THE ALIEN TORT STATUTE AND THE LAW OF NATIONS IN *KIOBEL* AND BEYOND

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ABSTRACT

In Kiobel v. Royal Dutch Petroleum *the U.S. Supreme Court wrongly applied a presumption against extraterritoriality to claims authorized by the Alien Tort Statute (ATS). Even assuming such a presumption properly could extend to the ATS and claims authorized thereunder, the presumption is easily overcome by Congress's unambiguous instruction that the statute encompasses violations of "the law of nations," which includes both substantive and jurisdictional components—including principles of extraterritorial jurisdiction. Early 19th Century case law and congressional reaction thereto clearly demonstrate that Congress expressly invoked "the law of nations" to overturn the Court's imposition of a limiting presumption in the piracy context in order to grant the United States universal jurisdiction over that offense. Rather than rely on this strong indicia of congressional intent, the Court in* Kiobel *instead seized upon a judicially invented presumption that came into existence twenty years after the ATS was enacted, gave it novel application to a jurisdictional statute and claims authorized thereunder, and then projected it backward in time.*

Yet Kiobel *nonetheless correctly determined that conduct-regulating rules of decision under the ATS derive from international law and that domestic law of the forum, or* lex fori, *provides procedures and remedies. This framework is consistent with public and private law principles of the law of nations under which the statute ought to be construed. Although this framework should have led the Court to conclude that the claims in* Kiobel *were actionable, the Court's misunderstanding has not completely erased the possibility of future claims involving foreign elements from being brought under the statute. The Court left the door open for claims that sufficiently "touch and concern" the United States. The Article concludes that, going forward, courts should use international law for the conduct-regulating rules under the ATS and domestic law for procedures and remedies. Jurisdictional principles of the law of nations ought to guide analysis of whether claims involving foreign elements sufficiently touch and concern the United States so as to displace the presumption against extraterritoriality.*

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I. INTRODUCTION

Over the last thirty years or so, the Alien Tort Statute (ATS) has generated its own cottage industry of judicial opinions and scholarly articles. The 1789 statute, which grants U.S. district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations"[1] has launched waves of court decisions and academic commentary ranging from the particulars about both historical and current relationships between U.S. and international law as well as the existence and scope of corporate liability under international law, to broader debates about the place of international human rights litigation in U.S. courts.[2]

In *Kiobel v. Royal Dutch Petroleum*, the United States Supreme Court recently posed a couple of questions that promise to affect, if not altogether determine, the viability of ATS claims for the foreseeable future; specifically, the Court asked "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[3] Causes of action arising in foreign territory have comprised both the

1. 28 U.S.C. § 1350 (2006).

2. For instance, as of March 11, 2013, the citation pulls up 871 judicial opinions and 2,110 scholarly articles on LexisNexis. For a range of different scholars' and practitioners' opinions on these and other ATS issues, see *Special Feature:* Kiobel *Symposium*, SCOTUSBLOG, http://www.scotusblog.com/category/special-features/kiobel-symposium/ (last visited June 25, 2013).

3. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) (order directing re-argument).

vast majority and the most contentious ATS claims over the past three decades.[4] Thus *Kiobel* effectively determines whether the ATS survives as a vehicle for human rights claims arising abroad in U.S. courts or, instead, is "placed on the shelf"[5] until Congress amends the statute to the satisfaction of the Court.

Kiobel applied a presumption against extraterritoriality to claims arising under the ATS and held that the claims at issue in the case were not actionable because they were brought by foreigners against foreigners for conduct abroad.[6] The presumption is a canon of statutory construction intended to capture Congress's intent that statutes ordinarily do not apply outside U.S. territory unless Congress affirmatively indicates extraterritorial application.[7] I have elsewhere described the problem with using the presumption to construe a jurisdictional statute like the ATS and the causes of action it authorizes.[8] In this Article I want to engage the Court's decision on its own terms. Even assuming a presumption against extraterritoriality properly extends to the ATS and causes of action authorized thereunder, I argue that the Court in *Kiobel* got it wrong. Specifically, the ATS does affirmatively indicate extraterritorial application by expressly invoking "the law of nations."[9] That law comprises both substantive and jurisdictional principles, and Congress intended the ATS to comprise these principles as well.

