transport witnesses.¹⁶⁹

2. Public Interest Factors

Second, the court should evaluate “public interest factors” with respect to the chosen forum.¹⁷⁰ Public interest factors include “administrative difficulties flowing from court congestion; the ‘local interest in having localized controversies decided at home’; . . . [and] avoidance of unnecessary problems in conflict of laws.”¹⁷¹ Chief among these “public interest” factors is the forum’s interest in litigating disputes arising within its borders.¹⁷² In some jurisdictions, reconciliation and communication trump retribution and deterrence as the primary rationales for punishment.¹⁷³ In these nations, special weight must be accorded to the local interest of obtaining catharsis through practices like truth and reconciliation commissions.¹⁷⁴

¹⁶⁸ See U.S. DEP’T OF STATE, NIGERIA 2013 HUMAN RIGHTS REPORT 1, 12 (2013), available at <http://www.state.gov/documents/organization/220358.pdf> (“[C]ourt officials often lacked the proper equipment, training, and motivation to perform their duties . . .”).

¹⁶⁹ For a reasonable, albeit slightly anti-ATS approach to an analysis of forum non conveniens factors in ATS cases, see Brief of the Governments, *supra* note 8, at 32 (observing that in extraterritorial ATS claims brought in the United States, “[c]ritical evidence will mostly be located abroad, often in the hands of a challenged sovereign,” and “any private defendant . . . will face great difficulty in obtaining . . . evidence needed to defend themselves . . . given such evidence is likely to be situated in the jurisdiction where the events occurred”).

¹⁷⁰ *Windt v. Qwest Commc’ns Int’l, Inc.*, 529 F.3d 183, 189 (3d Cir. 2008) (citing *Gulf Oil*, 330 U.S. at 508-09).

¹⁷¹ *Id.* at 189 (quoting *Gulf Oil*, 330 U.S. at 509).

¹⁷² *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981).

¹⁷³ See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

¹⁷⁴ See Julian Simcock, Note, *Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa’s Truth and Reconciliation Commission*, 47 STAN. J. INT’L L. 239, 260 (2011) (“[C]ritics of the Apartheid Reparation Litigation have a strong argument that the punitive aspects of the ATS do not comport with the TRC’s focus on restoration and reparation.”).

3. Other Considerations

Two additional considerations merit discussion. First, in forum non conveniens jurisprudence, a domestic plaintiff's choice of forum is presumed convenient.¹⁷⁵ This should not be the case in the ATS analysis. Again following the lead of American forum non conveniens jurisprudence, a "foreign plaintiff's choice [of forum]" is not presumed convenient.¹⁷⁶ Second, the ATS premier forum analysis should not consider the relative favorability of one forum's laws vis-à-vis another's.¹⁷⁷ Absent a showing of a complete bar to relief in one forum that is otherwise available in another, the extent to which the forum's law is more or less "plaintiff friendly" is irrelevant.¹⁷⁸

Thus, to determine the forum in which an ATS plaintiff must commence or attempt to commence the action, a court should adhere to forum non conveniens jurisprudence,¹⁷⁹ weighing the above private and public interest factors to make a value judgment as to the comparative propriety of adjudication in one forum versus another. The ultimate question when weighing competing jurisdictional claims under the revised ATS is whether one forum would "vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary . . . to pursue [the] remedy."¹⁸⁰

E. The Inability Requirement

Once an alien-plaintiff has attempted or actually commenced an action in the forum best suited to resolve the dispute, jurisdiction will lie under the revised ATS if he alleges inability to

¹⁷⁵ *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996).

¹⁷⁶ *Windt*, 529 F.3d at 190; *see also Piper Aircraft Co.*, 454 U.S. at 256 ("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.")

¹⁷⁷ *Piper Aircraft Co.*, 454 U.S. at 255. Availability of strict liability theory in the United States and potential for plaintiffs to recover greater damages than in Scotland were not accorded substantial weight in forum non conveniens analysis.

¹⁷⁸ *Id.* at 254 ("[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight . . .").

¹⁷⁹ *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹⁸⁰ *Gulf Oil Corp.*, 330 U.S. at 508 (internal quotation marks omitted).

effectively pursue the action in that forum. This is called the “inability” requirement, and should involve the most exacting standard of the proposed “read-in” requirements to the ATS. Judges, evaluating ATS claims at the 12(b)(6) stage, should thus engage in a searching inquiry.

