

1 environment, harmed the health of its people, and incited a ten-year civil war, during which
2 thousands of civilians died or were injured. They assert that defendants are guilty of war crimes
3 and crimes against humanity, as well as racial discrimination and environmental harm that violates
4 international law.

5 In December 2008, an en banc panel of the Ninth Circuit Court of Appeals remanded the
6 action to this court for the limited purpose of ascertaining whether, as an initial, prudential matter,
7 exhaustion should be required. See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en
8 banc) (“*Rio Tinto IV*”); *id.* at 825 n. 1 (McKeown, J.) (“As a prudential matter, in this case there
9 is a certain logic to considering exhaustion before considering threshold grounds that may ‘deny[]
10 audience to a case on the merits’” (citation omitted; alteration original)).

11 12 I. PROCEDURAL BACKGROUND

13 The factual background of this dispute is detailed extensively in the court’s prior order on
14 defendants’ motion to dismiss; that discussion is incorporated by reference in this order. See
15 *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116, 1121-27 (“*Rio Tinto I*”); see also *Rio Tinto IV*, 550 F.3d
16 at 825-26 (McKeown, J.) (factual and procedural overview). The court provides a brief summary
17 of the procedural history of the action as relevant to the issue on remand below.

18 A. Plaintiffs’ Lawsuit and *Rio Tinto I*

19 On November 2, 2000, Alexis Holyweek Sarei, a California resident who lived in
20 Bougainville between 1973 and 1987, and twenty-one individuals who then resided in Bougainville
21 or elsewhere in PNG, filed this putative class action against Rio Tinto plc and Rio Tinto Limited
22 (collectively “Rio Tinto”). Shortly thereafter, plaintiffs filed a first amended complaint asserting
23 claims under the Alien Tort Claims Act, 28 U.S.C. § 1350.¹ The amended complaint pled claims
24 for crimes against humanity; war crimes/murder; violation of the rights to life, health, and
25 security of the person; racial discrimination; cruel, inhuman, and degrading treatment; violation
26

27 ¹First Amended Class Action Complaint for Violations of the Alien Tort Claims Act [28
28 U.S.C. § 1350], Docket No. 7 (Dec. 6, 2000).

1 of international environmental rights; and a consistent pattern of gross violations of human rights.²
2 The pleading also alleged claims for negligence, public nuisance, private nuisance, strict liability,
3 equitable relief, and medical monitoring.³ Plaintiffs contend that Rio Tinto's mining operations
4 destroyed Bougainville's environment and the health of its residents. They also assert that,
5 because the mine was a joint venture between Rio Tinto and the PNG government, and because
6 Rio Tinto's threats led PNG to use military force against the Bougainvilleans, it is responsible for
7 human rights violations and war crimes committed during Bougainville's civil war.

8 On January 26, 2001, Rio Tinto filed a motion to dismiss plaintiffs' complaint,⁴ asserting
9 that the court lacked subject matter jurisdiction because plaintiffs had failed to state a cognizable
10 claim under the Alien Torts Claim Act. Alternatively, it argued that the action should be
11 dismissed on *forum non conveniens* grounds, as either Papua New Guinea or Australia was a more
12 appropriate forum. Finally, Rio Tinto challenged plaintiffs' claims as nonjusticiable under the act
13 of state, political question, and international comity doctrines.

14 In July 2002, the court issued a final order on Rio Tinto's motion to dismiss,⁵ which, *inter*
15 *alia*, addressed its threshold argument that the action should be dismissed because plaintiffs had
16 not exhausted remedies available locally in PNG. *Rio Tinto I*, 221 F.Supp.2d at 1132-33.
17 Comparing the ATCA and the Torture Victims Protection Act ("TVPA"), the court concluded that
18 there was no explicit statutory requirement that plaintiffs exhaust local remedies before filing suit
19 in federal court under the ATCA, and no indication in the legislative history that Congress
20 intended to impose such a requirement on ATCA claims. *Id.* at 1132-38. The court next
21 considered Rio Tinto's alternative argument, namely, that exhaustion of local remedies is a well-

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23 ²See *id.*, ¶¶ 210-66.

24 ³See *id.*, ¶¶ 267-93.

25 ⁴Notice of Motion and Motion to Dismiss for Failure to State a Claim, Docket No. 18 (Jan.
26 26, 2001).

27 ⁵See Amended Order Granting Defendants' Motion to Dismiss, Docket No. 163 (July 9,
28 2002). The court had previously issued an order on the motion in March 2002. (See Order,
Docket No. 131 (Mar. 23, 2002).)

1 established principle of international law and should be required of an ATCA plaintiff pleading
2 a “violation of the law of nations.” *Id.* at 1138-39. The court concluded that “the ATCA does
3 not adopt wholesale all principles of international law,” but instead “creates a domestic cause of
4 action for violations of international law,” which “need not impose the same conditions on a
5 plaintiff’s right to sue as international law or the domestic law of other nations.” *Id.* at 1139.
6 Consequently, the court held that plaintiffs were not required to exhaust remedies available in
7 PNG, or show that doing so would be futile, before filing an ATCA suit in federal court. *Id.*

8 **B. *Sosa, Rio Tinto II and Rio Tinto III***

9 The parties filed cross-appeals. Plaintiffs challenged the court’s dismissal of their ATCA
10 claims on jurisdictional and political question grounds, while Rio Tinto maintained that the ATCA
11 required exhaustion of local remedies. The appeal was argued and submitted on September 8,
12 2003; the panel withdrew the submission, however, on December 11, 2003, to await the Supreme
13 Court’s opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

14 In *Sosa*, the Supreme Court held that the ATCA “is a jurisdictional statute creating no new
15 causes of action.” It noted, however, that the statute “was intended to have practical effect the
16 moment it became law,” and thus provided a “cause of action for [a] modest number of
17 international law violations with a potential for personal liability.” *Id.* at 724. Consistent with
18 this view of the statute, the Court held that “courts should require any claim based on the present-
19 day law of nations to rest on a norm of international character accepted by the civilized world and
20 defined with a specificity comparable to the features of the 18th-century paradigms” it identified
21 when tracing the ATCA’s history. *Id.* at 725. The Court observed in dicta that it “would
22 certainly consider” an exhaustion requirement “in an appropriate [ATCA] case.” *Id.* at 733 n. 21.

23 Following *Sosa*, in June 2005, the parties reargued their cross-appeals in this case and the
24 matter was resubmitted. In August 2006, a three-judge panel of the Ninth Circuit affirmed in
25 part, reversed in part, and remanded. See *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006)
26 (“*Rio Tinto II*”), withdrawn and superseded on rehearing in part by *Sarei v. Rio Tinto, PLC*, 487
27 F.3d 1193 (9th Cir. 2007) (“*Rio Tinto III*”) (Fisher, J.). Rio Tinto petitioned for rehearing and
28 rehearing en banc. Its petition was initially granted in part; the merits panel’s majority and

1 dissenting opinions were withdrawn and superseded by *Rio Tinto III*.

2 In *Rio Tinto III*, the panel considered Rio Tinto's contention that an exhaustion requirement
3 should be read into the ATCA. *Id.* at 1213-23. Examining congressional intent – of “paramount
4 importance” in any exhaustion inquiry – the court concluded that the ATCA’s “legislative history
5 stopped] short of a broad and unambiguous statement that Congress believed that the satisfaction
6 of the international exhaustion rule was *required* as a matter of U.S. domestic law before an
7 ATCA claim could be heard in a U.S. court.” *Id.* at 1214, 1217. Noting that the TVPA targeted
8 only torture and extrajudicial killing claims, the panel observed that in “addressing causes of
9 action based on norms of customary international law, Congress . . . treated different kinds of
10 substantive claims differently – a caution against importing an across-the-board exhaustion
11 requirement into ATCA based on what Congress did in the TVPA.” *Id.* at 1217-18.

12 Finding no support for a statutory exhaustion requirement in the text or legislative history
13 of the ATCA, the court next assessed whether exhaustion was warranted as a matter of judicial
14 discretion. Ultimately, it concluded that “the balance tips against judicially engrafting an
15 exhaustion requirement onto a statute where Congress has declined to do so, and in an area of
16 international law where the Supreme Court has called for the exercise of judicial caution rather
17 than innovation.” *Id.* at 1219.⁶

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20 ⁶The court offered four reasons why it declined to require exhaustion as a matter of judicial
21 discretion in every ATCA case. First, it noted that “the international norm of exhaustion does
22 not speak to the hybrid situation [in an ATCA case] where a domestic court in a sovereign
23 country, rather than an international tribunal, is charged with adjudicating violations of customary
24 international law through the vehicle of a civil suit.” *Id.* at 1220. Second, it concluded that
25 international exhaustion was procedural rather than substantive, and noted that the Supreme Court
26 had not addressed whether the methodology it employed in *Sosa* to identify substantive
27 international norms within ATCA’s jurisdictional grant also applied to procedural and other
28 nonsubstantive customary law norms. *Id.* at 1221. Third, the court found defendants’ argument
that an exhaustion requirement could improve compliance with international human rights law by
providing an incentive for nations to improve their legal systems “fairly speculative,” and posited
the “alternative and perhaps equally plausible hypothesis” that foreign court judgments against
rights-abusing defendants could place pressure “from above” on the state where the human rights
abuses had occurred. *Id.* at 1222 (quoting Ellen Lutz & Kathryn Sikkink, *The Justice Cascade:
The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1, 4

1 Judge Bybee wrote a lengthy dissent expressing the view that exhaustion of local remedies
2 should be required before a U.S. court exercises jurisdiction over ATCA claims. *Id.* at 1224-46
3 (Bybee, J., dissenting). Judge Bybee observed that exhaustion “is a well-established principle of
4 international law,” and one the United States “has long recognized.” *Id.* at 1231. In addition,
5 he referenced various international tribunals and treaties requiring exhaustion. *Id.* at 1232-33.
6 After discussing whether exhaustion was procedural or substantive, *id.* at 1233-36, and concluding
7 that the exhaustion requirement was sufficiently well-defined to be easily applied by the courts,
8 *id.* at 1236-38, Judge Bybee argued that, at the very least, courts “should recognize exhaustion
9 as a prudential principle required by our domestic law [] for the same reasons that we require
10 exhaustion of state, tribal and administrative remedies.” *Id.* at 1238.⁷

11 C. *Rio Tinto IV*

12 Following the decision in *Rio Tinto III*, Rio Tinto filed a second petition for hearing en
13 banc, which asserted that exhaustion ought to be required. The petition was granted. See *Sarei*
14 *v. Rio Tinto, PLC*, 499 F.3d 923 (9th Cir. 2007). The case was argued and submitted on October
15 11, 2007. On December 16, 2008, the en banc court remanded the case “for the limited purpose
16 to determine in the first instance whether to impose an exhaustion requirement on plaintiffs.” *Rio*
17 *Tinto IV*, 550 F.3d at 832 (McKeown, J.).

18
19 _____
20 (2001); *id.* at 24-25, 30). Finally, in a nod to the unique nature of the ATCA, the Ninth Circuit
21 concluded that importing a blanket exhaustion requirement into the ATCA “by judicial fiat” was
22 inadvisable, “especially when Congress has not seen fit to do so when it had the opportunity.”
23 *Rio Tinto III*, 487 F.3d at 1223.

24 ⁷Judge Bybee identified three reasons for imposing a prudential exhaustion requirement:
25 (1) the requirement would demonstrate respect for the tribunals or other dispute resolution
26 processes of a sovereign nation, *id.* at 1238-40; (2) it would give other countries “the opportunity
27 to address their own conflicts and craft their own solutions,” and would “encourage creative
28 political solutions” that cannot readily be achieved through litigation, *id.* at 1240-41; and (3) it
would foster more accurate fact-finding by requiring that the initial round(s) of litigation occur,
when possible, where the claims arose, *id.* at 1242. In addition, he noted, an exhaustion
requirement would “preserve” the courts’ role in a government of separated powers. *Id.* at 1242.
Examining this action, Judge Bybee concluded that it was “a textbook case for exhaustion.” *Id.*
at 1245-46.

