Nos. 02-56256, 02-56390

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, et al.,

Plaintiffs-Appellants,

v.

RIO TINTO, PLC, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REHEARING EN BANC

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INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517, the United States files this amicus brief in support of defendants-appellees' second petition for rehearing en banc.

Plaintiffs in this case, current and former residents of Bougainville, Papua New Guinea, sued the corporate parent companies of a mine located in Bougainville, asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The United

States has a significant interest in the proper construction and application of the ATS. As the Supreme Court recently acknowledged, the federal courts' recognition of claims under the ATS can have significant implications for the United States' foreign relations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

In its original opinion in this case, this Court addressed the validity of plaintiffs' claims under the ATS, even though no party had briefed the issue, because it believed the question had some bearing on the district court's subject matter jurisdiction under the ATS. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1077 (9th Cir. 2006), *withdrawn* April 12, 2007. In its amicus brief in support of defendant-appellees' initial petition for rehearing, the United States explained that the Court's analysis of the validity of plaintiffs' claims was significantly flawed, and that the Court need not have addressed those issues because a court has jurisdiction under the ATS so long as an alien asserts a colorable tort claim in violation of international law, even if the claim turns out to be invalid. In its revised opinion, the Court accepted that analysis and reserved the question of the validity of plaintiffs' claims. *See Sarei v. Rio Tinto, PLC*, Slip Op. 4134 (9th Cir. Apr. 12, 2007) ("[W]e need not and do not decide whether plaintiffs' substantive claims and theories of vicarious liability constitute valid ATCA claims after *Sosa*.").

However, the panel's revised opinion rejected defendant-appellees' argument that plaintiffs could not properly assert claims under the ATS at this time, because they failed to exhaust their local remedies in Papua New Guinea. The majority held that it would be inappropriate for a court to require exhaustion of local remedies where Congress has not specifically mandated such a requirement. Slip Op. 4170–71. Defendants-appellees have filed a new petition seeking en banc rehearing of the exhaustion issue.

As we explained in our prior filing in this case (and in two appeals pending before this Court),[1] the presumption against extraterritorial application of U.S. law absent express direction from Congress, the history of the ATS' enactment, and the Supreme Court's many warnings in *Sosa* necessarily lead to the conclusion that the ATS does not authorize federal courts to fashion federal common law — i.e., *law of the United States* — to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens. However, the factors that foreclose the projection of U.S. law into foreign countries counsel strongly in favor of requiring plaintiffs to exhaust available local

[1] *See* the United States' amicus curiae briefs in *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.), and in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.).

remedies for redress of injuries resulting from such conduct before they can sue in a U.S. court to urge the court to impose U.S. law under the ATS.[2]

ARGUMENT

A Plaintiff's ATS Claims Arising in a Foreign Jurisdiction May Be Considered, if at All, Only after Exhaustion of Available Local Remedies.

A. As noted, the majority held that, where a claim asserted under the ATS arises abroad, a court should not require exhaustion of foreign remedies, because Congress has not specifically mandated that prerequisite. Slip Op. 4170–71. In so holding, the majority relied on the Supreme Court's admonition in *Sosa* to exercise "judicial caution." *Id.* at 4165. As an initial matter, we do not think it appropriate to construe *Sosa* as counseling against the adoption of an exhaustion requirement. Indeed, the Supreme Court stated that it "would certainly consider this [exhaustion] requirement in an appropriate case." 542 U.S. at 733 n.21.

The majority also erred in focusing on the lack of a clear Congressional statement. Looking for such a statement is proper when Congress creates a cause of action, and a court is attempting to discern legislative intent. Here, however, the Court is considering a jurisdictional statute and circumscribed power of the courts to

[2] The United States expresses no views on the validity of any aspect of the Court's decision not discussed in this brief.

recognize a very limited number of federal common law claims that may be asserted under that statute. The Supreme Court went out of its way to chronicle reasons why a court must act cautiously and with "a restrained conception of * * * discretion" in recognizing ATS claims and extending liability. *Id.* at 726; *see id*. at 725–730, 732 n.20. The Court discussed at length the reasons for approaching this federal common law power with "great caution." *Id*. at 728. Adopting an exhaustion requirement in appropriate cases is fully in keeping with the Supreme Court's instruction that, when exercising common law authority under the ATS, courts should do so in a restrained and modest fashion.

In *Sosa*, the Court questioned whether the courts' limited federal common law power could properly be invoked "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727–28 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold a foreign government or its agent has transgressed those limits. * * * Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise the risk of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."). Assuming arguendo, however, that a court

could ever do so, it is important that the court show due respect to competent tribunals abroad and mandate exhaustion where appropriate.