The “inability” requirement aims to further the policy of judicial economy.¹⁸¹ To remedy the economic problems in contemporary application and interpretation of the ATS,¹⁸² it establishes a high threshold test: only those actions where plaintiffs would be denied a remedy but for a federal court’s acceptance of jurisdiction will survive a 12(b)(6) motion. Additionally, the stringent test articulated above gives the ATS heightened legitimacy while respecting international sovereignty.¹⁸³ Finally, requiring a showing of inability, guided by clear criterion, makes those rare instances in which federal courts confer ATS jurisdiction appear more calculated, and thus, legitimate.¹⁸⁴

1. Unwillingness as Inability

“Inability” contemplates situations where the premier forum is unwilling or unable to resolve the dispute. A party need not establish literal impossibility in order to survive a 12(b)(6) motion under the re-interpreted ATS. Brazen unwillingness to adjudicate satisfies the inability prong. Judges evaluating an ATS claim under the proposed criteria should consult Article 17 of the International Criminal Court’s Rome Statute.¹⁸⁵

¹⁸¹ *Rosado v. Wyman*, 397 U.S. 397, 435 (1970) (Black, J., dissenting) (acknowledging “the very important consideration of judicial economy”).

¹⁸² See Donald J. Kochan, *No Longer Little Known but now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 132 (2005) (“As private companies increasingly become subject to ATS suits, such suits threaten to discourage the very overseas investment and development that helps expand individual liberty [and] human rights . . .”).

¹⁸³ Incorporation of the three “read-in” requirements legitimizes ATS jurisdiction by setting forth a set of clear, predictable standards.

¹⁸⁴ Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 585 (1983) (“Th[e] mutual recognition of legitimacy is a central element of the principle of comity and validates the exercise of state power.”).

¹⁸⁵ Rome Statute of the International Criminal Court art. 17(2)(a)-(c), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

In the unwillingness analysis, a court should consider three factors: (1) whether the proceedings aim to “shield[] person[s] concerned from [civil] responsibility;” (2) “unjustified delay in the proceedings;” and (3) the extent to which “proceedings [were or are] not being conducted independently or impartially,” but rather in a manner “inconsistent with an intent to bring the person concerned to justice.”¹⁸⁶

In a 2009 case, the International Criminal Court enunciated two practical indicators of unwillingness: the existence of “ongoing investigations or prosecutions,” and the existence of past investigations where a decision was made not to prosecute.¹⁸⁷ While the existence of an ongoing investigation weighs against a finding of unwillingness, it should not be outcome determinative.¹⁸⁸ Otherwise, domestic courts seeking to shield responsible parties from civil responsibility would initiate sham proceedings to circumvent the rule.¹⁸⁹

Judicial corruption within the premier forum triggers “unwillingness” under the proffered interpretation.¹⁹⁰ Perhaps contemplated by ICC language, yet explicitly unaddressed, corruption has devastating potential to dismantle domestic judicial systems.¹⁹¹ Nigerian plaintiffs have regularly harnessed this argument in ATS litigation against oil companies.¹⁹² In a 2009 case, one federal district court advised that where domestic

¹⁸⁶ *Id.*

¹⁸⁷ Prosecutor v. Katanga, ICC-01/04/01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case ¶ 78 (Sept. 25, 2009). The International Criminal Court also recognized that a State’s inaction in “investigati[on]” or “prosecuti[on]” qualifies as “unwillingness.”

¹⁸⁸ *Id.*

¹⁸⁹ After World War II, Japanese war criminals tried a similar tactic, albeit in the context of the prohibition on double jeopardy. Van Schaack and Slye explain that “the Japanese Cabinet launched war crimes trials of Japanese defendants, perhaps thinking that the principle of double jeopardy would prevent subsequent trials.” BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 37 (2d ed. 2010).

¹⁹⁰ See Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT’L L. 121, 123 (2005).

¹⁹¹ Short, *supra* note 162, at 1003 (arguing for retention of forum non conveniens to dispose of misplaced ATS claims but conceding, “human rights plaintiffs in the United States may not be able to return to the countries of abuse to seek judicial compensation from their abusers, and they should not be forced to do so by U.S. courts”).

¹⁹² See *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1097 (N.D. Cal. 2008).

remedies are technically “available,” yet “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile,” an ATS plaintiff cannot be required to exhaust remedies in the domestic forum.¹⁹³

Thus, because corruption “prevented [Nigerian] courts from functioning adequately,” dismissal was inappropriate on grounds of non-exhaustion.¹⁹⁴ Corruption should likewise affect the outcome of a judge’s consideration of “unwillingness” under the re-interpreted ATS.¹⁹⁵

2. Other Factors as “Inability”

A judgment that the plaintiff is plainly unable to pursue the action in the premier forum should defeat a 12(b)(6) motion. The Rome Statute should again guide the judicial inquiry.¹⁹⁶ Specifically, Article 17(3) advises that “inability” can be established by demonstrating “a total or substantial collapse” of the domestic judicial system, or a failure “to obtain the accused or the necessary evidence and testimony.”¹⁹⁷