1 Judge McKeown, who authored the plurality opinion, concluded that the *Sosa* Court's
2 statement that exhaustion should be considered in an "appropriate" ATCA case indicated that
3 exhaustion ought to be approached "as a prudential principle." *Id.* at 827. Juxtaposing
4 "prudential" or judicially-imposed exhaustion with statutory exhaustion requirements, she
5 explained that the former "originated [in the United States] in habeas corpus cases to serve a
6 gatekeeping function," i.e., to prevent unnecessary conflicts between the federal and state courts,
7 which are "equally bound to guard and protect [constitutional] rights." *Id.* at 828 (citation
8 omitted). In this context, and in the tribal court context as well, Judge McKeown stated, the
9 principle of prudential exhaustion is "grounded in principles of comity," specifically respect for
10 another, potentially conflicting sovereign. *Id.* at 828-29. Judge McKeown compared the
11 prudential exhaustion requirement in these areas with the exhaustion of local remedies rule that
12 is part of international law, and concluded that the international rule too was motivated by
13 concerns regarding comity. *Id.* at 829-30.

14 Judge McKeown next discussed the considerations animating exhaustion. She noted that
15 cases like this one "simultaneously appeal to two divergent impulses that have traditionally played
16 out in our country's international affairs and have been imported into our legal system. The first
17 impulse is to safeguard and respect the principle of comity. . . . The second is the American role
18 in establishing collective security arrangements that support international institutions, including
19 international tribunals. . . . Both impulses draw from the recognition that we need a complement
20 to our domestic system, because we are but one member in a community of nations." *Id.* at 830-
21 31.

22 The interplay of these concerns informs the prudential exhaustion analysis that the plurality
23 directed be conducted here:

24 "The lack of a significant U.S. 'nexus' [in this case] is an important consideration
25 in evaluating whether plaintiffs should be required to exhaust their local remedies
26 in accordance with the principle of international comity. . . . [On the other hand,
27 s]ome of the [plaintiffs'] claims – torture, crimes against humanity, and war crimes
28 – may implicate matters of 'universal concern,' generally described as offenses 'for

1 which a state has jurisdiction to punish without regard to territoriality or the
2 nationality of the offenders.’” *Id.* at 831 (citations omitted).

3 Observing that the mere existence of universal jurisdiction did not necessarily mean that it should
4 be exercised, Judge McKeown concluded that “in ATS cases where the United States ‘nexus’ is
5 weak, courts should carefully consider the question of exhaustion, particularly – but not
6 exclusively – with respect to claims that do not involve matters of ‘universal concern.’” *Id.*

7 Several members of the en banc panel wrote separately to express their views regarding
8 exhaustion in the ATCA context.⁸ Judge Bea, joined by Judge Callahan, concurred in the limited
9 remand, but opined that the ATCA mandated application of a traditional exhaustion analysis in
10 every case. *Id.* at 833-37 (Bea, J., concurring). Emphasizing the *Sosa* Court’s explanation that
11 the ATCA “simply provides a forum for hearing existing causes of action that arise under the law
12 of nations,” Judge Bea argued that “it makes more sense to interpret the [ATCA] as incorporating
13 the whole of the law of nations: the rights it grants *and* the limitations it places on those rights.”
14 *Id.* at 833; *id.* at 835 (“But if exhaustion *is* raised [in a particular case], and so the case *is*
15 appropriate, it would seem *Sosa* indicated the Court would consider exhaustion as a *requirement*.
16 ‘Deference to the political branches,’ on the other hand, is not required, but only ‘*possible*,’ and
17 then only on a case-specific – i.e., prudential – basis”). Such an exhaustion requirement, he
18 stated, would include standard exceptions for futility or ineffectiveness. *Id.* at 836 (“In other
19 words, as *part* of the law of nations’s exhaustion requirement, the futility excuse is *also*

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21 ⁸Judge Ikuta, joined by Judge Kleinfeld, dissented to express her view that “in the absence
22 of direction from Congress, [courts] cannot read the ATS as authorizing an extension of
23 jurisdiction to disputes lacking any nexus to United States territory, citizens, or interests.” 550
24 F.3d at 840 (Ikuta, J., dissenting) (citing *Sosa*, 542 U.S. at 726). Judge Reinhardt, joined by
25 Judges Pregerson, Berzon, and Rawlinson, dissented. *Id.* at 841-46 (Reinhardt, J., dissenting).
26 He argued that the *Sosa* Court had not “counseled” the court to adopt prudential exhaustion in the
27 ATCA context, or “signaled” that it believed such a requirement was appropriate. *Id.* at 841.
28 Consequently, Judge Reinhardt maintained, the court should refrain from imposing such a
requirement before the Supreme Court had “had the opportunity to decide itself after the issue is
properly presented to it.” *Id.* at 841. Citing evidence that many putative class members feared
returning to PNG, Judge Reinhardt also concluded that this case was not an “appropriate” one in
which to require exhaustion. *Id.*

1 incorporated into the ATS's statutory exhaustion requirement. Thus, a statutorily required two-
2 step exhaustion analysis would permit Sarei to prosecute his ATS claims without exhausting his
3 local remedies in Papua New Guinea if he can prove that local remedies there are ineffective,
4 unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue").⁹ Echoing Judge
5 Bybee's dissent in *Rio Tinto III*, Judge Bea contended that "[a] mandatory requirement of
6 exhaustion of local remedies, except where futile or otherwise unavailable, allows our courts to
7 play the role the ATS intended them to play: an ultimate venue for claimed violations of the law
8 of nations when those claimed violations cannot or will not be cured by the courts of the country
9 in which the injuries occurred." *Id.*¹⁰

10 In the end, seven of the eleven members of the en banc panel declined to impose an
11 exhaustion *requirement* in every ATCA case.¹¹ Six, however, agreed to remand the case to this
12 court for the limited purpose of having the court consider whether to impose a *prudential*
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16 ⁹See *id.* at 836 (Bea, J., concurring) ("I wish to make clear that a statutory exhaustion
17 requirement does not mean a plaintiff must prove in every case that he *has* exhausted his local
18 remedies. Rather, it means a district court must conduct a two-step exhaustion analysis, in the
19 process considering whether first, local remedies exist, and second, whether local exhaustion
would be futile, unduly prolonged, or subject to one of the other exceptions recognized in
customary international law. If so, local exhaustion requirements may be excused").

20 ¹⁰Judge Bea noted that the "one aspect" of Judge Bybee's *Rio Tinto III* dissent with which
21 he disagreed was the latter's "speculat[ion] as to whether there was an additional, prudential basis
22 for exhaustion" in the ATCA context. *Id.* at 834 n. 3. Judge Bea opined that "the elements that
23 go into a prudential consideration, such as 'nexus' or international comity, [] should [not] be left
24 to individual and potentially discordant trial court determinations." This was particularly true,
25 he noted, because "[t]he facts underpinning these prudential considerations are generally
26 undisputed; the determinations primarily involve judicial policy with regard to international
relations." *Id.* Consequently, Judge Bea opposed imposition of an initial, prudential exhaustion
inquiry and argued for conducting a mandatory two-step exhaustion analysis in every ATCA case.
Id.

27 ¹¹See *Rio Tinto IV*, 550 F.3d at 824 (plurality authored by Judge McKeown joined by
28 Judges Schroeder and Silverman); *id.* at 841 (dissent authored by Judges Reinhardt joined by
Judges Pregerson, Berzon, and Rawlinson).

1 exhaustion requirement. *Id.* at 832 n. 10 (McKeown, J.).¹²

3 II. DISCUSSION

4 A. Prudential Exhaustion in Alien Tort Claims Act Cases

5 Where, as in the case of the ATCA, Congress has not clearly required exhaustion, sound
6 judicial discretion governs. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), superseded
7 by statute as stated in *Booth v. Churner*, 532 U.S. 731, 732 (2001). “Judicially-imposed or
8 prudential exhaustion is not a prerequisite to the exercise of jurisdiction, but rather is ‘one among
9 related doctrines – including abstention, finality, and ripeness – that govern the timing of federal-
10 court decisionmaking.’” *Rio Tinto IV*, 550 F.3d at 828 (McKeown, J.) (quoting *McCarthy*, 503
11 U.S. at 144).

12 As noted, in *Sosa*, the Supreme Court recognized that imposing a prudential exhaustion
13 requirement might be warranted in “appropriate” ATCA cases. *Sosa*, 542 U.S. at 733 n. 21.
14 Citing this observation, the *Rio Tinto IV* plurality held that “[w]here the ‘nexus’ to the United
15 States is weak, courts should carefully consider the question of exhaustion, particularly – but not
16 exclusively – with respect to claims that do not involve matters of ‘universal concern.’” *Rio Tinto*
17 *IV*, 550 F.3d at 824 (McKeown, J.). In conducting this analysis, the plurality directed that courts
18 balance two competing interests. *Id.* at 830. On the one hand, they must “safeguard and respect
19 the principle of comity.” *Id.*; see also *Sosa*, 542 U.S. 761 (Breyer, J., concurring) (“I would ask
20 whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that
21 lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws
22 and their enforcement”). On the other hand, “[t]he nature of certain allegations and the gravity

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25 ¹²The judges who concurred in the limited remand were Judges McKeown, Schroeder,
26 Silverman; Judges Bea and Callahan, *id.* at 833 (Bea, J., concurring) (“I concur in the plurality’s
27 conclusion that the district court erred by failing to conduct an exhaustion analysis, and I agree
28 a limited remand is the preferable solution”); and Judge Kleinfeld, *id.* at 840 (Kleinfeld, J.,
concurring) (“I concur in the result reached by Judge McKeown’s opinion, limited remand for
consideration of whether exhaustion should be required. I do so because we must provide some
clear direction to the district court, and only a result adopted by a majority can do so”).

1 of the potential violations of international law [] trigger the second impulse: [U.S. courts']
2 historical commitment to upholding customary international law.” *Rio Tinto IV*, 550 F.3d at 831
3 (McKeown, J.). In analyzing prudential exhaustion in the ATCA context, therefore, courts must
4 ask questions typically associated with the doctrine of international comity, while at the same time
5 evaluating the universality of plaintiffs’ claims.

6 Following the en banc court’s remand, the court received briefs from the parties and held
7 a hearing at which they presented their respective positions concerning the nature of the inquiry
8 the court had been asked to conduct. The parties disagreed regarding the meaning of the
9 plurality’s direction that the court “determine in the first instance whether to impose an exhaustion
10 requirement on plaintiffs.” *Id.* at 832. Plaintiffs argued that the court had been directed solely
11 to decide, as a threshold matter, whether a prudential exhaustion requirement should be imposed
12 in this case; they asserted that if the court answered that question yes, it should not conduct the
13 traditional two-step exhaustion analysis but should return the matter forthwith to the circuit
14 court.¹³ Focusing on the plurality’s discussion of the standard two-step exhaustion analysis as a
15 “framework for evaluating exhaustion,” *Rio Tinto* countered that it should be permitted to “justify
16 an exhaustion requirement,” which plaintiffs could rebut by demonstrating the futility of
17 exhaustion. Specifically, it asserted that the court “should weigh the ‘animating considerations’
18 of U.S. nexus and matters of ‘universal concern’ and determine ‘whether to impose an exhaustion
19 requirement on plaintiffs’” only *after* considering “the availability and adequacy of remedies” in
20 Papua New Guinea.¹⁴

21 While, based on the language of the plurality opinion, the matter is not free from doubt,
22 the court ultimately concluded that the plurality wished it to determine, as an initial threshold
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26 ¹³Plaintiffs’ Status Report and Request for Briefing Schedule, Docket No. 201 (Jan. 14,
2009).