Because the ATS invokes the law of nations, the better canon for construing the statute is the *Charming Betsy* canon, which instructs courts to construe statutes in conformity with international law if possible.[10] According to this canon, claims involving extraterritorial

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4. *See, e.g.*, Doe v. Exxon Mobil, 654 F.3d 11 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

5. *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004) ("[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.").

6. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

7. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

8. *See* Anthony J. Colangelo, Kiobel *Insta-Symposium:* Kiobel *Contradicts* Morrison, OPINIO JURIS, (May 10, 2013, 9:00 AM), http://opiniojuris.org/2013/05/10/kiobel-insta-symposium-kiobel-contradicts-morrison/; Anthony J. Colangelo, Kiobel *Insta-Symposium: An Extraterritorial Cause of Action*, OPINIO JURIS, (Apr. 17, 2013, 4:26 PM), http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-an-extraterritorial-cause-of-action/.

9. 28 U.S.C. § 1350 (2006).

10. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

activity and, in particular, claims involving what are called "universal jurisdiction" violations of the law of nations, should be actionable under the ATS. Once it is understood that the law of nations or international law supplies the applicable conduct-regulating rule under the ATS and that the law of nations also provides that procedures and the form of remedy come from the domestic law of the forum, or the *lex fori*, the better construction emerges that the ATS confers geographically unlimited jurisdiction over universal jurisdiction violations of the law of nations.

The Article concludes by observing that although *Kiobel* did not reach this result, it did adopt the correct choice-of-law framework: namely, that international law supplies the conduct-regulating rules under the ATS and forum law provides procedures and remedies. Moreover, it is still feasible under *Kiobel* for courts to entertain claims with foreign elements. To figure out when such claims are actionable, I suggest courts look to other principles of extraterritorial jurisdiction under international law for guidance.

II. THE ATS AFFIRMATIVELY CONFERS UNIVERSAL JURISDICTION

According to the Supreme Court, a statute applies outside U.S. territory if it contains a "clear indication of extraterritorial application."[11] The ATS contains such an indication: it clearly indicates universal jurisdiction to cover claims arising everywhere by expressly incorporating the law of nations, which comprises both substantive and jurisdictional components.[12] Accordingly, no presumption against extraterritoriality should have applied to the ATS.

A much-cited case from 1818 generally regarded as the Supreme Court's first invention of a presumption against extraterritoriality, *United States v. Palmer*, applied a limiting presumption to block U.S. jurisdiction over the universal offense of piracy on a foreign-flag vessel because the vessel was considered the legal equivalent of foreign sovereign territory.[13] Congress immediately rejected that construction and enacted a new statute the very next year granting universal jurisdiction. Crucially, Congress rewrote the statute to affirmatively confer

11. *Morrison*, 130 S. Ct. at 2878 (observing that a statute applies extraterritorially if it contains "clear indication of an extraterritorial application").

12. *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1032 (2011) (explaining that "international law is not comprised of only substantive rules; it is also jurisdictional—including rules of extraterritorial jurisdiction").

13. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 632-33 (1818).

universal jurisdiction by expressly granting jurisdiction over "piracy, as defined by the law of nations."[14] By invoking "the law of nations," Congress purposefully authorized the application of both an international substantive rule and an international jurisdictional principle so as to confer upon U.S. courts universal jurisdiction to apply the international substantive rule.[15] The ATS similarly expressly confers jurisdiction over torts "in violation of the law of nations,"[16] and similarly should be understood to authorize application of international substantive and jurisdictional components of that law.

In brief, Congress knew how to bestow universal jurisdiction over law-of-nations violations in what was clearly considered foreign territory, and did so by explicitly incorporating into statutes "the law of nations," which includes both substantive and jurisdictional components. It was inappropriate for the Supreme Court to read that "affirmative indication" of jurisdiction out of the ATS in *Kiobel*[17]—indeed, it was especially inappropriate because Congress could not have known of any judicially created presumption at the time it enacted the ATS and used precisely the "law of nations" language to repudiate a presumption against extraterritoriality once before.