Fear of violent reprisal in the premier forum qualifies as “inability.”¹⁹⁸ In order to prove a risk of “reprisal,” the alien must establish that “it is more likely than not that the alien would be subject to persecution” in the premier forum.¹⁹⁹ In one recent ATS case, a class of Colombian plaintiffs successfully opposed a defendant-oil company’s motion to dismiss on forum non conveniens grounds based on the risk of “personal harm” involved in bringing the action in a Colombian court.²⁰⁰ The district court applied the above test and acknowledged “an alternative forum is

¹⁹³ *Id.* (quoting S. REP. NO. 102-249, at 10 (1991)).

¹⁹⁴ *Id.*

¹⁹⁵ See Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL’Y INT’L BUS. 95 (1999) (focusing on judicial corruption in Latin America).

¹⁹⁶ Rome Statute, *supra* note 185, art. 17(3).

¹⁹⁷ *Id.*

¹⁹⁸ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005).

¹⁹⁹ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (quoting *I.N.S. v. Stevic*, 467 U.S. 407, 429-30 (1984)).

²⁰⁰ *Mujica*, 381 F. Supp. 2d at 1143.

inadequate if the claimants cannot pursue their case without fearing retaliation.”²⁰¹

Immunity of the defendant in the premier forum qualifies as “inability.”²⁰² In a 2009 ATS case initiated in federal district court, a judge came to this same conclusion.²⁰³ The court reasoned that an Iraqi statute which “shield[ed] defendants from liability in Iraqi courts” precluded the defendants from establishing “failure to exhaust” as an affirmative defense.²⁰⁴ The same analysis should apply under the revised ATS. If an otherwise qualifying claim is barred by some form of immunity in the premier forum, the plaintiffs need only allege attempted or actual commencement to satisfy “inability” under the statute.

The mere fact that a foreign remedy would be less plaintiff-friendly would not satisfy inability under the re-interpreted ATS.²⁰⁵ Rather, a potential ATS plaintiff cannot establish inability under the revised interpretation based on a showing of inadequacy of available remedies unless “it is no remedy at all.”²⁰⁶

In order to satisfy the “inability” prong of the revised ATS, a plaintiff need not demonstrate that bringing the action in the forum would be literally impossible.²⁰⁷ The Spanish Constitutional Court addressed this very issue in an appeal regarding the propriety of exercising universal jurisdiction over crimes committed by General Augusto Pinochet in Chile.²⁰⁸ Faced with

²⁰¹ *Id.*

²⁰² Yang, *supra* note 190, at 130.

²⁰³ *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 594-95 (E.D. Va. 2009). The court’s decision was made in the context of the defendant’s failure to meet its burden of establishing the affirmative defense of failure to exhaust administrative remedies.

²⁰⁴ *Id.* at 595.

²⁰⁵ See *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025-26 (W.D. Wash. 2005) (“A foreign remedy is adequate even if not identical to remedies available in the United States.”).

²⁰⁶ *Id.* (internal quotation marks omitted).

²⁰⁷ For an interpretation on “impossibility” as defined in various nations’ jurisdictional provisions, see Nwapi, *supra* note 119, at 35 (surmising that “legal impossibility arises where no foreign court has jurisdiction, or . . . when there is a legal obstacle to accessing the foreign court”) (internal quotation marks omitted).

²⁰⁸ S.T.C., Sept. 26, 2005 (No. 237) (Spain), available at <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2372005.aspx>; see also Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L L. 829, 832 (2000).

an exhaustion-type inquiry that parallels many such analyses judges will conduct under the re-interpreted ATS, the Constitutional Court considered whether the initiation of concurrent proceedings in Guatemala barred commencement of the action in Spain.²⁰⁹ Although the Constitutional Court refused to dismiss the suit on other grounds, it reasoned that to adopt a requirement of literal impossibility “defeats the purpose of universal jurisdiction . . . thus resulting in impunity.”²¹⁰ Thus, in order to demonstrate that the action cannot be pursued in the forum pursuant to the third requirement of the re-interpreted ATS, a plaintiff must demonstrate domestic unwillingness or inability to pursue the action.

Judges considering an ATS case at the 12(b)(6) stage should interpret the ATS to require (1) actual or attempted commencement of the action (2) in the “premier forum,” and (3) an inability to pursue the action in that forum. A plaintiff’s ATS claim should be evaluated with heightened scrutiny at each successive step, pursuant to the jurisprudence outlined above. If implemented, this re-interpretation will drastically reduce the number of ATS cases litigated,²¹¹ yet preserve a federal forum for plaintiffs who would otherwise lack a civil remedy.