27 ¹⁴*Rio Tinto’s Response to Plaintiffs’ Status Report and Request for Briefing Schedule*,
28 Docket No. 204 (Mar. 6, 2009) at 3-7.

1 inquiry, whether it was appropriate to impose a prudential exhaustion requirement in this case.¹⁵
2 It therefore solicited briefs that addressed the factors identified in the plurality opinion as relevant
3 to this determination – i.e., nexus and universality, as informed by general notions of comity –
4 and that refrained from arguing factors relevant in applying the traditional two-step exhaustion
5 analysis – i.e., the availability of local remedies, and whether plaintiffs should be excused from
6 exhausting local remedies because they “are ineffective, unobtainable, unduly prolonged,
7 inadequate, or otherwise futile to pursue,” *Rio Tinto IV*, 550 F.3d at 833 n. 1 (Bea, J.,
8 concurring).¹⁶ The court further determined that, if it concluded a prudential exhaustion
9 requirement should be imposed with respect to any of plaintiffs’ claims, it would conduct the
10 traditional two-step exhaustion analysis before returning the matter to the circuit court so that the
11 appellate court would have a full and complete record in deciding whether plaintiffs should be
12 required to pursue local remedies as to any claim.¹⁷

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14 ¹⁵*Rio Tinto IV*, 550 F.3d at 833 n. 1 (Bea, J., concurring) (“[T]he district court must, in
15 its discretion, choose whether [exhaustion is in fact required], depending on considerations such
16 as whether [plaintiffs’] claims have a close nexus to the United States, affect principles favoring
17 international comity and advancement of international institutions, and implicate notions of
18 customary international law”); see *id.* at 832 (McKeown, J.) (“We remand to the district court
19 for the limited purpose to determine in the first instance *whether* to impose an exhaustion
20 requirement on plaintiffs” (emphasis added)); see also *id.* at 836 (Bea, J., concurring) (“[A]
21 statutory exhaustion requirement . . . means a district court must conduct a two-step exhaustion
22 analysis. . . . But this is different from the plurality’s prudential exhaustion doctrine, which
23 grants district courts discretion to decide whether or not to consider exhaustion in the first place”);
24 *id.* at 837 n. 7 (“[I]t appears the plurality holds the district court here has discretion not to conduct
25 a two-step exhaustion analysis should it find one unnecessary due to prudential considerations”).

26 ¹⁶In its brief, Rio Tinto prematurely raised arguments regarding access to witnesses and
27 evidence in PNG. (Rio Tinto Opening Brief at 15-18.) For the reasons stated, these matters will
28 be considered, if at all, after the threshold inquiry as to whether exhaustion should be prudentially
required in this case has been completed.

¹⁷See *Rio Tinto IV*, 550 F.3d at 837 (Bea, J., concurring) (“I would require the district
court to consider (1) whether Sarei had local remedies and exhausted them and (2) whether such
exhaustion would be futile or otherwise inadequate – not merely require the court to decide
whether to conduct this two-step analysis [as does the plurality]”); *id.* at 841 (Reinhardt, J.,
dissenting) (“The plurality opinion remands this action to the district court to consider whether
this is a case in which prudential exhaustion analysis should be applied, and, if so, whether

1 **B. Whether Exhaustion Should be Prudentially Required in This Case**

2 **1. Strength of the Nexus Between Plaintiffs' Claims and the United States**

3 In *Rio Tinto IV*, Judge McKeown made the following observation with respect to the nexus
4 between plaintiffs' claims and the United States:

5 "This [case] . . . lacks the traditional bases for exercising our sovereign jurisdiction
6 to prescribe laws, namely nationality, territory, and effects within the United
7 States. See RESTATEMENT (THIRD) [FOREIGN RELATIONS LAW OF THE UNITED
8 STATES] § 403(2) at cmt. d [(1987)] (stating jurisdiction is appropriately exercised
9 with respect to activity outside the state that has or intends to have substantial effect
10 within the state's territory). The lack of a significant U.S. 'nexus' is an important
11 consideration in evaluating whether plaintiffs should be required to exhaust their
12 local remedies in accordance with the principle of international comity." *Rio Tinto*
13 *IV*, 550 F.3d at 831.

14 Examining the accepted bases for jurisdiction to prescribe set forth in section 402 of the
15 Restatement, *Rio Tinto* adds that plaintiffs' claims have nothing to do with "conduct that, wholly
16 or in substantial part, takes place within [U.S.] territory," RESTATEMENT § 402(1)(a); that they
17 do not implicate "the status of persons, or interests in things, present within its territory," *id.*,
18 § 402(1)(b); and that they are not premised on "conduct outside [the U.S.'s] territory that has or
19 is intended to have substantial effect within its territory," *id.* § 402(1)(c).¹⁸ Defendants also argue

20 _____
21 plaintiffs should be required to exhaust their remedies in Papua New Guinea before proceeding
22 further in the district court"); see also *id.* at 832 (McKeown, J.) ("As a preliminary matter, to
23 'exhaust,' it is not sufficient that a plaintiff merely initiate a suit, but rather, the plaintiff must
24 obtain a final decision of the highest court in the hierarchy of courts in the legal system at issue,
25 or show that the state of the law or availability of remedies would make further appeal futile. []
26 Another basic element is that the remedy must be available, effective, and not futile. [] To
27 measure effectiveness, a court must look at the circumstances surrounding the access to a remedy
28 and the ultimate utility of the remedy to the petitioner. . . . A judgment that cannot be enforced
is an incomplete, and thus ineffective, remedy. The adequacy determination will also necessarily
include an assessment of any delay in the delivery of a decision" (citations omitted)).

¹⁸Rio Tinto Opening Brief at 3.

1 that no U.S. national is a party to this action, such that there might be a basis for exercising
2 jurisdiction to prescribe under section 402(2).¹⁹ Finally, Rio Tinto asserts that plaintiffs'
3 allegations do not involve "conduct outside [U.S.] territory by persons not its nationals that is
4 directed against the security of the state or against a limited class of other state interests,"
5 RESTATEMENT § 402(3).²⁰

6 In response, plaintiffs assert that "[a]ny challenge to the sufficiency of nexus in this case
7 must be made with the understanding that every ATS case will involve claims by an alien for a
8 tort committed in violation of the law of nations."²¹ They argue that "[w]hat Rio asks this Court
9 to do is defer to factors articulated in the Restatement in order to determine the wisdom and
10 legitimacy of the ATS itself."²² Because the ATCA provides jurisdiction in U.S. courts when
11 (1) an alien sues (2) for a tort (3) committed in violation of the law of nations, plaintiffs contend
12 that "[a]ny threshold requirements suggested for jurisdiction by the Restatement that are in tension
13 with the very language of the ATS cannot seriously be considered."²³ Given these requirements

14
15 ¹⁹This section states, in relevant part, that "a state has jurisdiction to prescribe law with
16 respect to . . . the activities, interests, status, or relations of its nationals outside as well as within
17 its territory." RESTATEMENT § 402(2). Although, as noted, plaintiffs allege that Sarei is a lawful
18 permanent resident ("LPR") of the United States, Rio Tinto asserts that LPR status is not
19 synonymous with the term "U.S. national," and thus that Sarei's residence does not provide a
20 basis for plaintiffs to invoke jurisdiction to prescribe under this section. (Rio Tinto Opening Brief
21 at 3 n. 2 (citing 8 U.S.C. § 1101(a)(3); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-71 (9th
22 Cir. 2003); and RESTATEMENT § 212).) Additionally, Rio Tinto contends that, as a corporation's
23 nationality "is that of the state under whose law it is organized," RESTATEMENT § 213; *id.* § 402
24 cmt. e, Rio Tinto plc is a British corporation, and Rio Tinto Limited is an Australian corporation.
25 (Rio Tinto Opening Brief at 3 n. 1.) It also notes that neither corporation maintains a principal
26 place of business in the United States, which is one basis for assessing "nationality" in the context
27 of diversity jurisdiction. (*Id.*)

28 ²⁰Rio Tinto Opening Brief at 3.

²¹Plaintiffs' Reply at 10.

²²*Id.* at 11.

²³*Id.* (citing *Wiwa v. Royal Dutch Petroleum Co.*, __ F.Supp.2d __, 2009 WL 1574869,
*2 (S.D.N.Y. Apr. 23, 2009) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)
(identifying the "first," "second," and "third" "ATS conditions")); see also *id.* at 12

1 for stating a claim under the ATCA, plaintiffs maintain that “neither [their] citizenship status [],
2 nor [their] physical location [] at the time they suffered violations of customary international law,
3 is determinative on the question of ‘nexus’ to the United States.”²⁴ Plaintiffs also observe that the
4 Ninth Circuit has held that courts “are constrained by what § 1350 shows on its face: no
5 limitations as to the citizenship of the defendant, or the locus of the injury.” *In re Estate of*
6 *Ferdinand E. Marcos Human Rights Litigation (Trajano v. Marcos)*, 978 F.2d 493, 500 (9th Cir.
7 1992).

8 Plaintiffs contend that, rather than focusing on the Restatement factors, the nexus inquiry
9 must examine the ties Rio Tinto has to the United States as well as the “strong United States
10 interest in vindicating international human rights violations” committed by companies acting
11 abroad.²⁵ Plaintiffs argue that Rio Tinto is a multinational mining group that has its largest
12 concentration of assets in the United States; that has operations in at least fifty countries
13 worldwide, including the United States; that owns a California corporation, U.S. Borax; that
14 obtained much of the original funding for its Panguna mining operations in PNG from the Bank
15 of America; and that maintains American Depository Receipt facilities at the Bank of New York.²⁶
16 Put differently, plaintiffs argue that the presence of adequate minimum contacts between Rio Tinto
17 and the United States for personal jurisdiction purposes demonstrates that this case has an

18 _____
19 (“Jurisdictional requirements of the ATS itself cannot logically be weighed as factors held against
20 Plaintiffs in determining whether a sufficient nexus exists – the ATS is not itself under scrutiny”).

21 ²⁴*Id.* at 12; see also Plaintiffs’ Opening Brief at 18-21; *id.* at 21 (“[N]either the citizenship
22 status of the Plaintiffs, nor the physical location of Plaintiffs at the time they suffered violations
23 of customary international law, is determinative on the question of ‘nexus’ to the United States.
24 Were these considerations determinative, the ATS would have no force or effect, and the legion
25 of precedential case law permitting foreign plaintiffs to litigate under the ATS for offenses
26 committed abroad would be swept away. The holding in *Sosa* precludes Rio from arguing that
27 extraterritorial torts affecting non-citizens cannot be adjudicated here [in the United States] under
28 the ATS”).

²⁵*Id.* at 21 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d
289, 339 (S.D.N.Y. 2003)).

²⁶*Id.* at 21-24.

1 adequate “nexus” to the United States.

2 The court concludes that “nexus” is most sensibly evaluated in the ATCA context by
3 consideration of a spectrum or range (weakest to strongest) of contacts or connections, not as an
4 absolute. In assessing where on that spectrum a particular ATCA case falls, courts should
5 consider the Restatement factors outlined above, other pertinent connections between the United
6 States and the parties and/or claims, and the scope and purpose of the ATCA itself.²⁷ Viewed in
7 this manner, the parties’ positions are reconcilable and reflect a variety of factors, all of which
8 are properly considered in testing the strength of the “nexus” between an ATCA plaintiff or his
9 claims and a United States forum.