A. *Universal Jurisdiction Authorizes All States to Apply the Law of Nations*

To understand how the ATS confers universal jurisdiction under the law of nations it is necessary to understand universal jurisdiction. The international legal principle existed at the time Congress enacted the ATS,[18] it exists under the "present-day law of nations,"[19] and it was recognized by the Court's decision in *Sosa v. Alvarez-Machain.*[20] Universal jurisdiction grants every state in the world jurisdiction to apply international law to certain violations of the law of nations, even if the state had no connection to the violation when and where it occurred.[21] To be sure, this is one of the principle's defining characteristics: when states exercise universal jurisdiction, they do not apply

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14. An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 5, 3 Stat. 510, 513-14 (1819).

15. *See infra* notes 46-51.

16. 28 U.S.C. § 1350. (2006).

17. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010).

18. *See infra* note 22.

19. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

20. *See id.* at 732.

21. *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150-51 (2006).

solely national law to conduct beyond their borders but an international law that already applied to the conduct when and where it occurred.

The Supreme Court made this point unambiguously in *United States v. Smith* with regard to the original universal jurisdiction offense of piracy:

> [t]he common law . . . recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race.[22]

The substantive prohibition on universal violations of the law of nations is tied intimately with a jurisdictional principle that all states may enforce that prohibition:

> And the general practice of all nations, in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.[23]

Similarly, Blackstone declared piracy "an offence against the universal law of society; a pirate being . . . *hostis humani generis.*"[24]

As these authorities make clear, universal jurisdiction grants all states jurisdiction to enforce international law. When a state exercises universal jurisdiction, it does not extend solely national law extraterritorially to foreign conduct but rather acts as a decentralized enforcer of the law of nations already applicable to the conduct when and where it occurred.

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22. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820).

23. *Id.* at 162. *See also* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (explaining that piracy is subject to "universal jurisdiction" and that it "is considered as an offence within the criminal jurisdiction of all nations").

24. 4 WILLIAM BLACKSTONE, COMMENTARIES *71. *See also id.* ("[B]y declaring war against all mankind, all mankind must declare war against him . . . .").

Universal jurisdiction works the same way today[25] and should give rise to ATS liability under *Sosa*'s methodology. For example, *Sosa* cited *United States v. Smith*—the criminal piracy case quoted at length above—to demonstrate the "historical paradigms" that inform ATS inquiries under "the present-day law of nations."[26] As discussed, *Smith*'s definition of piracy under the law of nations included both a substantive and a jurisdictional component: substantively, piracy comprised robbery on the high seas; jurisdictionally, "all nations . . . punish[] all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever . . . ."[27] Immediately after citing *Smith*, *Sosa* cited the Second Circuit's famous statement in *Filártiga v. Peña-Irala* that, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an

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25. Today treaties, while not themselves the customary law of nations (since they are positive agreements among states), provide strong evidence of what customary international law deems universal jurisdiction violations by demonstrating "the customs and usages of civilized nations," The Paquete Habana, 175 U.S. 677, 700 (1900), resulting from widespread state practice ratifying and implementing the treaties in domestic law. For example, treaties like the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5.2 and 7.1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, arts. 5 and 7, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, authorize and, in many situations, require the exercise of jurisdiction by states parties with personal jurisdiction over offenders—even if the state had no connection to the offense when it occurred. Any doubt about the customary lawmaking character of the treaties is resolved by the fact that they do not condition the exercise of universal jurisdiction by states parties with custody of the accused on the commission of the offense within the territory of another state party to the treaty. By effectively extending the prohibition in the treaty to any state in the world where the offense occurs, these treaties are quintessential "law-making" treaties, or treaties of customary "norm-creating character." Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138 (2d Cir. 2010); *see also* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), Advisory Opinions and Orders, 1969 I.C.J. 3, ¶¶ 70-71 (Feb. 20); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987). In other words, the treaties clearly reflect "the customs and usages of civilized nations," *The Paquete Habana*, 175 U.S. at 700, with respect to both what conduct is substantively prohibited under the law of nations and when states have jurisdiction over that conduct. In this regard, the treaties help cure the Court's early lament in *Smith* that "[o]ffences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations." *Smith*, 18 U.S. (5 Wheat.) at 159 (relying on writings of twenty-five publicists or scholars to ascertain the settled definition and scope of piracy under the law of nations). Today such a code largely exists in the form of widely ratified multilateral treaties. And they unambiguously provide jurisdiction where a state gains personal jurisdiction over the perpetrator of certain universal violations of the present-day law of nations—even if that state had no connection to the violation when it occurred.

26. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

27. *Smith*, 18 U.S. (5 Wheat.) at 162.

enemy of all mankind."[28] Factually, *Filártiga* involved a foreign plaintiff, foreign defendant, and foreign conduct. Legally, as with *Smith*'s recitation of universal jurisdiction over an "enemy of the human race," *Filártiga*'s invocation of an "enemy of all mankind" encompasses both a substantive prohibition and a jurisdictional principle that all states can enforce that international legal prohibition.[29] As the next section explains, *Sosa* got it exactly right: the ATS affirmatively confers universal jurisdiction to apply the law of nations and no presumption against extraterritoriality should limit the application of that law.

B. *The ATS Embodies Universal Jurisdiction*

The Supreme Court recently reaffirmed that a presumption against extraterritoriality applies to U.S. statutes.[30] The presumption is not a limitation on sovereignty but a canon of construction designed to effectuate legislative intent.[31] As the Court explained early on in *United States v. Palmer*, even where Congress has power to legislate, general statutory "words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law."[32] When "examin[ing] the law,"[33] "[a]ssuredly context can be consulted as well."[34] The language and context of the ATS clearly demonstrate that to the extent courts use the law of nations as the rule of decision under the statute, the statute confers universal jurisdiction under that law.

Palmer used a species of presumption against extraterritoriality to restrictively construe the reach of a 1790 statute prohibiting piracy, defined as "robbery . . . upon the high seas" by "any person or persons."[35] The Court held that the statute did not reach such acts committed by foreigners against foreigners on a foreign-flag ship.[36] Here it should be stressed—especially given the Court's framing of the extraterritoriality issue in *Kiobel*—that piracy on another nation's ship constituted a "violation[] of the law of nations occurring within the

28. *Sosa*, 542 U.S. at 732 (quoting Filartiga v. Pena-Irala, 603 F.2d 876, 890 (2d Cir. 1980)).

29. *Sosa*, 542 U.S. at 732.

30. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

31. *Id.*

32. 16 U.S. (3 Wheat.) at 631-32.

33. *Id.*

34. *Morrison*, 130 S. Ct. at 2883.

35. 16 U.S. (3 Wheat.) at 632.

36. *Id.*

territory of a sovereign other than the United States,"[37] given that traditionally "[a] vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality."[38]

Indeed it was precisely this jurisdictional feature and the attendant fear of foreign sovereign interference that caused the Court in *Palmer* to restrict the 1790 piracy statute's scope. The Court first observed that the title of the entire act—"'an act for the punishment of certain crimes against the United States'"—suggested that Congress's concern was with "offences against the United States, not offences against the human race."[39] The Court then turned to its principal concern that reading all of the piracy statute's general terms globally would interfere with other nations' sovereignty by projecting U.S. law onto the legal equivalent of foreign sovereign territory—namely, foreign-flag ships.

The 1790 act prohibited not just "robbery . . . upon the [high] sea[s]"—which constituted piracy under the law of nations,[40] but also purely municipal offenses like "run[ing] away" with a ship or merchandise or "lay[ing] violent hands upon [a] commander."[41] These latter offenses did not constitute piracy under the law of nations but were instead referred to as "piracy . . . by statute."[42] These piracies by statute were solely creatures of municipal or domestic law, not international law. As a result, they were subject only to territorial (or flag) and national jurisdiction, not universal jurisdiction.[43]

The *Palmer* Court worried that Congress could not have intended all of these other general terms prohibiting piracy by statute under municipal law to apply globally to activities on foreign-flag ships. The reason was that such extraterritorial application of U.S. law into a foreign jurisdiction could interfere with foreign sovereignty:

> But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay

37. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012).

38. Wilson v. McNamee, 102 U.S. 572, 574 (1880); *see also* St. Clair v. United States, 154 U.S. 134, 152 (1894); United States v. Smiley, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864) (No. 16,317).