IV. POLICY ADVANTAGES OF THE REVISED ATS

The re-interpreted ATS embodies sound policy.²¹² In eliminating resident ambiguities and by setting forth clear requirements, the three “read-in” requirements afford crusading judges less leeway in application of the ATS.²¹³ Moreover, crafting a stricter interpretation of the statute reduces problems of

²⁰⁹ S.T.C., Sept. 26, 2005 (No. 237, § I(2)(b)) (Spain).

²¹⁰ *Id.* § II(4).

²¹¹ *Cf.* Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 268 (2004) (labeling as a “myth” the “flood of cases . . . against corporate defendants under the ATS”).

²¹² *See* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1 (2002). Responsible ATS litigation “may impose sanctions on the wrongdoer and galvanize international condemnation of the wrongs, as well as deprive the perpetrator of the benefit of his offense and make the victim whole.” *Id.* at 51.

²¹³ *See* Joshua L. Bettridge, Note, *The Alien Tort Statute: Judicial Activism and Its Impact on International Law*, 1 REGENT J. INT’L L. 65 (2003).

efficiency and comity, yet ensures an effective compensation according to the Right-Remedy paradigm.²¹⁴

The required showings of (1) actual or attempted commencement; (2) in the forum best suited to adjudicate the matter; and (3) actual or practical inability to pursue the action in that forum, drastically reduce the ATS' jurisdictional scope.²¹⁵ Less time and money are thus spent litigating misplaced ATS claims.

By the same token, the re-interpretation signals America's commitment to affording greater deference to the sovereignty of other nations. It is consistent with their stated desire to resolve disputes occurring within their own borders.²¹⁶ Finally, the revised ATS leaves open the possibility of litigating truly meritorious claims—where plaintiffs would, absent a federal forum, be stripped of a civil remedy. As such, it ensures continued adherence to the Right-Remedy precept within American constitutional law, and promotes a positive image of America as an avid, albeit discerning, advocate of global humanitarian rights.²¹⁷

A. *Judicial Economy*

The re-interpreted ATS will drastically narrow the statute's jurisdictional scope, reduce litigation expense, and thus further the policy of judicial economy. It will make it much harder for a plaintiff to state a prima facie case for original jurisdiction under

²¹⁴ In addition, a human rights abuse victim's right to a civil remedy is discoverable outside the United States, and its Right-Remedy framework. The United Nations' Universal Declaration of Human Rights agrees in principle that a human rights violation should have a corresponding civil remedy. See Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 475 (1990).

²¹⁵ See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 65 (1985), for a personal jurisdiction-framed limit on the scope of the ATS.

²¹⁶ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981).

²¹⁷ Vincent Warren, *Siding with the Plaintiffs Is the Right Thing to Do*, N.Y. TIMES (Nov. 16, 2012, 5:17 PM), <http://www.nytimes.com/roomfordebate/2012/02/28/corporate-rights-and-human-rights/siding-with-the-plaintiffs-is-the-right-thing-to-do> ("In upholding the use of [the ATS] for the last three decades, the U.S. court system has sent one resounding message . . .").

the statute.²¹⁸ Specifically, the added “commencement” and “inability” prongs will assure that most ATS cases qualifying under the current jurisdictional regime will fail under the revised interpretation. Tougher requirements mean fewer ATS claims will be litigated, and thus federal judges will spend less time and money adjudicating them.

1. Discerning Exercises of Jurisdiction: Case Illustrations

Abstract paeans to policy aside, sample cases best illustrate the positive economic impact of the proposed interpretation. Recall the cavalier exercises of jurisdiction discussed earlier in this Comment to illustrate the efficiency problems of the ATS: *Mamani*²¹⁹ and *Ben-Haim*.²²⁰ Neither case would pass muster under the re-interpretation.

In *Mamani*, Bolivian plaintiffs sued Bolivian defendants in Florida for atrocities committed in Bolivia.²²¹ The case reached the Eleventh Circuit, where a judge spent eight pages considering the merits of the plaintiffs’ claims.²²² Under the proposed revision, the claim would have been dead on arrival in federal court.²²³

The plaintiffs’ failure to allege commencement in Bolivia— unquestionably the “premier forum” under the proposed criteria— would have assured expeditious resolution of the case.²²⁴ The district court need only expend several sentences disposing of the matter before turning its attention to problems exerting more than mere tangential influence on America.

²¹⁸ Depending on the judge evaluating the motion, most ATS claims today will survive a 12(b)(6) dismissal if the plaintiff alleges that he is (1) an alien; (2) suing in tort; (3) for a violation of the law of nations. The proposed interpretation adds three pre-conditions whose presence a judge can determine immediately.