10 The *Rio Tinto IV* plurality commented that the nexus between plaintiffs’ claims here and
11 the United States appeared to be weak given that Rio Tinto is a foreign corporation; that the acts
12 in question occurred exclusively on foreign soil; and that the violations alleged were directed at
13 aliens, virtually all of whom have no connection with the United States. See *Rio Tinto IV*, 550
14 F.3d at 831 (McKeown, J.) (“The lack of a significant United States ‘nexus’ to the allegations
15 here stimulates the comity response. These claims involve a foreign corporation’s complicity in
16 acts on foreign soil that affected aliens (though at least one of them – Sarei – has enjoyed the
17 status of a lawful permanent resident of this country for some time now”).²⁸ Balanced against

18
19 ²⁷None of the concurring or dissenting members of the *Rio Tinto IV* en banc panel endorsed
20 or joined in Judge McKeown’s analysis regarding the weight to be afforded the Restatement
21 factors in evaluating nexus. Consequently, it does not appear that her views regarding the subject
22 are binding on remand. See, e.g., *Alperin*, 410 F.3d 532, 552 n. 13 (“Abiding by the rule that
23 when ‘no single rationale explaining the result enjoys the assent of five Justices, the holding of
24 the Court may be viewed as that position taken by those Members who concurred in the judgments
25 on the narrowest grounds,’ *Marks v. United States*, 430 U.S. 188, 193 [] (1977) (internal
26 quotation marks omitted)). As a result, the plurality’s analysis serves as a useful starting point
27 in evaluating “nexus,” but does not preclude consideration of other factors. The court concurs
28 with the plurality that the Restatement factors are relevant; it also finds persuasive plaintiffs’
arguments that the specific purpose and jurisdictional requirements of the ACTA (e.g., that suit
be filed by an alien) caution against limiting the nexus inquiry to the Restatement factors, or
applying them in an overly rigid fashion.

²⁸Plaintiffs note that Sarei’s wife is a putative class member acting on behalf of her
deceased son, who was killed in the Bougainville conflict. They assert that Mrs. Sarei is a United

1 these factors are Rio Tinto's connections to the United States. The court agrees with plaintiffs
2 that these merit consideration, although it does not agree that they are dispositive in assessing the
3 strength of the "nexus" between this dispute and an American forum. This is particularly true
4 since most of Rio Tinto's connections to the United States have nothing to do with plaintiffs'
5 claims.²⁹

6 Plaintiffs represent that the government of PNG and the Autonomous Bougainville
7 Government, now established on that island,³⁰ have confirmed that they do not oppose the court's
8 exercise of ATCA jurisdiction over plaintiffs' claims; they present several letters sent by PNG and
9 Bougainvillean officials to the U.S. ambassador to PNG confirming this fact.³¹ These submissions

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11 States citizen, and that her son was as well. (Plaintiffs' Opening Brief at 18 n. 25.)

12 ²⁹Rio Tinto concedes that its "ownership of U.S. companies might be relevant to nexus if
13 those companies were involved in the challenged conduct." (Rio Tinto Reply at 8.)

14 ³⁰Under the Bougainville Peace Agreement signed August 30, 2001, Bougainville's
15 autonomy will increase over time, as it will "operat[e] under a home-grown Bougainville
16 Constitution with a right to assume increasing control over a wide range of powers, functions,
17 personnel and resources on the basis of guarantees contained in the National [PNG] Constitution."
18 See Bougainville Peace Agreement at 1, available at <http://www.google.com/#hl=en&q=bougainville+peace+agreement&aq=0&oq=bougainville+peace+&aqi=g4&fp=kE0CVI1PqvM> (last visited July 2, 2009). A referendum on independence from Papua New Guinea will
19 take place between 2015 and 2020. See, e.g., *Asia: Explosive Mines; Bougainville*, THE
20 ECONOMIST (LONDON), Feb. 9, 2008, at 61. In June 2005, an Autonomous Bougainville
21 Government was elected and assumed power. See, e.g., Lloyd Jones, *Island Ready for Self-Rule*,
22 COURIER MAIL (AUSTRALIA), June 15, 2005, at 12. More recently, the Autonomous Government
23 of Bougainville and PNG signed a memorandum of understanding, which contemplates that PNG
24 will transfer power over minerals and oil and gas resources to Bougainville, as well as lift a
25 moratorium on mining to boost economic development. See, e.g., Elisabeth Behrmann, *PNG's
26 Bougainville Paving Way for Copper, Gold Exploration*, DOW JONES NEWSWIREs, May 2, 2008.
27 The entity created by the Bougainville government to oversee these resources – the Bogenvil
28 Resources Development Corporation, Ltd. ("BRDC") – will not deal with Panguna-related mining
issues, however, as they remain politically volatile. *Id.*

³¹Plaintiffs' Opening Brief at 13-14 ("In 2002, both the U.S. Government and the PNG
Government expressed opposition to the litigation proceeding in the United States. Since the end
of the conflict, however, . . . the government of Papua New Guinea [has] confirmed that it [does]
not oppose the litigation and that it would not effect diplomatic or bilateral relations. The
Autonomous Bougainville Government agrees and takes the view that the case 'should be heard

1 show that, as early as 2003, the PNG government advised the United States that it neither
2 “support[ed] nor den[ied] the constitutional rights of [its] citizens [to] tak[e] whatever action they
3 deem[ed] necessary” with respect to the claims asserted in this suit.³² In 2005 and again in 2009,
4 PNG officials reaffirmed this position, explaining that the PNG government was “not a party to
5 this case,” and did “not see the case presently before the courts in the US affecting diplomatic and
6 bilateral relations between our two countries.” The government also stated that it did not believe
7 the lawsuit “affect[ed] the peace process on the island of Bougainville.”³³ In a letter to the U.S.
8 ambassador to PNG, the Acting Chief Administrator for the Autonomous Bougainville
9 Government communicated his government’s belief that “the case should be heard and decided
10 by courts in the United States as the citizens have exercised their rights to have the case heard
11 there.”³⁴ The Administrator noted that “if the case is not heard [in the U.S.], [this] will result in
12 further delays, frustrations and likelihood of prejudices to [the] rights and interests of Plaintiffs
13 and us all.”³⁵ Finally, he commented that the Bougainville government did “not see the case
14 presently in US Courts adversely affecting any relations between [it] and [the] United States.”³⁶

15 The fact that PNG and the Autonomous Bougainville Government do not oppose litigation

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17 and decided by courts in the United States’” (record citations omitted). See Berman Decl., Exh.
18 A (letter from Patrick Koles, Acting Chief Administrator for the Autonomous Bougainville
19 Government, to Leslie Rowe, Ambassador at the United States Embassy in Papua New Guinea
20 (May 26, 2009)); B (letter from Margaret L. Elias, the Chief Secretary to Government of Papua
21 New Guinea to Leslie Rowe, Ambassador at the United States Embassy in Papua New Guinea
22 (February 11, 2009)); C (letter from Joshua Kalinoe, then-Chief Secretary to Government of
23 Papua New Guinea to Robert Fitts, then-Ambassador at the United States Embassy in Papua New
24 Guinea (March 30, 2005)); and D (letter from Joshua Kalinoe, then-Chief Secretary to
25 Government of Papua New Guinea to Susan Jacobs, then-Ambassador at the United States
26 Embassy in Papua New Guinea (February 6, 2003)).

27 ³²Berman Decl., Exh. D.

28 ³³Berman Decl., Exhs. B & C.

³⁴Berman Decl., Exh. A.

³⁵*Id.*

³⁶*Id.*

1 of plaintiffs' claims in the United States does not strengthen the nexus between the claims and the
2 United States. Similarly, evidence that the United States no longer opposes litigation in this
3 forum³⁷ does not change the fact that the nexus between the claims and the United States is weak
4 in terms of nationality, territory, and effects within this country.

5 Rio Tinto argues that, given the fact that "[i]nternational law imposes a duty on all states
6 to provide effective judicial processes and remedies for the violation of norms reflecting matters
7 of universal concern," comity requires that the United States "respect . . . PNG as a co-equal
8 sovereign" and "allow PNG to fulfill its obligation" to adjudicate the claimed human rights
9 violations.³⁸ It asserts the United States and its courts "cannot ignore [this] obligation [to respect
10 another nation's sovereignty simply because that nation] 'consent[s]' to a U.S. forum."
11 Ultimately, Rio Tinto concludes that, since no "government can[] opt out of its sovereign duty
12

13 ³⁷In September 2006, the U.S. government submitted an *amicus curiae* brief to the Ninth
14 Circuit, in which it explained:

15 "At the request of the district court, in November 2001, the Government filed a
16 statement of interest, presenting the State Department's views about the effect this
17 litigation would have on the Bougainville peace process and the conduct of the
18 United States' foreign relations. That statement was based on the State
19 Department's assessment of the Government's foreign relations interests and the
20 peace process as they existed in 2001, which are different from the interests and
21 circumstances that exist today."

22 (See Rio Tinto's Supplemental Request for Judicial Notice in Support of Reply Brief on the
23 Limited Remand Issue, Exh. 46 ("Brief for the United States as Amicus Curiae Supporting Panel
24 Rehearing or Rehearing En Banc") at 14 n. 3.) Moreover, when pressed by the en banc panel to
25 state whether continued adjudication of the action would negatively affect foreign relations PNG
26 or other U.S. interests, a representative of the Executive Branch confirmed that the U.S.
27 government did not believe the case raised any "case-specific" political questions or unduly
28 sensitive foreign affairs. (See Statement of the United States Government (Robert Loeb,
Department of Justice) at oral argument before Ninth Circuit en banc panel (audio file located at
http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000001917), at 45:45 to 47:10
of oral argument (detailing government's then-current position regarding U.S. interests in this
case).)

³⁸Rio Tinto Opening Brief at 5. Rio Tinto asserts that "[b]oth PNG and the U.S. have
ratified the International Covenant on Civil and Political Rights ('ICCPR'), undertaking the
obligation to provide and enforce remedies for persons whose rights recognized under
international law are violated." (*Id.* at 4.)

1 to provide remedies for violations of customary international law,” the fact that PNG and the
2 Autonomous Bougainville Government do not oppose litigation of the case in this court does not
3 preclude imposition of a prudential exhaustion requirement or application of the traditional two-
4 step exhaustion analysis.³⁹

5 The court agrees with Rio Tinto insofar as it asserts that the consent or non-opposition of
6 PNG and the Autonomous Bougainville Government to having the litigation proceed in this forum
7 does not strengthen the nexus between plaintiffs’ claims and the United States. To the extent Rio
8 Tinto suggests that comity considerations and international law obligations *require* the United
9 States to defer to another sovereign’s initial adjudication of claims involving matters of universal
10 concern, however, it adopts the position taken by Judges Bybee and Bea in their respective
11 opinions.⁴⁰ Seven of the eleven judges who were members of the *Rio Tinto IV* en banc court
12

13 ³⁹*Id.*; see also Rio Tinto Reply at 13-14 (“A foreign government cannot, by writing a letter,
14 avoid its obligation to adjudicate the claims of its citizens respecting human rights . . . Comity
15 means respecting PNG’s duty to adjudicate these matters in its own courts in the first instance.
16 That the current PNG government may or may not object to a U.S. court taking on this very
difficult case has no relevance to the comity analysis underlying the exhaustion inquiry”).