39. *Palmer*, 16 U.S. (3 Wheat.) at 631.

40. *Smith*, 18 U.S. (Wheat.) at 162.

41. *Palmer*, 16 U.S. (Wheat.) at 626-27.

42. 4 WILLIAM BLACKSTONE, COMMENTARIES *72. *See also* Colangelo, *supra* note 12, at 1061-75 (explaining the difference between piracy under the law of nations and piracy by statute).

43. Colangelo, *supra* note 12, at 1061-1075.

> violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.[44]

The Court then reasoned backward from this supposition about the piracies by statute listed in the latter part of the 1790 act to the particular piracy in the case before it—robbery on the seas by "any person"—and gave that piracy the same, limited construction.[45]

According to Congress, however, the Court got it wrong. *Palmer* was "roundly criticized by contemporaries" for limiting the scope of the 1790 statute and stunting the United States's ability to prosecute piracy under the law of nations.[46] In one famous criticism, John Quincy Adams renounced *Palmer* as "a sample of judicial logic—disingenuous, false, and hollow" and an "enormous hole in the moral garment of this nation made by this desperate thrust of the Supreme Court."[47]

Then, in direct response to *Palmer*, Congress passed a new piracy statute the very next year to mend the hole *Palmer* had hewn and to affirmatively create universal jurisdiction over piracy against the law of

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44. *Palmer*, 16 U.S. (Wheat.) at 632-33. That *Palmer* had to do with the fact that the offense occurred on foreign territory is confirmed by the Court's decision just two years later in *United States v. Klintock*, which dealt with the same section of the same 1790 statute as *Palmer*, but the piracy had occurred on a stateless, instead of a foreign-flag, ship. United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820). The Court distinguished *Klintock* on this basis and applied the statute on the ground that *Palmer* only governed ships "sailing under the flag of a foreign State, whose authority is acknowledged. This is the case which was presented to the Court [in *Palmer*]; and this is the case which was decided." *Id.* at 151; *see also id.* at 152 (observing that general statutory terms "ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State"). These cases make crystal clear that ships were deemed part of the territory of the state under whose flag they sailed.

45. *Palmer*, 16 U.S. (Wheat.) at 633 ("That the general words of the two latter members of this sentence [piracies by statute] are to be restricted to offences committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of the sentence [robbery on the high seas or piracy under the law of nations].").

46. G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 731 (1989).

47. J. Q. Adams, diary entry for May 11, 1819, *in* 4 THE MEMOIRS OF JOHN QUINCY ADAMS 363 (C. Adams ed., 1874-77).

nations.[48] The statute, accordingly, conferred jurisdiction over "any person or persons whatsoever" who "shall, on the high seas, commit the crime of piracy, *as defined by the law of nations.*"[49]

In short, to overrule *Palmer* and affirmatively indicate universal jurisdiction, Congress expressly invoked the definition of piracy under "the law of nations."[50] The ATS contains a similar invocation. It too confers jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations . . . ."[51] It is passing strange for the Supreme Court in *Kiobel* to evidently have found that precisely the type of language Congress used to confer universal jurisdiction—and to overrule the Court's limiting presumption once before—does not now confer universal jurisdiction to apply the law of nations.

To be sure, when courts use the law of nations as the rule of decision none of the presumption's motivating rationales apply. To the contrary, the rationales may even argue in favor of the exercise of U.S. jurisdiction to fulfill U.S. obligations under international law in some cases—for example, in cases where the United States has a responsibility to punish universal offenses like piracy. At bottom, the presumption aims "to protect against unintended clashes between our laws and those of other nations which could result in international discord,"[52] and to heed the presumption that when Congress legislates, it "is primarily concerned with domestic conditions."[53] Although the ATS is a primarily jurisdictional statute,[54] the presumption could in principle apply if courts were to use purely domestic U.S. common law principles as conduct-regulating rules of decision. In that situation, it would be courts, not Congress, crafting "our laws." Yet as conduct-regulating rules, those laws could still "clash" with foreign laws inside foreign territory.[55]

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48. *See* United States v. Hasan, 747 F. Supp. 2d 599, 612 (E.D. Va. 2010) ("In response to the Supreme Court's interpretation of the Act of 1790 in *Palmer*, Congress passed the Act of 1819 to make clear that it wished to proscribe not only piratical acts that had a nexus to the United States, but also piracy as an international offense subject to universal jurisdiction."); ALFRED P. RUBIN, THE LAW OF PIRACY 144 (2d ed. 1998) ("The immediate result of *U.S. v. Palmer* in the halls of the Congress was the passage of [the Act of 1819] . . . .").