As a matter of international comity, "United States courts ordinarily * * * defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). Such international comity seeks to maintain our relations with foreign governments, by discouraging U.S. courts from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895). To reject a principle of exhaustion and proceed to resolve a dispute arising in another country, concerning a foreign government's treatment of its own citizens, is the opposite of the model of "judicial caution" and restraint mandated by *Sosa.*

Moreover, exhaustion is fully consistent with Congress' intent in enacting the ATS. Congress enacted the ATS to provide a mechanism through which certain private insults to foreign sovereigns committed within U.S. jurisdiction could be remedied in federal courts. In the late 18th-century, the law of nations included "rules binding individuals for the benefit of other individuals," the violation of which

"impinged upon the sovereignty of the foreign nation." *Sosa*, 542 U.S. at 715. Such violations, "if not adequately redressed[,] could rise to an issue of war." *Ibid.* Violations of safe conducts, infringement of the rights of ambassadors, and piracy came within this "narrow set." *Ibid.* But under the Articles of Confederation, "[t]he Continental Congress was hamstrung by its inability to cause infractions of treaties, or the law of nations to be punished." *Id.* at 716 (quotation marks omitted).

The Continental Congress urged state legislatures to authorize suits "for damages by the party injured, and for the compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Ibid.* (quotation marks omitted). Most states failed to respond to the Congress' entreaty. Physical assaults on foreign ambassadors in the United States, and the absence of a federal forum to redress ambassadors' claims, led to significant diplomatic protest. *Id.* at 716–17. After ratification of the Constitution, the First Congress adopted the ATS to remedy this lacuna, thereby reducing the potential for international friction. *Id.* at 717–18.

The whole point of the ATS was thus to *avoid* international friction. The ATS was enacted to ensure that the National Government would be able to provide a forum for punishment or redress of violations for which a nation offended by conduct against it or its nationals might hold the offending party (and, in turn, the United

States) accountable. Those animating purposes of the ATS have nothing to do with a foreign government's treatment of its won citizens abroad. Against this backdrop, reinforced by cautions mandated by the Supreme Court in *Sosa* and the prescription against extraterritorial application of U.S. law, courts should be very hesitant *ever* to apply their common law power to apply *U.S. law* to adjudicate a foreign government's treatment of its own nationals. But even assuming that such extraterritorial claims are cognizable under the ATS, an exhaustion requirement manifestly would *further*, not undermine, Congress' intent to minimize the possibility of diplomatic friction by affording foreign states the first opportunity to adjudicate claims arising within their jurisdictions.

Consistent with that result, it is notable that when Congress by statute *has* created a private right for claims that may arise in foreign jurisdictions, it has required exhaustion as a prerequisite to suit. *See, e.g.*, Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, § 2(b). And Congress adopted this requirement in the TVPA, in part, because it viewed exhaustion as a procedural practice of international human rights tribunals, as the dissent notes. Slip Op. 4186 (Bybee, J., dissenting) (discussing S. Rep. No. 102-249, pt. 4, at 10 (1991).

B. Finally, we reiterate that the ATS does not encompass claims arising within the jurisdiction of a foreign sovereign, especially where the claims would require a U.S.

court to evaluate a foreign sovereign's treatment of its own citizens. As we have noted, the Supreme Court expressly identified — as one of the questions to be considered in demarcating the limited scope of the judge-made law that may be fashioned in accordance with the ATS — whether it would ever be proper for federal courts to project the (common) law of the United States extraterritorially to resolve disputes arising in foreign countries. *See Sosa*, 542 U.S. at 727–28.

The history of the ATS' enactment, described above, shows that Congress enacted the ATS to provide a forum for adjudicating alleged violations of the law of nations occurring within the jurisdiction of the United States and for which the United States therefore might be deemed responsible by a foreign sovereign. There is no indication whatsoever that Congress intended the ATS to apply — or to authorize U.S. courts to apply U.S. law — to purely extraterritorial claims, especially to disputes that center on a foreign government's treatment of its own citizens in its own territory. Indeed, the recognition of such claims would conflict with Congress' purpose in the ATS of reducing diplomatic conflicts.

Moreover, recognizing ATS claims arising in foreign states conflicts with the presumption, adopted in the early years of the Republic, "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248

(1991) (quotation marks omitted). This presumption reflects not only a judgment about the appropriate exercise of the United States' own power to impose its law to govern conduct and afford remedies, but also a corresponding respect for the sovereign authority of other states. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004). The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Arabian Am. Oil Co.*, 499 U.S. at 248. Thus, "unless there is the affirmative intention of the Congress clearly expressed," in "the language [of] the relevant Act," the Court presumes that a statute does not apply to actions arising abroad. *Ibid.* (quotation and alteration marks omitted).

The ATS does not "clearly express[]" Congress' intent to authorize the courts to project the law of the United States to govern conduct and redress injuries in the jurisdiction of a foreign sovereign. Indeed, contemporaneous actions by Congress confirm that it did not. The same Congress that enacted the ATS enacted a statute criminalizing piracy, assaults on ambassadors, and violations of safe conduct — the three historic paradigm violations of the law of nations identified by *Sosa*. 1 Stat. 112, §§ 8, 25 (April 30, 1790). That statute was written in general terms and contained no geographic limitation. But in a case involving acts of piracy committed by foreigners within the jurisdiction of a foreign sovereign, the Supreme Court held that