17 ⁴⁰Compare, e.g., Rio Tinto Opening Brief at 6-7 (“Our national interest is that [universally
18 accepted] norms be enforced, but not that the U.S. be the enforcing nation. The U.S. has no
19 greater claim to the authority to enforce the norms of international law than other nations that are
20 willing and able to do so”) and Rio Tinto Reply at 14 (“Nor would the U.S. commitment to
21 effective enforcement of international law be served by inquiring, case by case, into the foreign
22 government’s motives or preferences. The institutional interests at stake are best served by
23 respecting each jurisdiction’s duty to enforce claims based on customary international law”) with
24 *Rio Tinto III*, 487 F.3d at 1238-40 (Bybee, J., dissenting) (“First, requiring exhaustion of local
25 remedies will promote respect for foreign tribunals or other processes for dispute resolution, such
26 as commissions or political records. . . . Exhaustion recognizes the possibility of legislative,
27 executive or judicial acts in another nation; it thus respects the processes by which another nation
28 has constituted itself and is worthy to be considered part of the community of nations. . . . Taking
up cases that can be handled domestically aggravates diplomatic and local tensions because it
interferes with local control and stirs up unnecessary publicity. . . . By accepting jurisdiction over
foreign suits that can be appropriately handled locally, the federal courts embroil the nation in a
kind of judicial ‘imperialism’ that suggests the United States does not respect or recognize a
foreign government’s ability to administer justice” (citations omitted)) and *Rio Tinto IV*, 550 F.3d
at 836-37 (Bea, J., concurring) (“A mandatory requirement of exhaustion of local remedies,
except where futile or otherwise unavailable, allows our courts to play the role the ATS intended

1 rejected imposing a mandatory exhaustion requirement, however, and the plurality directed that
2 the court “consider” whether exhaustion ought to be required in this action as a prudential
3 matter.⁴¹ Given the outcome of the en banc proceedings, Rio Tinto’s argument that exhaustion
4 is required is not persuasive.⁴²

5 In sum, weighing the Restatement factors, the nature of Rio Tinto’s contacts with the
6 United States, and the relationship between the United States and plaintiffs and their claims, the
7 court agrees with the en banc plurality that the nexus between plaintiffs’ claims and the United
8

9
10 them to play: an ultimate venue for claimed violations of the law of nations when those claimed
11 violations cannot or will not be cured by the courts of the country in which the injuries occurred.
12 The requirement simultaneously prevents our unelected judiciary . . . from assuming the role of
13 a roving sheriff in recurring, internecine disputes involving claims of inequity and oppression
outside the United States” (citations omitted)).

14 ⁴¹Alternatively, Rio Tinto argues that the reasoning of decisions imposing prudential
15 exhaustion in tribal and administrative law contexts “support[s] imposing an exhaustion
16 requirement.” (Rio Tinto Opening Brief at 26-30.) As with Rio Tinto’s positions regarding
17 comity, this argument overlooks the scope of the *Rio Tinto IV* plurality’s remand, which, rather
18 than *requiring* that the court impose an exhaustion requirement, directed the court to *consider*
whether such a requirement was warranted *in this case*, given the weak nexus between plaintiffs’
claims and the United States, principles of international comity, and the extent to which plaintiffs’
claims involve matters of universal concern.

19 ⁴²At the hearing, Rio Tinto’s counsel argued that the nexus-universal concern inquiry could
20 be conceptualized as a matrix. He opined that one quadrant of the matrix represented cases in
21 which there was no (or very weak) nexus, and asserted that although, in such cases, jurisdiction
22 lies to adjudicate violations of universal norms, an exhaustion requirement *must* be imposed. (See
23 Reporter’s Transcript of Proceedings (“RT”), Monday, July 6, 2009, at 19:22-20:8; *id.* at 37:7-
24 16.) This argument is unavailing in light of *Rio Tinto IV*. The *Rio Tinto IV* plurality concluded
25 that the nexus in this case was weak or nonexistent. It nonetheless evaluated the universality of
26 the concerns raised by plaintiffs’ claims, and discussed the need to balance the universality of the
27 concerns against the nexus. Based on the language of the plurality opinion, the court concludes
28 that the *Rio Tinto IV* plurality implicitly rejected defendants’ position where nexus is weak, an
exhaustion requirement must always be imposed. Had the plurality adopted or accepted
defendants’ analysis, it would have held that exhaustion was required once the court determined
that the nexus was weak or nonexistent. It did not do so. Attempting to carry out the mandate
of the Ninth Circuit’s opinion, the court likewise declines to impose this type of exhaustion
requirement.

1 States is weak.⁴³

2 2. Matters of “Universal Concern”

3 “In ATS cases where the United States ‘nexus’ is weak, courts should carefully consider
4 the question of exhaustion, particularly – but not exclusively – with respect to claims that do not
5 involve matters of ‘universal concern.’” *Rio Tinto IV*, 550 F.3d at 831 (McKeown, J.). Matters
6 of “universal concern” are offenses “for which a state has jurisdiction to punish without regard
7 to territoriality or the nationality of offenders.” *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir.
8 1995); see also RESTATEMENT § 404 (“A state has jurisdiction to define and prescribe punishment
9 for certain offenses recognized by the community of nations as of universal concern . . . even
10 where none of the bases of jurisdiction indicated in § 402 [nationality, territory, and in-country
11 effects] is present”).

12 As the second step in evaluating whether exhaustion of some or all of plaintiffs’ claims
13 ought to be required as a prudential matter, therefore, the court examines the ATCA claims

14
15 ⁴³This does not mean that every ATCA case will have a weak or relatively weak nexus with
16 the United States simply because plaintiffs are aliens alleging violations of international law.
17 Contrary to plaintiffs’ assertions, the nexus inquiry does not necessarily undermine the scope or
18 purpose of the ACTA, nor conflict with the elements of an ATCA claim. In a given case, certain
19 of the Restatement factors might well weigh in favor of a finding that nexus was strong, or at least
20 less attenuated than it is here. Violations of international law alleged by ACTA plaintiffs might
21 have a substantial, direct, and foreseeable effect on the United States, for example, because there
22 had been an influx of immigrants to the country seeking refuge from human rights abuses
23 occurring elsewhere. This would result in a much stronger connection between the United States
24 and “those whom [its] regulation [through adjudication] was designed to protect.” Several of the
25 Restatement factors, in fact, speak to the second factor the plurality identified as relevant to the
26 prudential exhaustion analysis – i.e., the universality of the concerns implicated by plaintiffs’
27 claims. See RESTATEMENT § 403(2) (identifying as relevant factors “the character of the activity
28 to be regulated, the importance of regulation to the regulating state, the extent to which other
states regulate such activities, and the degree to which the desirability of such regulation is
generally accepted; . . . the importance of the regulation to the international political, legal, or
economic system; . . . [and] the extent to which the regulation is consistent with the traditions of
the international system”). Finally, even if a court determines that exhaustion ought be required
as a prudential matter in a given ATCA case, defendants must still show that local remedies are
available and that exhaustion will not be futile. Thus, a finding that nexus is weak does not
necessarily mean that American courts will refuse to hear every ATCA case involving foreigners
alleging torts against foreign corporations on foreign soil.

1 pleaded in the first amended complaint to ascertain whether they involve matters of “universal
2 concern.”⁴⁴ In doing so, the court finds instructive, but not controlling, the list of offenses
3 denominated matters of universal concern in section 404 of the Restatement. Section 404
4 specifically states that the list set forth therein is not exhaustive. See RESTATEMENT § 404 (“A
5 state has jurisdiction to define and prescribe punishment for certain offense recognized by the
6 community of nations as of universal concern, *such as . . .*” (emphasis added)); *id.*, cmt. a
7 (“Universal jurisdiction for additional offenses is provided by international agreements . . .”).⁴⁵
8 Moreover, although evaluating whether to require prudential exhaustion – as envisioned by the
9 plurality – is a separate inquiry from subject matter jurisdiction under the ACTA, neither the
10 statute itself⁴⁶ nor cases interpreting it limit the claims that are actionable under the ATCA to the

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12 ⁴⁴Rio Tinto argues that, following the Supreme Court’s decision in *Ashcroft v. Iqbal*, 129
13 S.Ct. 1937 (2009), plaintiffs’ complaint does not sufficiently plead that it aided and abetted
14 violations of matters of universal concern. (Rio Tinto Opening Brief at 20-26.) This argument
15 is unavailing for at least two reasons. First, Rio Tinto ignores the *limited* nature of the question
16 before the court on remand, namely, whether as a prudential matter, an exhaustion requirement
17 should be imposed in this case. An attack on the sufficiency of plaintiffs’ pleadings, or the merits
18 of their aiding and abetting claims, is beyond the scope of the remand. Cf. *Rio Tinto III*, 487
19 F.3d at 1200 (explaining that the initial jurisdictional inquiry in an ATCA case does not evaluate
20 “[w]hether the cause of action [will] turn[] out to be well founded in law and fact,” quoting *Bell*
21 *v. Hood*, 327 U.S. 678, 683 n. 2 (1946)). Second, *Iqbal* addressed a narrow issue: what pleading
22 standard had to be satisfied to state a claim against an individual government official for
23 purposeful discrimination in *Bivens* and § 1983 suits. Nothing in *Iqbal* suggests that the pleading
24 standard it articulates applies to ATCA claims; indeed, after *Twombly*, courts appear divided over
25 the pleading standards applicable to § 1350 claims involving accomplice liability. See generally
26 Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply*
27 *the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177
28 (2008).

23 ⁴⁵See also, e.g., George K. Walker, *Principles for Collective Humanitarian Intervention*
24 *to Succor Other Countries’ Imperiled Indigenous Nationals*, 18 AM. U. INT’L L. REV. 35, 77
25 (2002) (“The § 404 list is not exclusive, and certainly today would include crimes against
26 humanity” (footnote omitted)).

26 ⁴⁶In the years since *Sosa* was decided, Congress has not accepted Justice Souter’s invitation
27 to provide guidance regarding the scope of claims that are actionable under the ACTA. See *Sosa*,
28 542 U.S. at 731. Hence, that decision and the standards it articulates for determining whether a
particular claim is cognizable under the ACTA control.

1 matters of universal concern identified in section 404. Therefore, while the Restatement offers
2 some guidance in evaluating the second prong of the plurality's prudential exhaustion test, it is
3 not the sole source to which the court looks in assessing whether the claims asserted in this suit
4 implicate matters of "universal concern."

5 Other useful reference points include Judge Reinhardt's observation that "heinous offenses
6 like genocide, crimes against humanity, and war crimes" fall within ATCA jurisdiction because
7 they violate specific "'norm[s] of international character accepted by the civilized world'" that all
8 nations have an interest in remedying. *Rio Tinto IV*, 550 F.3d at 845 (Reinhardt, J., dissenting)
9 (citing *Sosa*, 542 U.S. at 742 (Breyer, J., concurring)). All relevant sources indicate that, while
10 the two inquiries are not coextensive, evaluating whether a claim involves a matter of "universal
11 concern" for purposes of deciding whether to impose a prudential exhaustion requirement overlaps
12 to some extent with the analysis required to ascertain whether a claim falls within ATCA
13 jurisdiction, i.e., whether it is sufficiently "specific, universal, and obligatory." *In re Estate of*
14 *Marcos Human Rights Litigation (Hilao v. Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir.
15 1994).

16 Although the primary focus of this prong of the prudential exhaustion analysis is
17 universality, the specificity of a norm, and the extent to which nations feel obliged to follow it,
18 inform a decision regarding its universality. It is thus appropriate to look to ATCA jurisprudence,
19 "the works of jurists on public law, [] the general practice of nations, [and] court decisions that
20 discuss and enforce international law," *Rio Tinto I*, 221 F.Supp.2d at 1131 (citations omitted),
21 as well as the types of claims listed in section 404 of the Restatement, in evaluating whether a
22 particular claim involves matters of "universal concern." Because a court evaluating the
23 universality of a particular norm in the ATCA context must be sensitive to that norm "as it has
24 evolved and exists among the nations of the world today," *Kadic*, 70 F.3d at 238 (citing *Filartiga*
25 *v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980)), the court examines each of plaintiffs' claims
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1 in turn to ascertain whether it can currently be considered “universal.”⁴⁷

2 (a) Crimes Against Humanity

3 Plaintiffs’ first ATCA claim alleges that Rio Tinto “acted jointly and willfully with PNG
4 and the government of Australia to institute a blockade of Bougainville,” which constituted
5 “genocide because it foreseeably resulted in the killing of natives, caused serious bodily harm,
6 [and] was deliberately calculated to destroy plaintiffs and their way of life.”⁴⁸ Plaintiffs also assert
7 that the “instigation of the blockade and denial of medical treatment and other necessities that
8 caused severe pain and suffering, as well as death, constitute acts of official torture.”⁴⁹

9 Both before and after *Sosa*, federal courts have recognized claims for certain crimes against
10 humanity, including genocide and torture, as sufficiently universal to give rise to jurisdiction
11 under the ATCA.⁵⁰ See, e.g., *Bowoto v. Chevron Corp.*, 557 F.Supp.2d 1080, 1084-85 (N.D.
12 Cal. 2008) (“The case at bar [] considers whether common law claims of torture and summary

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14 ⁴⁷An approach that evaluates each claim in the operative complaint separately comports
15 with prudential exhaustion practice in contexts such as habeas. See, e.g., *King v. Ryan*, 564 F.3d
16 1133, 1138 (9th Cir. 2009) (“Habeas petitioners have long been required to adjudicate their claims
17 in state court – that is, ‘exhaust’ them – before seeking relief in federal court. This requirement
18 is ‘grounded in principles of comity[,] as it gives states the first opportunity to address and correct
19 alleged violations of state prisoner’s federal rights.’ The current statutory exhaustion requirement
20 prevents a federal court from granting habeas relief ‘unless it appears that . . . the applicant has
21 exhausted the remedies available in the courts of the State.’ In 1982, the U.S. Supreme Court
22 interpreted the exhaustion rule in the habeas context as requiring ‘total exhaustion’ of ‘mixed’
23 petitions – that is, those petitions that contain both exhausted and unexhausted claims. *Rose [v.*
24 *Lundy*, 455 U.S. 509 (1982),] required district courts to dismiss a mixed petition, ‘leaving the
25 prisoner with the choice of returning to state court to exhaust his claims or of amending or
26 resubmitting the habeas petition to present only exhausted claims to the district court’” (citations
27 omitted)).