²¹⁹ *Mamani v. Berzaín*, 654 F.3d 1148 (11th Cir. 2011).

²²⁰ *Ben-Haim v. Neeman*, 543 F. App’x 152 (3d Cir. 2013).

²²¹ *Mamani*, 654 F.3d at 1150.

²²² Ultimately, the Eleventh Circuit dismissed the plaintiffs’ complaint for failure to state a claim under *Iqbal*’s plausibility pleading standard. *Id.* at 1156-57.

²²³ *See id.*

²²⁴ Undertaking the analysis set forth earlier in this Comment, Bolivia would qualify as the proper forum because (1) all witnesses except the named defendants resided in, and were citizens of, Bolivia; and (2) most, if not all, evidence relating to the alleged systematic extermination perpetrated by the Bolivian military was located in Bolivia. *Id.*

An analysis of the troubling *Ben-Haim* case under the revised analytical framework is equally instructive.²²⁵ In *Ben-Haim*, United States citizens residing in Israel sued Israeli officials for “discrimination against fathers in the Israeli courts.”²²⁶ Although the plaintiffs’ claims were disposed of via motion to dismiss for want of subject matter jurisdiction, the inherent flexibility of the current ATS allowed the claim to reach federal court in the first instance.²²⁷ The U.S. District Court for the District of New Jersey, and next, the Court of Appeals for the Third Circuit, spent valuable time dismissing misplaced claims.²²⁸

The re-interpreted ATS bars claims brought by plaintiffs, like those in *Ben-Haim*, who cannot satisfy the “commencement” prong.²²⁹ A plaintiff or attorney who knows at the outset that he cannot state a prima facie ATS claim is unlikely to file suit.²³⁰ Had the attorneys or represented parties in *Ben-Haim* knew that they faced stricter jurisdictional requirements—which they could not satisfy—they may have forgone suit altogether.²³¹ If the plaintiffs (or their attorney) rolled the dice and sued anyway, their failure to first sue in Israel, prior to suing in New Jersey, would have barred their claim.²³² A judge need only author three sentences, taking perhaps ten minutes, to dismiss the case. The “read-in” requirements thus curb efficiency concerns by (actually) limiting jurisdiction, and by deterring potential ATS plaintiffs from filing before the litigation process has begun.²³³

²²⁵ See *Ben-Haim v. Neeman*, 543 F. App’x 152 (3d Cir. 2013).

²²⁶ *Id.* at 153.

²²⁷ *Id.* at 154.

²²⁸ *Id.* at 152.

²²⁹ *Id.* Curiously, *Ben-Haim* properly initiated the underlying child-custody suit in Israel. The suit that is the subject of the exemplar case, however, involved a secondary claim brought by *Ben-Haim* against Israeli officials for failure to impartially resolve the prior litigation. This latter (pertinent) action was not first brought in the Israeli courts, as the revised ATS would mandate. *Id.*

²³⁰ See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

²³¹ *Ben-Haim*, 543 F. App’x at 152.

²³² *Id.* at 153.

²³³ Cf. Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437 (2013). Professors Issacharoff and Miller argue that heightened pleading “weed[s] out claims that have no realistic chance of success,” yet “if the court scrutinizes complaints too strictly . . . violations of legal rights will not be redressed.” *Id.* at 437.

In short, the re-interpreted ATS fixes most of the efficiency concerns characteristic of the current statute. The added requirements of (1) actual or attempted commencement (2) in the forum best suited to adjudicate the matter and (3) inability to pursue the action in the premier forum will severely limit the statute's jurisdictional scope. As such, less effort will be directed towards resolution of misplaced ATS cases like *Mamani* and *Ben-Haim*, carving out more time and resources to consider meritorious ATS actions.²³⁴

B. Comity

The proposed ATS will engender international comity for the same reason it promotes judicial economy: limiting the reach of extraterritorial jurisdiction. A more disciplined approach to extraterritorial application of the ATS—a surefire consequence of close adherence to the proposed amendment—will lessen instances in which American courts trounce upon the sovereignty of other nations, thereby reducing foreign policy friction.²³⁵

1. Avoiding Foreign Policy Friction: Case Illustrations

The heightened inquiry under the revised ATS will make it harder for foreign plaintiffs suing foreign defendants for foreign international humanitarian violations to procure a United States forum. As such, many of the cases provoking the greatest international outrage under the current interpretation would never have been heard under this revised formulation.²³⁶ Moreover, the proposed ATS will reduce international opprobrium

²³⁴ *Twombly*, 550 U.S. at 559 (acknowledging the necessity of heightened pleading standards “to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975))) (internal quotation marks omitted).