49. An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 5, 3 Stat. 510, 513-14 (1819) (emphasis added).

50. *Id.*

51. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (1789).

52. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

53. *Id.*

54. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

55. *Arabian Am. Oil Co.*, 449 U.S. at 248.

But when U.S. courts apply the law of nations as the conduct-regulating rule, the potential for true conflicts of laws largely disappears. Unlike, for example, the Securities Exchange Act at issue in *Morrison v. National Australia Bank*, or the Sherman Antitrust Act at issue in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,[56]—both of which involved projecting purely U.S. domestic conduct-regulating laws into foreign territory—the law of nations also applies to regulate conduct inside foreign territories. Concerns about extraterritorial applications of U.S. law conflicting with foreign law inside foreign territory largely vanish since U.S. law authorizes application of an international law already operative inside the foreign territory.[57]

Further, while the presumption that Congress legislates with only domestic concerns in mind may make sense for statutes reflecting national values and preferences like the securities or antitrust laws, that presumption holds far less intuitive force when Congress authorizes application of the law of nations, which, after all, deals by definition with foreign nations and shared values and preferences with those nations. The Supreme Court has explained that courts can consider "context" in determining the geographic scope of statutes.[58] Here the context is that the statute authorizes application of international, not domestic, law, and the relevant canon of construction is *Charming Betsy*, under which courts construe ambiguous statutes in conformity with international law.[59] *Charming Betsy* would allow and indeed sometimes encourage U.S. jurisdiction, even where there is no U.S. connection to the violation of the law of nations because international law would allow and sometimes encourage the exercise of universal jurisdiction.

In sum, when Congress authorizes application of the law of nations,

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56. 542 U.S. 155 (2004).

57. The argument that the ATS should not reach foreign harms because it is unique in authorizing civil liability under international law fails for at least three reasons. As an initial matter, civil liability is explicitly built into the statute. Presumptions are only that: presumptions. They do not apply where statutes are clear, and the ATS is clear on civil liability. Second, as noted above, using international criminal law to discern the norm of international law actionable under the ATS is consistent with *Sosa*'s methodology, *see supra* Part I. Indeed, requiring a freestanding norm of civil liability in international law would effectively render the ATS a dead letter, contrary to *Sosa*'s methodology and clear finding that the ATS is not a mere "jurisdictional convenience to be placed on the shelf for use by a future Congress . . . to make some element of the law of nations actionable for the benefit of foreigners." *Sosa*, 542 U.S. 692, 719 (2004). Finally, as Part III explains below, international law allows jurisdiction in civil suits between foreigners arising out of foreign conduct or transactions.

58. *Morrison*, 130 S. Ct. at 2883.

59. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

it should be presumed to authorize application of *all* of the law of nations, including the relevant law of jurisdiction. As the next Part explains, the law of nations permits universal jurisdiction in civil suits. In fact, historical authorities from the time of the ATS's enactment suggest that it would have been contrary to the law of nations to close U.S. courts to foreigners, thereby discriminating against them and denying them access to justice.

III. THE LAW OF NATIONS CONTEMPLATES UNIVERSAL JURISDICTION IN CIVIL SUITS

A duty to provide access to justice existed under the classical law of nations, endured through the 19th Century, and supports universal jurisdiction in civil suits between foreigners under the ATS today. As the Supreme Court acknowledged in *Sosa*,[60] the law of nations traditionally included both public and private international law[61] and linked torts and crimes.[62]

And then, as now, transitory torts can be brought in U.S. courts.[63] In fact, it would have been contrary to the law of nations at the time of the ATS's enactment to close U.S. courts to foreigners, thereby discriminating against them and denying them access to justice.[64] As to the ATS in particular, under longstanding principles of public and private interna-

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60. *Sosa*, 542 U.S. at 715 ("The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.").

61. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839) (describing private international law and conflict of laws in particular as part of "the law of nations"); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 5 (describing "the importance of . . . international principles in matters of mere private right and duty"), § 9 ("The jurisprudence, then, arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. To no part of the world is it of more interest and importance than to the United States . . . . This branch of public law may, therefore, be fitly denominated private international law . . . ."), § 30 (including private international law as part "of the acknowledged law of nations") (Little, Brown and Co. 5th ed. 1857).

62. *See Sosa*, 542 U.S. at 723-24 (rejecting Sosa's argument that law-of-nations violations were only "public wrongs" and explaining that "Vattel explicitly linked" criminal and civil remedies); *see also* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996) ("The distinction between crime and tort was not a difference between two kinds of wrongful acts. In most instances, the same wrong could be prosecuted either as a crime or as a tort. *Nor was the distinction a difference between the kinds of persons who could initiate the actions. Victims could initiate both kinds.*") (emphasis added).

63. *See infra* note 66-67.

64. *See infra* note 68-69.

tional law, the law of nations provides conduct-regulating rules defining actionable universal jurisdiction violations of international law and forum law, or the *lex fori*, provides the remedy.

A. *The Law of Nations Authorizes Universal Adjudicative Jurisdiction*

To begin, as a matter of adjudicative jurisdiction, or the exercise of jurisdiction by U.S. courts, there is nothing exceptional about U.S. courts entertaining suits between foreigners arising out of foreign conduct or transactions, and it certainly is not a violation of international law. Joseph Story could not have been clearer on this point—the relevant section from his famous *Commentaries on the Conflict of Laws* is reproduced in full immediately below:

> There are nations, indeed, which wholly refuse to take cognizance of controversies between foreigners, and remit them for relief to their own domestic tribunals, or to that of the party defendant; and, especially, as to matters originating in foreign countries. Thus, in France, with few exceptions, the tribunals do not entertain jurisdiction of controversies between foreigners respecting personal rights and interests. But this is a matter of mere municipal policy and convenience, *and does not result from any principles of international law.* In England, and America, on the other hand, suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the State, in which the suit is brought.[65]

This has been so throughout U.S. history.[66] In other words, all that is needed is personal jurisdiction.[67] In fact, according to Story:

> All that any nation can, therefore, *be justly required to do,* is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects; and to *give them the same redress,* as to rights and wrongs, which it deems

65. STORY, *supra* note 61, § 542 (emphasis added).

66. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) (collecting cases).

67. *See id.*; *see also* STORY, *supra* note 61, § 554 ("It has already been stated, that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found . . . .").

> fit to acknowledge in its own municipal code for natives and residents.[68]

According to Story, the private international law prescribing this requirement was a matter of "international justice."[69] Thus there is nothing unique about U.S. courts entertaining suits between foreigners, even "as to matters originating in foreign countries": such suits "are maintainable, and are constantly maintained" in the United States, and affording redress to foreigners traditionally was a matter of international justice.[70]

B. *The Law of Nations Authorizes Universal Prescriptive Jurisdiction to Apply International Law and Remedies Under the* Lex Fori

The question then becomes what prescriptive jurisdiction or substantive law applies to foreign violations of the law of nations. As Part I explained, when courts exercise universal jurisdiction under the ATS they do not apply only national law but also the law of nations. That is, international law itself prescribes the applicable conduct-regulating rule. And in civil suits between foreigners for claims arising abroad, private international law has long provided that the law of the forum, or the *lex fori*, supplies the remedy.[71] Again, Story could not have been clearer:

> It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to the *Lex fori.*[72]

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68. STORY, *supra* note 61, § 557 (emphasis added).

69. *Id.* § 3; *see also id.* § 557 ("The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty.").

70. *Id.* §§ 542, 547.

71. *See infra* note 72.