28 ⁴⁸First Amended Complaint, ¶¶ 211, 213.

⁴⁹*Id.*, ¶ 214.

⁵⁰The specificity of a plaintiff’s torture allegations is relevant in assessing whether the
particular conduct on which a claim is based gives rise to ATCA jurisdiction. See, e.g., *Kiobel*
v. Royal Dutch Petroleum Co., 456 F.Supp.2d 457, 465 (S.D.N.Y. 2006) (“*Sosa* leaves unclear
what conduct is included within ‘torture.’ [] However, dictum in *Sosa* suggests that at least
some forms of torture continue to provide a basis for actionable claims under the ATS”).

1 execution can be pled against *corporations* under the ATS. . . . The Court finds that plaintiffs’
2 claims for torture and summary execution may be brought under the ATS. . . .”); *Mujica v.*
3 *Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1183 (C.D. Cal. 2005) (finding that a claim
4 alleging crimes against humanity, based on the forced displacement of civilians, gave rise to
5 ATCA jurisdiction); see also *Kadic*, 70 F.3d at 239-42 (“The Executive Branch has emphatically
6 restated in this litigation its position that private persons may be found liable under the Alien Tort
7 Act for acts of genocide, war crimes, and other violations of international humanitarian law. . . .
8 In the aftermath of the atrocities committed during the Second World War, the condemnation of
9 genocide as contrary to international law quickly achieved broad acceptance by the community
10 of nations. . . . [F]rom its incorporation into international law, the proscription of genocide has
11 applied equally to state and non-state actors”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774,
12 791 n. 20 (D.C. Cir. 1984) (Edwards, J., concurring) (“On the basis of international covenants,
13 agreements and declarations, commentators have identified at least four acts that are now subject
14 to unequivocal international condemnation: torture, summary execution, genocide and slavery”
15 (citations omitted)).⁵¹ Genocide, moreover, is one of the matters of “universal concern” identified
16 in section 404 of the Restatement, and both genocide and crimes against humanity are among the
17 “heinous crimes” mentioned by Judge Reinhardt in his dissent. As pled, therefore, plaintiffs’ first
18 claim for crimes against humanity amounting to genocide and torture implicates matters of
19 universal concern.

20 (b) War Crimes

21 Plaintiffs’ second claim alleges that Rio Tinto’s actions during the hostilities that occurred
22 in Bougainville violated the international law of war and the Geneva Convention Relative to the
23

24
25 ⁵¹See also, e.g., *Rio Tinto IV*, 550 F.3d at 831 (McKeown, J.) (“Some of the claims –
26 torture, crimes against humanity, and war crimes – may implicate matters of ‘universal concern’
27”); *Rio Tinto III*, 487 F.3d at 1202 (“Plaintiffs here have alleged several claims asserting *jus*
28 *cogens* violations that form the least controversial core of modern ATCA jurisdiction, including
allegations of war crimes, crimes against humanity and racial discrimination”); *Rio Tinto I*, 221
F.Supp.2d at 1150-51 (“Genocide is a recognized crime against humanity”).

1 Protection of Civilian Persons in Time of War, Article III.⁵² War crimes are one of the matters
2 of “universal concern” listed in section 404 of the Restatement, and federal courts have long
3 recognized that alleged violations of the law of war give rise to an actionable ATCA claim. See,
4 e.g., *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 417 F.3d 104, 116 (2d
5 Cir. 2008) (“While not exhaustive, the list of principles that may be said to have ‘ripened into
6 universally accepted norms of international law’ [] includes the proscriptions against piracy, slave
7 trade, attacks on or hijacking of aircraft, genocide, and war crimes” (citing *Kadic* and
8 RESTATEMENT § 404)); *Kadic*, 70 F.3d at 242-43 (“After the Second World War, the law of war
9 was codified in the four Geneva Conventions, which have been ratified by more than 180 nations,
10 including the United States []. Common article 3, which is substantially identical in each of the
11 four Conventions, applies to ‘armed conflict[s] not of an international character.’ . . . Thus,
12 under the law of war as codified in the Geneva Conventions, all ‘parties’ to a conflict . . . are
13 obliged to adhere to these most fundamental requirements of the law of war. The liability of
14 private individuals for committing war crimes has been recognized since World War I and was
15 confirmed at Nuremberg . . . and remains today an important aspect of international law. [] The
16 District Court has jurisdiction pursuant to the Alien Tort Act over appellants’ claims of war
17 crimes and other violations of international humanitarian law” (footnotes and citations omitted));
18 *Jane Doe I v. Islamic Salvation Front (FIS)*, 993 F.Supp. 3, 8 (D.D.C. 1998) (“This court
19 concludes that the acts of the FIS alleged by Plaintiffs are proscribed by international law against
20 both state and private actors, as evidenced by Common Article 3. Accordingly, Plaintiffs have
21 properly alleged subject matter jurisdiction under the ATCA”). Plaintiffs’ second claim,
22 therefore, also involves a matter of “universal concern.”

23 (c) Environmental Tort Claims

24 The first amended complaint includes two distinct environmental tort claims: the third
25 claim alleges violations of the rights to life, health, and security while the sixth alleges violations
26 of international environmental rights.

27
28 ⁵²First Amended Complaint, ¶¶ 220-21.

1 Plaintiffs allege that the right to life “is specifically applicable to cases involving severe
2 environmental harm”;⁵³ that the right to health “constitutes a norm of customary international
3 law”;⁵⁴ and that international law recognizes “that harm which threatens human life or health
4 necessarily implicates a violation of the right to security of the person.”⁵⁵ They assert that Rio
5 Tinto violated their rights to life and health “by appropriating land owned by indigenous people
6 for the purpose of opening a mine, [and by] knowingly emitting and depositing volatile and highly
7 toxic mine waste onto the land and into the water, thus destroying rivers and land that provided
8 a way of life for the native people.”⁵⁶

9 In *Rio Tinto I*, the court concluded that, although various international law treaties and/or
10 agreements reference the rights to life and health, and some address the impact environmental
11 degradation has on those rights, there was insufficient international consensus regarding the type
12 of conduct that violated the rights for purposes of ACTA jurisdiction. *Rio Tinto I*, 221 F.Supp.2d
13 at 1158.⁵⁷ Additionally, the court considered relevant in assessing the universality of the rights
14 the fact that the United States had refused to ratify at least one of the treaties that recognize them.
15 *Id.* at 1157-58. Ultimately, the court was unable to conclude that the rights to life and health were
16 rights that other nations universally recognized could be violated through conduct harmful to the
17 environment. *Id.* at 1158 (citing *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 WL
18 142006, *7 (S.D.N.Y. Apr. 11, 1994) (“Not all conduct which may be harmful to the
19 environment, and not all violations of environmental laws, constitute violations of the law of
20 nations”)); see also, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)
21 (rejecting plaintiffs’ reliance on “several sources of international environmental law to show that

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23 ⁵³First Amended Complaint, ¶ 227.

24 ⁵⁴*Id.*, ¶ 228.

25 ⁵⁵*Id.*, ¶ 229.

26 ⁵⁶*Id.*, ¶ 230.

27 ⁵⁷The court also found that the rights were not sufficiently specific to support ATCA
28 jurisdiction. *Rio Tinto I*, 221 F.Supp.2d at 1158.

1 the alleged environmental abuses caused by Freeport's mining activities are cognizable under
2 international law," the court explained that "Beanal fails to show that these treaties and
3 agreements enjoy universal acceptance in the international community. The sources of
4 international law cited by Beanal and the *amici* merely refer to a general sense of environmental
5 responsibility and state abstract rights and liberties devoid of articulable or discernable standards
6 and regulations to identify practices that constitute international environmental abuses or torts").

7 Since *Rio Tinto I*, federal courts have continued to hold that, at present, claims that
8 environmental damage or destruction has injured or threatened individuals' rights to life and health
9 are not sufficiently specific to give rise to ATCA jurisdiction. Courts so holding have recognized
10 that this lack of specificity, and nations' differing interpretations of the conduct that violates the
11 rights, undercuts any claim that they are universal. This is because nations cannot universally
12 subscribe to a principle that is without concrete content. See, e.g., *Bowoto*, 557 F.Supp.2d at
13 1095 ("The right to life, liberty and security of person are widely recognized as fundamental
14 human rights. However, these international instruments do not purport to define these rights nor
15 is there ATS jurisprudence upholding or defining such claims"); *Kiobel v. Royal Dutch Petroleum*
16 *Co.*, 456 F.Supp.2d 457, 467 (S.D.N.Y. 2006) ("Defendants argue that there is no particular or
17 universal understanding of the civil and political rights [to life, liberty, security and association]
18 covered by Plaintiffs' claim, and thus, pursuant to *Sosa*, these 'rights' are not actionable under
19 the ATS. [] The Court agrees"); *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d
20 7, 129 (E.D.N.Y. 2005) ("In the developing area of international environmental law, the United
21 States and other nations have tended to treat protection of the environment on an ad-hoc, situation-
22 by-situation and case-by-case basis" (citations omitted)); see also *Flores v. Southern Peru Copper*
23 *Corp.*, 414 F.3d 233, 254-55 (2d Cir. 2003) (holding, in a suit where Peruvian residents alleged
24 that pollution from an American mining company's operations had caused severe, deadly lung
25 disease, that general statements regarding the rights to life and health "are boundless and
26 indeterminate. They express virtuous goals understandably expressed at a level of abstraction
27 needed to secure the adherence of States that disagree on many of the particulars regarding how
28 actually to achieve them. . . . For the foregoing reasons, plaintiffs have failed to establish the

1 existence of a customary international law ‘right to life’ or ‘right to health’”); *id.* at 266 (“Because
2 plaintiffs have failed to submit evidence sufficient to establish that intranational pollution violates
3 customary international law, the District Court properly granted defendant’s motion to dismiss”);
4 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 340 (S.D.N.Y.
5 2003) (“[I]t is well-established that environmental damage, without more, generally does not
6 violate international law” (citations omitted)).