²³⁵ *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 818 (S.D. Ind. 2010) (“[R]ecognizing new ATS causes of action involves comity considerations . . .”).

²³⁶ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

because it aligns American exercise of extraterritorial jurisdiction with contemporary trends in international law.²³⁷

Earlier in this Comment, two cases were castigated above all others as fomenting international discord: *In re South African Apartheid Litigation*²³⁸ and *Kiobel*.²³⁹ The plain fact that federal courts considered these cases angered observers in the Netherlands, the United Kingdom, Germany, and the European Commission.²⁴⁰ Under the revised ATS, these cases, and others that would provoke international tension, would not be justiciable.

In *South African Apartheid Litigation*, a class of South African plaintiffs sued several international corporations in the U.S. District Court for the Southern District of New York under the ATS for aiding and abetting the South African government's implementation of the repressive apartheid regime.²⁴¹ The "premier forum" factors weighed heavily in favor of litigation in South Africa. Most of the witnesses resided in South Africa, all plaintiffs were South African citizens, and South Africa had a compelling local interest in remedying past discrimination.²⁴² Because this expansive class did not first file suit in South Africa,

²³⁷ The re-interpreted ATS shares many of the characteristics of the "Forum of Necessity" concept. According to one scholar, similar jurisdictional doctrines have been adopted in as many as twenty-three nations. See Nwapi, *supra* note 119, at 31-32.

²³⁸ *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); see also Transcript of Oral Argument at 31, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No 10-1491), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf ("In the South African apartheid case, not only did the State Department seek to protest the action, but the Government of South Africa filed a letter, and the district court ignored both.").

²³⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁴⁰ The Netherlands was the most vocal objector to America's potential exercise of extraterritorial jurisdiction in *Kiobel*. This is not particularly surprising because of the identity of the principal defendant in the case, Royal Dutch Shell.

²⁴¹ *Apartheid Litig.*, 617 F. Supp. 2d at 240-41. Confusingly, this sprawling litigation has several different case names, all of which share a common core of facts. To gauge the litigation's progress, see *Am. Isuzu Motors, Inc. v. Ntsebeza*, 533 U.S. 1028 (2008); *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013); and *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

²⁴² In *Khulumani*, the court accorded great weight to the statements of South Africa's then-president about the effect of the ATS litigation on South Africa's truth and reconciliation commission. *Khulumani*, 504 F.3d at 299 (Korman, J., concurring in part and dissenting in part). President Mbeki, quoted in *Khulumani*, opined that it was "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country." *Id.*

they would be precluded from pursuing the action in a federal forum under the re-interpreted ATS.²⁴³

Applying the facts of *Kiobel* to the revised ATS requires deeper analysis.²⁴⁴ It is nonetheless equally illustrative of the comity-related merits of this proposal. In *Kiobel*, Nigerian plaintiffs sued Dutch, British, and Nigerian corporations in federal court.²⁴⁵ The plaintiffs invoked ATS jurisdiction on the grounds that the defendant-corporations allegedly aided, in Nigeria, commission of torture and crimes against humanity.²⁴⁶

As the *Kiobel* plaintiffs did not first bring suit in Nigeria, ATS jurisdiction would be unavailable under the re-interpretation.²⁴⁷ Assuming, *arguendo*, that the plaintiffs had indeed commenced the action in Nigeria, thereby satisfying the “commencement” requirement, the proposed ATS would have nonetheless denied jurisdiction.²⁴⁸ The *Kiobel* plaintiffs would struggle to establish the “inability requirement,” specifically that the Nigerian courts were either unable or unwilling to adjudicate the matter.²⁴⁹

Even conceding the potential bias of the Nigerian courts, courts of the Netherlands would have had a better claim to the dispute than those of America. The Netherlands would have been second choice in the “premier forum” analysis because the principal defendant, Royal Dutch Shell, is headquartered in Holland. There is no indication that the Nigerian plaintiffs’ efforts to obtain compensation would be substantially frustrated in the Netherlands. Approximately two years ago, a Nigerian farmer successfully litigated a massive claim against Shell Oil in a Dutch

²⁴³ *Id.*

²⁴⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁴⁵ *Id.* at 1662.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1663.