the statute did not apply. *United States v. Palmer*, 16 U.S. 610, 630–34 (1818). Noting that the statute was entitled "'an act for the punishment of certain crimes *against the United States*,'" the Supreme Court explained that Congress intended to punish "offences against the United States, not offences against the human race." *Palmer*, 16 U.S. at 632 (emphasis added). It is inconceivable that the same Congress, in enacting the ATS, meant to authorize an extension of the common law of the United States to regulate conduct in a foreign country (especially conduct involving a foreign government's treatment of its own nationals), which would go well beyond conduct Congress sought to reach in the criminal statute — and well beyond the purpose Congress sought to advance in enacting the ATS itself.[3] *See supra* at 6–8.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian Am. Oil*, 499 U.S. at 248; *Empagran*, 542 U.S. at 164–65. That danger is especially grave in ATS suits, where a court's projection of common law of the United States abroad can interfere with a foreign sovereign's choice about how to resolve conflicts within its jurisdiction. Thus, for example, in one

[3] In *United States v. Klintock*, the Supreme Court held that the statute considered in *Palmer* did apply to acts of piracy committed on the high seas by a United States citizen. 18 U.S. 144 (1820). But crimes committed on the high seas arise outside the territorial jurisdiction of any sovereign.

ATS case, plaintiffs seek to hold multinational corporations that did business with South Africa liable for the harms committed by the apartheid regime, despite the fact that the litigation is inconsistent with South Africa's own current reconciliation efforts. *See In re S. African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

A court in the United States is not well-positioned to evaluate what effect adjudication of claims asserted under the ATS may have on a foreign sovereign's own efforts to resolve conflicts, or the effect such adjudication will have on the diplomatic relations of the foreign state. It is precisely to avoid "unintended clashes" with such efforts that the Supreme Court requires Congress to speak clearly when it intends for legislation to apply extraterritorially. Congress has not done so in the ATS. Accordingly, claims under the ATS should not be recognized if they arise within the jurisdiction of another sovereign.

Moreover, Congress enacted the ATS to minimize diplomatic tensions. However, experience has shown that ATS suits asserting extraterritorial claims often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases (such as this one) against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). Thus serious diplomatic friction can result from judicial recognition of claims under the ATS arising within the jurisdiction of a foreign sovereign.

With these considerations in mind, plaintiffs' claims here are not cognizable under the ATS — i.e., courts may not apply the law of the United States in the form of judge-made federal common law to regulate and award damages for the alleged conduct — because there is no indication whatever, much less the requisite clear statement in the ATS itself, that Congress intended the ATS to authorize courts to project common law of the United States to govern conduct arising in the jurisdiction of a foreign sovereign, especially in suits against foreign corporations that require a court to review a foreign government's treatment of its own citizens.

We recognize that this Court previously held that the ATS encompasses claims arising within the territory of a foreign sovereign. *See In re Estate of Ferdinand Marcos Human Rights Litigation*, 978 F.2d 493, 499–501 (9th Cir. 1992). But in clarifying the standard courts should apply in considering claims under the ATS, the Supreme Court has since expressly noted that the extraterritorial reach of the ATS is a question courts must address. Moreover, in the *Marcos* decision, this Court failed to consider the historical origin of the ATS and the presumption against extraterritoriality. For these reasons, should the Court decide to grant rehearing en banc in this case, it would be appropriate for the Court to reconsider the territorial reach of the ATS and order briefing on the issue by the parties.

Defendants-appellees have requested rehearing en banc on the question whether exhaustion of local remedies is required. That question is en-banc-worthy in its own right, for reasons stated above and as requested in the defendants-appellees' rehearing petition. But the two doctrines discussed in this brief (exhaustion and non-extraterritoriality) grow out of similar concerns of not projecting our sovereign authority (either judicial or legislative) into the affairs of another sovereign. Indeed, the question whether the ATS authorizes courts to apply federal common law to conduct arising in a foreign country *at all* can fairly be regarded as logically antecedent to whether exhaustion of local remedies should be required for such a claim.

The en banc court could address the interrelated concerns underlying exhaustion and extraterritoriality in either of two ways. It could hold that, even assuming plaintiffs have a valid ATS claim, they would first be required to exhaust available local remedies before bringing suit in the United States under the ATS. Alternatively, because the issue of exhaustion only arises if the ATS applies extraterritorially, and because the Supreme Court's decision in *Sosa* provides a basis for the en banc court to reconsider that question, the court could take up that question first.[4]

[4] This circuit precedent likely explains why the extraterritoriality issue was not fully litigated or addressed by the panel.

CONCLUSION

For the foregoing reasons, the Court should grant defendant-appellees' petition for rehearing en banc.

Respectfully submitted,

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May 18, 2007

CERTIFICATE OF COMPLIANCE

I certify that this brief uses 14 point, proportionately spaced font and is 3,148 words, excluding those parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii). *Cf.* Ninth Circuit Rule 40-1 (a).

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Date: May 18, 2007

CERTIFICATE OF SERVICE

I certify that on this 18th day of May, 2007, I caused the foregoing Brief for the United States as Amicus Curiae Supporting Rehearing en Banc to be filed with the Court and served on counsel by causing an original and 50 copies to be delivered by OVERNIGHT DELIVERY to:

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