7 As a result, the court concludes that plaintiffs’ third claim that Rio Tinto’s alleged
8 environmental destruction of Bougainville violated their rights to life, health, and security of the
9 person is based on international law norms that have not, as yet, achieved the status of matters of
10 “universal concern.”⁵⁸

11 Plaintiffs’ sixth claim alleges that international law “has recognized a minimum right to
12 a safe environment as a customary norm.”⁵⁹ In *Rio Tinto I*, the court concluded that some of the
13 authorities cited in the complaint as support for this claim, particularly the Rio Declaration and
14 the Stockholm declaration, undermined plaintiffs’ position that defendants’ conduct violated
15 recognized international law. *Rio Tinto I*, 221 F.Supp.2d at 1159. It also evaluated the additional
16 bases for the environmental tort claims that plaintiffs had raised in their opposition to defendants’
17 motion to dismiss. *Id.* at 1160. These included the “principle of sustainable development,” a
18 concept the court found insufficiently “specific, universal, and obligatory” to support a claim for
19 violation of the law of nations. It noted, in fact, that plaintiffs’ expert conceded the principle
20 might be “too broad a concept to be legally meaningful.” *Id.*

21 The court next considered whether plaintiffs’ allegations stated a claim for violation of the
22 United Nations Convention on the Law of the Sea (“UNCLOS”), and whether, if so, such a claim
23

24 ⁵⁸As the court noted in *Rio Tinto I*, where the conduct alleged to violate the rights to life,
25 health and security of the person is torture, summary execution or disappearance, courts have
26 recognized the universal nature of the claim. See *Rio Tinto I*, 221 F.Supp.2d at 1158 n. 174.
27 This is consistent with the court’s conclusion that plaintiffs’ crimes against humanity claim
28 involves matters of “universal concern.”

⁵⁹First Amended Complaint, ¶ 255.

1 fell within its jurisdiction under the ACTA. Ultimately, the court held that “[b]ecause UNCLOS
2 reflects customary international law, plaintiffs may base an ATCA claim upon it.” *Id.* at 1162.

3 While the UNCLOS may reflect customary international law that is specific and obligatory,
4 the court concludes – for purposes of applying the second prong of the prudential exhaustion
5 analysis – that it is not a “matter of universal concern” in the same manner that *jus cogens* norms
6 such as genocide, torture or crimes against humanity are.⁶⁰ This conclusion is bolstered by the
7 fact that the United States has signed but not yet ratified UNCLOS. For these reasons, the court
8 finds that plaintiffs’ international environmental rights claims, including those premised on the
9 UNCLOS, involve norms “where aspiration has not yet ripened into obligation,” *Alvarez-Machain*
10 *v. United States*, 331 F.3d 604, 620 (9th Cir. 2003), reversed on other grounds sub. nom. *Sosa*
11 *v. Alvarez-Machain*, 542 U.S. 692 (2004). It thus concludes that the claims do not implicate
12 matters of “universal concern.”

13 (d) Racial Discrimination

14 Plaintiffs’ fourth ATCA claim for racial discrimination alleges that Rio Tinto “viewed the
15 people of Bougainville as inferior due to their color and culture and, therefore, intentionally
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19 ⁶⁰This conclusion is further supported by the fact that significant disagreement exists among
20 developed and developing nations as to the appropriate reach of international environmental
21 regulation. See, e.g., Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment*,
22 39 ENVTL. L. 141, 142-45 (2009) (“One group of environmental protection advocates, typically
23 those in developed countries with relatively stringent environmental protection laws, argues that
24 countries with less stringent protection laws should raise their standards to the higher, developed-
25 world standards. . . . The second reaction, also largely by environmental groups from wealthy
26 nations, has been to call for international institutions to set standards for environmental protection
27 to eliminate a ‘race to the bottom’ among jurisdictions. The Kyoto Protocol, for example,
28 attempts to set levels of carbon dioxide emissions by signatories. Similarly, the World Trade
Organization (WTO) has been moving gradually to include environmental standards as a regular
part of trade agreements. Such agreements also tend to emphasize the need for less-developed
countries to impose more stringent environmental standards domestically. The third reaction,
largely from interest groups and governments in emerging nations focused on improving the
economic welfare of the poor, is to argue that developing countries should not be expected to bear
the burden of restricting emissions to the same degree as developed economies”).

1 violated their rights.”⁶¹ It also asserts that Rio Tinto had “a deliberate policy of systematic racial
2 discrimination against plaintiffs.”⁶² Plaintiffs contend that, because defendants acted under color
3 of law in concert with the PNG government, their “discriminatory acts [] constitute governmental
4 action.”⁶³

5 As the court noted in *Rio Tinto I*, “it is well-settled that racial discrimination is a violation
6 of the law of nations.” Many courts have held, in fact, that discrimination “violates a *jus cogens*
7 norm.” *Rio Tinto I*, 221 F.Supp.2d at 1152 (citations omitted).⁶⁴ Racial discrimination is
8 proscribed by international law only when committed by state officials or under color of law,
9 however. *Id.* at 1153 (citing RESTATEMENT § 702 (“[a] *state* violates international law if, as a
10 matter of state policy, it practices, encourages, or condones . . . systematic racial
11 discrimination”)); see also, e.g., *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000)
12 (“However reprehensible, [] racial or religious discrimination . . . are included only in [§ 702]
13 of the Restatement, which describe[s] conduct that violates international law when undertaken by
14 a *state actor*” (citations omitted)); *In re South African Apartheid Litigation*, __ F.Supp.2d __, 2009
15 WL 960078, *7 (S.D.N.Y. Apr. 8, 2009) (“Racial discrimination is a violation of customary law
16 when it is practiced systematically as a matter of state policy” (footnotes and internal quotations
17 omitted)).

18 While the *Bigio* court held that “neither racial or religious discrimination in general nor
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20 ⁶¹First Amended Complaint, ¶ 239.

21 ⁶²*Id.*, ¶ 238.

22 ⁶³*Id.* See also *Rio Tinto I*, 221 F.Supp.2d at 1151-52 (“Plaintiffs contend that, given
23 PNG’s substantial financial interest in the Panguna Mine, defendants acted under color of state
24 authority in discriminating against the people of Bougainville”); see *id.* at 1154 (noting that
25 plaintiffs alleged “that PNG made its governmental power of eminent domain available to Rio
26 Tinto so that it could build the mine, and that, because of its profit participation in the mine, PNG
took no steps to control or minimize the negative impact of Rio Tinto’s mining operations”).

27 ⁶⁴*Jus cogens* norms “proscribe a limited set of activities so universally condemned by the
28 international community that they cannot be undertaken under any circumstances.” *Hirsh v. State*
of Israel, 962 F.Supp. 377, 381 (S.D.N.Y. 1997) (internal quotations omitted).

1 the discriminatory expropriation of property in particular is listed as an act ‘of universal concern’
2 in [section] 404 or is sufficiently similar to the listed acts for us to treat them as though they were
3 incorporated into [section] 404 by analogy,” *Bigio*, 239 F.3d at 448, it did so in the context of
4 concluding that a private company could not be sued for discrimination under the ACTA when
5 it had not acted in concert with state officials. See also *Iwanowa v. Ford Motor Co.*, 67
6 F.Supp.2d 424, 444 (D.N.J. 1999) (“The *Kadic* Court further noted that section 702 [of the
7 Restatement] . . . identifies violations that are actionable when committed by a state, whereas
8 section 404 of the Restatement lists a more limited category of violations of universal concern”).

9 Although the plurality opinion directed the court to weigh nexus against the universality
10 of the concerns underlying plaintiffs’ claims in assessing whether to impose a prudential
11 exhaustion requirement, *Rio Tinto IV*, 550 F.3d at 824, 831, and although it cited section 404 of
12 the Restatement as defining matters of “universal concern,” *id.*, for the reasons stated earlier, the
13 court does not believe that the plurality intended that the definition set forth in section 404 strictly
14 control the prudential exhaustion analysis.

15 The court is mindful, moreover, of the panel’s decision in *Rio Tinto III*, which held that
16 “[a]cts of racial discrimination are violations of *jus cogens* law.” *Rio Tinto III*, 487 F.3d at 1209
17 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), for the
18 proposition that “the Foreign Relations Law Restatement ‘identif[ies] *jus cogens* norms prohibiting
19 . . . systematic racial discrimination’”); see *Siderman de Blake*, 965 F.2d at 715 (“Courts seeking
20 to determine whether a norm of customary international law has attained the status of *jus cogens*
21 . . . must . . . determine whether the international community recognizes the norm as one ‘from
22 which no derogation is permitted’”); *Presbyterian Church of Sudan*, 244 F.Supp.2d at 306 (“The
23 Amended Complaint is rife with accusations which, if proven true, would constitute behavior
24 manifestly in violation of the most basic rules of international law and, indeed, of civilized
25 conduct. Such acts violate peremptory norms, or *jus cogens*. . . . Violations of *jus cogens* norms
26 constitute violations of obligations owed to all (‘*erga omnes*’). In other words, states may
27 exercise universal jurisdiction over acts committed in violation of *jus cogens* norms”). Because
28 racial discrimination violates a *jus cogens* norm, the court concludes that it should be treated as

1 a matter of universal concern for purposes of evaluating whether to impose a prudential exhaustion
2 requirement with respect to plaintiffs' fourth ACTA claim.

3 **(e) Cruel, Inhuman, and Degrading Treatment**

4 Plaintiffs' fifth claim for cruel, inhuman, and degrading treatment ("CIDT") asserts that,
5 by subjecting plaintiffs to inhumane treatment causing "lasting emotional, psychological and
6 physical trauma," Rio Tinto violated Article 16 of the Convention Against Torture and Other
7 Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").⁶⁵ Specifically, plaintiffs
8 alleged that "Rio's blockage, massive environmental destruction, and seizure of property for Rio's
9 purposes constitutes cruel, inhuman and degrading treatment."

10 In its original motion to dismiss, Rio Tinto did not argue that plaintiffs' CIDT claim should
11 be dismissed. Examining its subject matter jurisdiction to hear the claim *sua sponte*, the court
12 noted that it was not based on allegations of torture and that plaintiffs had not "articulated a
13 specific, universal and obligatory norm underlying th[e] claim." *Rio Tinto I*, 221 F.Supp.2d at
14 1163 n. 190 (citing *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1543 (N.D. Cal. 1987), superseded
15 by statute on other grounds as stated in *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002);
16 *Forti v. Suarez-Mason*, 694 F.Supp. 707, 712 (N.D. Cal. 1988); and *Hilao v. Estate of Marcos*,
17 103 F.3d 789, 794-95 (9th Cir. 1986)).

18 More recently, however, federal courts have begun to recognize that "there exists a
19 universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment
20 or punishment," and that CIDT "is therefore actionable under the ATCA." *Aldana v. Del Monte*
21 *Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting). See
22 also, e.g., *Doe v. Qi*, 349 F.Supp.2d 1258, 1321-22 (N.D. Cal. 2004) (stating that CIDT has been
23 condemned by numerous sources of international law and holding that where the conduct alleged
24 in a particular case to constitute CIDT is sufficiently egregious, it gives rise to jurisdiction under

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26 ⁶⁵First Amended Complaint, ¶¶ 249-50, 252. Article 16 of the CAT provides: "Each State
27 Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman
28 or degrading treatment or punishment which do not amount to torture as defined in article I, when
such acts are committed by or at the instigation of or with the consent or acquiescence of a public
official or other person acting in an official capacity."

1 the ATCA); *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 437 (S.D.N.Y. 2002) (“Despite the
2 absence of a distinct definition for what constitutes cruel, inhuman or degrading treatment, various
3 authorities and international instruments make clear that this prohibition is conceptually linked to
4 torture by shades of misconduct discernible as a continuum. . . . That it may present difficulties
5 to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or
6 degrading treatment bleed into torture should not detract from what really goes to the essence of
7 any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman or degrading
8 treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned
9 and renounced as offending internationally recognized norms of civilized conduct”).

10 Acknowledging that there “is no widespread consensus regarding the elements of cruel,
11 inhuman and degrading treatment,” one California district court has concluded that CIDT claims
12 “may be brought under ATS if the specific conduct alleged by the plaintiffs has been universally
13 condemned as cruel, inhuman, or degrading.” *Bowoto*, 557 F.Supp.2d at 1093-94 (citing *Qi*, 349
14 F.Supp.2d at 1322; and *Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass. 1995)).