²⁴⁸ *Id.*

²⁴⁹ A strong argument can be made that, were they required to do so, the *Kiobel* plaintiffs could satisfy the “inability” prong of the proposed ATS based on allegations of judicial corruption in Nigeria. One scholar has characterized the Nigerian justice system as “deficien[t] in terms of its day-to-day operations,” such that “any litigant . . . may find it difficult to pursue a court case in a Nigerian court.” JEDRZEJ GEORG FRYNAS, OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN COMPANIES AND VILLAGE COMMUNITIES 147 (2000).

forum.²⁵⁰ Thus, because a competent Dutch forum with a better claim to the litigation was available, and the plaintiffs failed to file suit in Nigeria, *Kiobel* would not have crossed the jurisdictional threshold of the revised ATS.²⁵¹

2. Assimilating to Jurisdictional Norms

The revised ATS further alleviates comity concerns by aligning American use of civil universal jurisdiction squarely with that of other developed nations.²⁵² Foreign sovereigns view the ATS with greater skepticism than even American tort law.²⁵³ The re-interpreted ATS is comparable to jurisdictional approaches employed in Canada,²⁵⁴ Belgium,²⁵⁵ Switzerland,²⁵⁶ and the Netherlands.²⁵⁷

Take Canada, for instance. Article 3136 of the Civil Code of Québec provides:

²⁵⁰ Yvonne Ndege, *Nigerian Farmer Wins Against Shell Oil*, AL JAZEERA (Jan. 31, 2013, 12:22 AM), blogs.aljazeera.com/blog/Africa/Nigerian-farmer-wins-against-shell-oil. Ndege was cautiously optimistic about the consequences of the holding, surmising that it “could also lead to more compensation claims from oil producing communities against Shell.”

²⁵¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁵² Great Britain, arguably the nation most culturally and developmentally akin to the United States, has no jurisdictional mechanism comparable to the ATS.

²⁵³ See Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 240 (1991). Professor Wiegand noted the “[r]epeated warnings against ‘American conditions’” and “substantial damage awards” that have “received wide publicity in Europe.” *Id.*

²⁵⁴ See Civil Code of Québec, S.Q. 1991, c. 64, art. 3136 (Can.), *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html.

²⁵⁵ Article 11 of Belgium’s Code of Private International Law permits the exercise of jurisdiction “when the matter presents close connections with Belgium and proceedings abroad seem impossible or when it would be unreasonable to demand that the action be brought abroad.” CODE DE DROIT INTERNATIONAL PRIVÉ [DIP] art. 11 (Belg.), *available at* <http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf>.

²⁵⁶ Switzerland affords “Emergency Jurisdiction” when “proceedings abroad are impossible or cannot reasonably be required to be brought.” CODE FÉDÉRAL SUR LE DROIT INTERNATIONAL PRIVÉ [CPIL] [CODE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, art. 3 (Switz.), *available at* <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/haas/lehrveranstaltungen/fs2015/intro-sports-law/PILA.pdf>.

²⁵⁷ Article 9(b) of the Dutch Code of Civil Procedure is a simpler version of the same idea, authorizing Dutch jurisdiction when “a civil case outside the Netherlands appears to be impossible.” WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] [CODE OF CIVIL PROCEDURE] art. 9(b) (Neth.), *available at* <http://www.dutchcivillaw.com/legislation/civilprocedure001.htm>.

Even though a Québec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Québec, if proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.²⁵⁸

Québec's take on extraterritorial jurisdiction is similar to that of the proposed interpretation. It requires a showing of exhaustion prior to commencement of the action in Québec.²⁵⁹ The requirement that the claim "cannot possibly be instituted outside" the forum or "cannot reasonably be required" to be initiated outside the forum is comparable to the "inability" prong of the revised ATS.²⁶⁰ The same underlying considerations—fairness, comity, and efficiency—undergird both forms.²⁶¹

Despite differences in verbiage, the practical effect of these catch-all jurisdictional provisions is the same: the courts of the state contemplating jurisdiction must defer to the domestic forum unless some form of inability, ranging from substantial frustration to literal impossibility, is demonstrated by the plaintiff. By assimilating the ATS into the contemporary jurisdictional fold,²⁶² the United States government can assuage the "deep[] concern[s] about the failure by some U.S. courts to take account of the jurisdictional constraints under international law."²⁶³

C. Compensating Deserving Victims

The revised ATS curbs litigation abuse and limits foreign policy clashes. If these were the only two objectives, then abolition

²⁵⁸ See Civil Code of Québec, S.Q. 1991, c. 64, art. 3136 (Can.), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See Nwapi, *supra* note 119, at 31-32. Professor Nwapi argues that Switzerland, Canada, Belgium, Mexico, the Netherlands, Uruguay, Argentina, Austria, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, and Turkey have adopted comparable jurisdictional provisions. *Id.*

²⁶³ Brief of the Governments, *supra* note 8, at 3.

of the ATS would provide an equal, if not superior, solution.²⁶⁴ When the third policy undergirding the statute—providing a tort remedy for victims of international human rights violations—comes into play, the situation becomes far more complex. Calls for abolition are shortsighted, overlooking true human rights victims: persons who, absent provision of a federal forum, would be robbed of a civil remedy.²⁶⁵ Proponents of abolition ignore the constitutional Right-Remedy imperative: the very standard by which the existence of fundamental humanitarian “rights” can be determined. The answers to these questions reveal the value of the revised ATS.