72. STORY, *supra* note 61, § 556; *see also, e.g.*, Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 41 (1961) (Desmond, J.) ("As to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies."). Some more recent treaties also expressly contemplate civil and administrative proceedings. *See e.g.*, International Convention for the Suppression of the Financing of Terrorism art. 5, G.A.5, Dec. 9, 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 270. But such contemplation does not implicitly erase other principles of international law that allow states to provide civil proceedings and remedies, like the entire field of private international law. The treaties themselves in fact are careful to explain that, for example,

To be certain, "the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, *without any regard to the domicil of the parties, the origin of the right, or the country of the act.*"[73] As noted, to treat foreigners differently could have amounted to a denial of justice, or, according to Story, a refusal of what a nation was "justly required to do."[74]

Thus where liability existed on a foreign contract, Story explained, whether such liability could be enforced against the defendant through personal arrest, or only *in rem*, depended on the law of the forum, not foreign law. This "better opinion now established both in England and America" was actually exemplified by, among other cases, what today some would call a "foreign-cubed" case: namely, "a recent case in England, where the plaintiff and the defendant were both foreigners, and the debt was contracted in a country, by whose laws the defendant would not have been liable to an arrest."[75] In the case, *De la Vega v. Vianna,* the plaintiff, a Spaniard, arrested the defendant, a Portuguese, in England for a debt arising out of a contract entered into in Portugal.[76] The defendant challenged his arrest on the basis that Portuguese law governing the contract, or the *lex causae,* did not establish that form of remedy.[77] The House of Lords flatly rejected this argument.[78] Lord Tenterton explained that the foreign party in England "must take the law as he finds it . . . . He is to have the same rights which all the subjects of this kingdom are entitled to."[79]

The same should have held for ATS suits under these longstanding international legal principles. The law of nations creates liability for universal jurisdiction violations, and the ATS supplies the form of remedy. A foreign defendant in U.S. court "must take the law as he finds it," and foreign plaintiffs are "to have the same rights which all the [citizens of the United States] are entitled to."[80]

"[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law." *Id.* at art. 21.

73. STORY, *supra* note 61, § 558 (emphasis added).

74. *Id.* § 557.

75. *Id.* § 571.

76. De la Vega v. Vianna, (1830) 109 Eng. Rep. 792 (K.B.) 792.

77. *Id.*

78. *Id.* at 793.

79. *Id.*; *see also* STORY, *supra* note 61, § 571.

80. De la Vega, [1830] 109 Eng. Rep. at 792-93; STORY, *supra* note 61, § 571.

IV. CONCLUSION

In *Kiobel*, the Supreme Court contradicted Congress's intent by using the presumption against extraterritoriality to limit the reach of the ATS. The Court also strayed away from the more relevant canon of construction, the *Charming Betsy* canon, which authorizes the ATS to reach all claims alleging universal jurisdiction violations of the law of nations. The crucial point for both canons is that U.S. courts apply international law as the conduct-regulating rule of decision under the ATS and forum law, or the *lex fori*, for procedures and remedies.

Although it came out wrong, *Kiobel* appeared to accept this crucial point, and the Court's opinion leaves room for this choice-of-law framework to operate in at least some future cases alleging multijurisdictional claims. The Court explained that the ATS "does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law."[81] Indeed the Court framed the issue in *Kiobel* as "whether the court has authority to recognize a cause of action under U.S. law *to enforce a norm of international law.*"[82] Hence international law supplies the conduct-regulating rule under the ATS and forum law, or *lex fori*, supplies the cause of action and the remedy.

The last section of *Kiobel* then leaves the door open for at least some future claims involving foreign elements. The Court concluded its opinion by observing:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.[83]

What degree of U.S. connection claims must exhibit to overcome the presumption will undoubtedly be the subject of much argument and litigation. I will conclude by suggesting that international legal principles of jurisdiction should guide that analysis. Pure universal jurisdiction may be difficult to argue after *Kiobel*, but there are other bases of extraterritorial jurisdiction in international law, including jurisdiction over activity abroad that has effects within a state (objective territorial-

81. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).

82. *Id.* at 1661 (emphasis added).

83. *Id.* at 1669.

ity),[84] activity by a state's nationals abroad (active personality),[85] activity against a state's nationals abroad (passive personality),[86] and activity that threatens the state and its official functions (protective principle).[87] Construing the statute in line with these principles would be to construe the ATS under the law of nations it invokes.

84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

85. *Id.* § 402(3) cmt. g.

86. *Id.*

87. *Id.* § 402(3) cmt. f.