15 “Cruel, inhuman, or degrading treatment or punishment is defined as acts which inflict
16 mental or physical suffering, anguish, humiliation, fear and debasement, which fall short of
17 torture.” *Aldana*, 452 F.3d at 1285 n. 1 (Barkett, J., dissenting) (citing the CAT). The principal
18 difference between torture and CIDT is “the intensity of the suffering inflicted.” RESTATEMENT,
19 § 702, Reporter’s Note 5 (quoting *Ireland v. United Kingdom*, 25 Pub. Eur. Ct. Hum. Rts., ser.
20 A para 167 (1978)); see also *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW),
21 2002 WL 319887, *8 (S.D.N.Y. Feb. 28, 2002) (“International law considers ‘cruel, inhuman
22 or degrading treatment’ as a general category of prohibited conduct of which ‘torture is at the
23 extreme end’”).

24 Here, plaintiffs’ CIDT claim is based on a wide range of conduct, including seizure of
25 Bougainvilleans’ property and displacement from their homes, environmental damage, and the Rio
26 Tinto’s alleged role in the blockade of the island during the civil war. Some of this conduct may
27 implicate matters of universal concern (e.g., the medical blockade), while some does not (e.g.,
28 damage to the environment). The CIDT claim that plaintiffs have asserted is thus in many

1 respects different from those that courts have found “closely akin to . . . torture,” and based on
2 conduct that is “universally condemned and renounced as offending internationally recognized
3 norms of civilized conduct.” *Tachiona*, 234 F.Supp.2d at 437; see *id.* at 438 (holding that
4 Zimbabwean ruling party’s public dragging of dead victims’ bodies before their homes, kin and
5 neighbors, constituted CIDT because it was an affront to their human dignity and caused their
6 families severe emotional distress); see also *In re South African Apartheid Litigation*, 2009 WL
7 960078 at *15 (holding that plaintiffs had adequately alleged a CIDT claim under an aiding and
8 abetting theory against automobile companies’ security personnel who “provided information
9 about anti-apartheid activists to the South African Security Forces, facilitated arrests, provided
10 information to be used by interrogators, and even participated in interrogations”).

11 As noted, several courts have stated that CIDT is actionable “if the specific conduct alleged
12 by the plaintiffs has been universally condemned as cruel, inhuman, or degrading.” *Bowoto*, 557
13 F.Supp.2d at 1093-94; *Qi*, 349 F.Supp.2d at 1321-22 (stating that where the conduct alleged in
14 is sufficiently egregious, a CIDT claim is actionable). Because multiple elements of plaintiffs’
15 CIDT claim do not involve conduct that has been universally condemned as cruel, inhuman, or
16 degrading, the court concludes that the specific CIDT claim plaintiffs assert does not exclusively
17 involve matters of universal concern.

18 (f) Consistent Pattern of Gross Violations of Human Rights

19 Plaintiffs’ final ACTA claim alleges that the repeated human rights abuses in which Rio
20 Tinto engaged violated an international law norm forbidding “infringements of recognized human
21 rights that are not violations when committed singly or sporadically.”⁶⁶ Specifically, plaintiffs
22 contend that “Rio’s consistent abuse of [plaintiffs], both in terms of destruction of the
23 environment, its racial discrimination and its participation in the military efforts to reopen the
24 mine, violate international law.”⁶⁷

25 Like their claim that Rio Tinto caused environmental damage that violated their rights to
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27 ⁶⁶First Amended Complaint, ¶ 264 (citing RESTATEMENT § 702(g), cmt. m).

28 ⁶⁷*Id.*, ¶ 265.

1 life and health, plaintiffs' allegation that the company engaged in a "consistent pattern" of human
2 rights violations suffers from a lack of specificity that undermines the notion that there is a
3 universal consensus condemning the conduct. Although neither party argued the question in *Rio*
4 *Tinto I*, the court recognized as much, observing that "plaintiffs' claim for gross violations of
5 human rights is not based on any specific provision of international law that is universally
6 recognized." *Rio Tinto I*, 221 F.Supp.2d at 1163 n. 190. Post-*Sosa* jurisprudence, though
7 limited, appears to affirm this conclusion. See, e.g., *Bowoto*, 557 F.Supp.2d at 1096 ("Plaintiffs
8 appear to concede that their claim of consistent patterns of gross violations of human rights cannot
9 survive scrutiny after *Sosa* and instead choose to focus on their independent causes of action . . .
10 Accordingly, the court grants defendants' motion for summary judgment as to plaintiffs' eighth
11 cause of action").

12 Like plaintiffs' CIDT claim, moreover, their consistent pattern claim rests on a wide range
13 of conduct, some of which may involve matters of "universal concern" and some of which does
14 not. For this reason, and because there is a high probability that different countries will have
15 different definitions of what constitutes a "consistent pattern of gross violations of human rights,"
16 the court believes that plaintiffs' seventh and final ACTA claim does not involve matters of
17 "universal concern."
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3. Balancing Nexus and Matters of “Universal Concern”⁶⁸

As alleged in the first amended complaint, plaintiffs’ claims for crimes against humanity, war crimes, and racial discrimination implicate matters of “universal concern.” “Individuals have an interest in obtaining a remedy for such injustices and the United States has an interest in

⁶⁸For the most part, Rio Tinto’s briefs, exhibits and the declaration of its expert, Duke Law Professor Madeline Morris, argue that a nation’s commitment to enforcing international law norms of “universal concern” is not inconsistent with that nation requiring exhaustion of adequate and available local remedies. (See Rio Tinto Opening Brief at 7-14, 18-20; Rio Tinto Reply at 3-6; Expert Declaration of Madeline Morris.) While interesting, Rio Tinto’s survey of the role exhaustion plays in enforcing international human rights in international and foreign tribunals is tangential to the threshold inquiry the plurality directed the court to undertake – i.e., balancing the nexus between the United States and plaintiffs’ claims against the universality of the claims. For this reason, the court has not directly referenced the information in this order. It observes, however, that the arguments advanced by Rio Tinto are not without controversy, and that, to the extent they imply that exhaustion ought to be required in every ATCA case, they have been expressly rejected by seven members of the *Rio Tinto IV* en banc panel. In his *Rio Tinto IV* dissent, in fact, Judge Reinhardt addressed many of these contentions. He noted that “[t]he scope of the exhaustion rule is less settled . . . in the realm of international human rights [than in the arena of diplomatic protection, where it developed, since international human rights] . . . law recognizes the primacy of the fundamental rights of individuals and the interest of states other than the victims’ own in guaranteeing such universal human rights.” *Id.* at 843. Given that the ATCA vests jurisdiction in U.S. court only for “heinous offences like genocide, crimes against humanity, and war crimes,” and that “[i]ndividuals have an interest in obtaining a remedy for such injustices and the United States has an interest in punishing the ‘*hostis humani generis*, an enemy of mankind,’” Judge Reinhardt argued that “the individual and institutional interests in an ATS case weigh heavily against requiring exhaustion.” *Id.* at 845. Additionally, he noted:

“The exhaustion principle is even less established in the enforcement of international human rights norms in domestic courts against individuals and corporations, than in supranational tribunals against states. Exhaustion under international law governs the *vertical* or *hierarchical* relationship of courts – such as the relationship of international tribunals like the International Court of Justice and the Inter-American Court of Human Rights to domestic courts. . . . And when a case is brought in such international tribunals, the defendant is often the state. . . . In adjudicating ATS claims, however, United States courts sit in *horizontal*, not vertical, relationship with courts of other countries that might exercise its jurisdiction over the same questions of international law as against individual defendants. The more appropriate point of comparison is therefore whether courts of other nations have imposed such a requirement before exercising universal jurisdiction. It appears that, for the most part, they have not.” *Id.* at 844 (citations omitted).

1 punishing the ‘*hostis humani generis*, an enemy of all mankind.’” *Rio Tinto IV*, 550 F.3d at 845
2 (Reinhardt, J., dissenting) (quoting *Filartiga*, 630 F.2d at 890). While the nexus between
3 plaintiffs’ claims and the United States is weak, the court believes that this consideration is
4 outweighed by the “heinous” nature of the allegations on which the claims are based, and for that
5 reason concludes that it should not, as a prudential matter, impose an exhaustion requirement with
6 respect to the claims.

7 By contrast, plaintiffs’ remaining claims, as pled, implicate norms that are not universal.
8 This fact, coupled with the weakness of the nexus between the claims and the United States,
9 weighs in favor of conducting a traditional two-step exhaustion analysis with respect to these
10 claims. As masters of their complaint, plaintiffs can choose whether to bypass this additional step
11 by amending their complaint to allege only universal claims that do not warrant exhaustion.⁶⁹ If
12 plaintiffs wish to proceed with all of the claims alleged in the first amended complaint, however,
13 the court will examine the availability of remedies and the futility of requiring exhaustion as
14 respects plaintiffs’ claims for violation of their rights to health, life, and security of the person;
15 cruel, inhuman, and degrading treatment; international environmental violations; and a consistent
16 pattern of gross human rights violations.⁷⁰

17 18 III. CONCLUSION

19 For the reasons stated, the court finds it inappropriate to impose a prudential exhaustion

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21 ⁶⁹For the most part, the claims as to which the court imposes a prudential exhaustion
22 requirement are those it concluded it lacked subject matter jurisdiction to hear under ACTA in *Rio*
23 *Tinto I*. The only exception is plaintiffs’ sixth claim to the extent it alleges a violation of
24 international law as reflected in UNCLOS. As to that claim, the court held that it gave rise to
25 jurisdiction under the ACTA. Here, the court concludes that the claim does not address matters
26 of sufficiently universal concern to overcome the weak nexus between this country and plaintiffs
27 and their claims such that conducting a traditional exhaustion analysis is warranted.

28 ⁷⁰Although not entirely clear, it appears that the panel and en banc decisions in the Ninth
Circuit leave intact the court’s earlier dismissal of the claims for violation of the rights to life,
health and security of the person; cruel, inhuman and degrading treatment (albeit this dismissal
was with leave to amend); environmental harm under the principle of sustainable development;
and a consistent pattern of gross human rights violations.

1 requirement with respect to plaintiffs' claims for crimes against humanity, war crimes, and racial
2 discrimination. Should plaintiffs' wish to pursue their ATCA claims for violation of the rights
3 to health, life, and security of the person; cruel, inhuman, and degrading treatment; international
4 environmental violations; and a consistent pattern of gross human rights violations, the court will
5 conduct the traditional two-step exhaustion analysis with respect to those claims before returning
6 the matter to the Ninth Circuit.⁷¹ Plaintiffs are directed to file a status report indicating whether
7 they intend to pursue these claims on or before **Monday, August 31, 2009**. If plaintiffs do elect
8 to pursue these claims, the court will issue a briefing schedule and set a hearing date for the
9 traditional two-step exhaustion analysis.

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11 DATED: July 31, 2009



MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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23 ⁷¹At the hearing, plaintiffs expressed a desire to amend their cruel, inhuman, and degrading
24 treatment claim to ensure that the claim is based on underlying norms that have been found to be
25 matters of universal concern in past ATCA litigation. If plaintiffs wish to proceed in this fashion,
26 they are directed to advise the court of this fact in the report that they are directed to file below.
27 Because the matter is before the court on limited remand from the Ninth Circuit, the court does
28 not believe it is appropriate to permit amendment of the pleadings at this stage. Rather, the court
will permit plaintiffs to abandon their cruel, inhuman, and degrading treatment claim as *currently*
pled without prejudice to their right to file an amended complaint if and when the matter is
returned from the Ninth Circuit. Any new claim would be subject to whatever exhaustion
procedure the Ninth Circuit adopts after further consideration of this matter.