While the proposed amendment promotes efficiency and comity by restricting the ATS’ jurisdictional reach, it is crafted such that deserving plaintiffs will have their day in an American court, and thus assures that a remedy will accompany each violation of human right. Thus, though it will drastically reduce the number of justiciable ATS claims, the revised ATS will not bar meritorious actions. This point is best demonstrated through applying the re-interpreted statute to potential ATS litigation.

Imagine the following situation. A class action is filed in federal district court. The plaintiffs allege that their relatives were summarily executed and tortured in Africa by agents of a European corporation present in Africa and subject to personal jurisdiction in the United States. The plaintiffs have filed suit in the African nation, but proceedings have stalled. The United States Department of State has issued reports indicating widespread judicial corruption in the nation.²⁶⁶

Under the above facts, the re-interpreted ATS would confer jurisdiction. As a threshold matter, the conduct complained of—

²⁶⁴ Tim Coleman, *Congress Should Decide the Alien Tort Statute’s Extent*, WALL ST. J. (Oct. 10, 2012, 3:23 PM), <http://online.wsj.com/articles/SB10000872396390444897304578046410156780442> (“Congress should either abolish the Alien Tort Statute or amend it in a way that protects American interests and prevents abuse of the federal courts.”).

²⁶⁵ See Issacharoff & Miller, *supra* note 233.

²⁶⁶ The facts from this paragraph are derived from *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *1 (S.D.N.Y. Feb. 28, 2002). Widely regarded as an exemplar of the human rights-related merits of ATS litigation, the district court’s refusal to dismiss the case led to a massive settlement. See also Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), www.nytimes.com/2009/06/09/business/global/09shell.html.

torture—is sufficiently severe to constitute a “violation of the law of nations.” Next, the “premier forum” analysis would yield the African nation in which the conduct occurred as the first-choice forum. Moreover, because the plaintiffs took a step towards commencing their action in that forum, the “commencement” requirement is satisfied. Finally, because the plaintiffs face a substantial risk of obtaining partial or inadequate relief in the corrupt domestic courts, the “inability” prong would probably be satisfied.

The re-interpreted ATS gives plaintiffs the opportunity to obtain otherwise elusive relief. It promotes respect for human rights by assuring that no violation thereof will lack a concomitant remedy. As such, it complies with America’s constitutional commitment to rights defined in terms of available remedies.

CONCLUSION

The current Alien Tort Statute, 28 U.S.C. § 1350, is as useful today as it was before 1980. Then, it was a neglected relic of the Judiciary Act of 1789. Today, it has crossed the boundary from uselessness to vexation; its undisciplined use yields little human rights progress and massive economic waste. Though perhaps theoretically useful—it allows the United States to claim that it is sensitive to international human rights abuses—its contemporary application assures that *Filartiga* will be but a pyrrhic victory for human rights proponents.

The proposal encourages efficient dispute resolution because it provides trial judges a set of clear requirements. Since they derive from established jurisprudence, judges evaluating ATS claims at the 12(b)(6) stage will confidently and quickly apply law to fact.

By adding three “read-in” requirements, the re-interpretation makes it harder for a plaintiff to state a prima facie ATS claim. As such, fewer ATS cases will be litigated. Those that escape 12(b)(6) dismissal will be better connected to the United States, and less likely to implicate the sovereignty of other nations.

The re-interpretation recognizes the importance of human rights and complies with the Right-Remedy paradigm. It assures that federal courts remain open to victims of abuse. Human rights plaintiffs who have tried to sue in the proper forum—and having

done so, cannot obtain compensation—will have their day in a federal district court.

The proposed re-interpretation thus both revives and calms the statute's application. The three "read-in" requirements will necessarily limit its invocation, thus quantitatively "quieting" the cacophony of ATS litigation. At the same time, however, it comports with the traditional Right-Remedy paradigm by freeing up time and space for deciding meritorious ATS suits in the *Filartiga* line, thus resurrecting the statute in qualitative terms.

If re-interpreted as advised, the ATS will foment fewer foreign-policy scuffles, ensure increased efficiency, and maintain America's position as human rights hegemon when viewed in terms of this nation's historic commitment to the Right-Remedy paradigm.

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