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Kiobel Amici Curiae Brief of Law of Nations Scholars

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No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM, CO., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF ON REARGUMENT OF *AMICI CURIAE* LAW OF NATIONS SCHOLARS SUPPORTING NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are academic specialists on universal jurisdiction and denial of justice under the law of nations. They have an important interest in this case, which raises the question of whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize causes of action for violations of the law of nations in foreign territory. Universal jurisdiction and denial of justice are longstanding law-of-nations principles that bear heavily on the resolution of this question. *Amici* respectfully submit this Brief in support of neither party to clarify the law and history relating to these principles in the law of nations and U.S. law. *Amici* are:

Anthony A. D'Amato, Leighton Professor of Law, Northwestern University, author of numerous books, including THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971), THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (with Ralph G. Steinhardt) (1999), and over 100 articles, including *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988). He is a member of the Supreme Court Bar.

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[1] This Brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for a party authored this Brief in whole or in part, nor did any person or entity, other than *Amici Curiae*, make a monetary contribution to the preparation or submission of this Brief.

Anthony J. Colangelo, Assistant Professor of Law, Southern Methodist University, Dedman School of Law, author of numerous articles on universal jurisdiction and U.S. extraterritorial jurisdiction, including *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881 (2009); *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121 (2007), cited in *United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto) 5-6 (July 14, 2008); *United States v. Emmanuel (a.k.a. Chuckie Taylor)*, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 5, 2007); *Goldberg v. UBS, Ltd.*, 690 F. Supp. 2d 92 (E.D.N.Y. 2010); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010); and *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149 (2006), cited in *In re S. Afr. Apartheid Litig.,* 617 F. Supp. 2d 228 (S.D.N.Y. 2009); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

SUMMARY OF ARGUMENT

The question presented is "whether 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."[2] In this *Amicus* Brief we argue from a historical perspective going back to the Middle Ages that when the law of nations is in issue, not only is there no presumption against extraterritoriality, but jurisdiction over causes of action arising abroad is in many cases required. More specifically, we argue that Congress affirmatively conferred universal jurisdiction in the Alien Tort Statute ["ATS"] under the law of nations, and that to refuse such jurisdiction in cases of denial of justice would be contrary to longstanding principles of the law of nations. In short, limiting the ATS to claims arising in U.S. territory would contravene both the statute's clear indication of universal jurisdiction and the *Charming Betsy* canon of construction that statutes should not be construed to violate the law of nations.[3]

ARGUMENT

I. The ATS Affirmatively Confers Universal Jurisdiction

No presumption against extraterritoriality applies to the ATS. The statute clearly indicates universal jurisdiction by expressly incorporating the law of nations, which contains both substantive and

[2] Order in Pending Case, *Kiobel, Esther, et al. v. Royal Dutch Petroleum, et al.,* No. 10-1491 (U.S. Mar. 5, 2012).

[3] *Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804).

jurisdictional components.[4] 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. 16 U.S. (3 Wheat.) 610, 632-33 (1818). 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 universal jurisdiction by expressly granting jurisdiction over "piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14. 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 that rule. The ATS similarly expressly confers jurisdiction over torts "in violation of the law of nations," 28 U.S.C. § 1350, and similarly should be understood to authorize application of international substantive and jurisdictional components of that law.

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[4] Every rule of international law down through the 19th Century was a combination of substantive and jurisdictional components for the simple reason that there were hardly any international courts; only national courts were consistently available to apply international 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 would be inappropriate for this Court to read that "affirmative indication" of jurisdiction out of the ATS today. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2883 (2010). Indeed, it would be especially inappropriate since 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 as applied to the early piracy statute.

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 first necessary to understand universal jurisdiction. The international legal principle existed at the time Congress enacted the ATS, it exists under the "present-day law of nations," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), and it was recognized by this Court's decision in *Sosa*, *see id*. at 732. 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. This is indeed one of the principle's defining characteristics: When

states exercise universal jurisdiction, they do not apply solely national law to activity beyond their borders but an international law that already applied to the activity when and where it occurred.

This Court made the point clearly 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.

18 U.S. (5 Wheat.) 153, 161-62 (1820). 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.

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[ ] It is against all, and punished by all"). Similarly, Blackstone declared piracy "an offence against the universal law of society; a pirate being . . . *hostis humani generis*." 5 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (1769); *see also id*. ("[B]y declaring war against all mankind, all mankind must declare war against him."). 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 national law extraterritorially to foreign conduct but rather acts as a decentralized enforcer of the law of nations that already applied to the conduct when and where it occurred.

Universal jurisdiction works the same way today[5] and gives rise to ATS liability under *Sosa*'s methodology.

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[5] 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, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, arts. 5.2, 7.1, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, arts. 5, 7, 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

(Continued on following page)

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." 542 U.S. at 732. As discussed, *Smith*'s definition of piracy under the law of nations included both a substantive and a jurisdictional component:

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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, 138-39 (2d Cir. 2010); *see also North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 41 (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." 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.

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." 18 U.S. (5 Wheat.) at 161-62. 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 enemy of all mankind." 542 U.S. at 732. 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. 542 U.S. at 732. 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 limits the application of that law.

B. The ATS Embodies Universal Jurisdiction

This Court recently reaffirmed that a presumption against extraterritoriality applies to U.S. statutes. *Morrison*, 130 S. Ct. at 2877 ("When a statute gives no clear indication of an extraterritorial application, it has none."). The presumption is not a limitation on sovereignty but a canon of construction designed to effectuate legislative intent. *Id.* As this

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." 16 U.S. (3 Wheat.) 610, 631-32 (1818). When "examin[ing] the law," *id*., "[a]ssuredly context can be consulted as well." *Morrision*, 130 S. Ct. at 2883. 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." 16 U.S. (3 Wheat.) 610, 626 (1818). The Court held that the statute did not reach such acts committed by foreigners against foreigners on a foreign-flag ship. *Id*. at 631. Here it should be stressed – especially given this Court's framing of the issue in the present case for re-argument – that piracy on another nation's ship constituted a "violation[ ] of the law of nations occurring within the territory of a sovereign other than the United States," Order in Pending Case, *Kiobel, Esther, et al. v. Royal Dutch Petroleum, et al.,* No. 10-1491 (U.S. Mar. 5, 2012), since 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." *Wilson v. McNamee*, 102 U.S. 572, 574 (1880).[6]

To be sure, 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." *Palmer*, 16 U.S. (3 Wheat.) at 631. 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.

For the 1790 act prohibited not just "robbery . . . upon the high seas" – which constituted piracy under the law of nations, *Smith*, 18 U.S. (Wheat.) at 161-62 – but also purely municipal offenses like "run[ing] away" with a ship or merchandise or "lay[ing] violent hands upon [a] commander." *Palmer*, 16 U.S. (Wheat.) at 626-27. These latter offenses did not constitute piracy under the law of nations but were

[6] *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).

instead referred to as "piracy . . . by statute." BLACKSTONE, COMMENTARIES at 72; *see also* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1061-75 (2011) (addressing the difference between piracy under the law of nations and piracy by statute). 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. *Id*.

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 violent hands up, on 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.

Palmer, 16 U.S. (Wheat.) at 632-33.[7] 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. *Id*. 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].").

Yet according to Congress – which presumably knew its own intent – the Court got it wrong. *Palmer* was "roundly criticized by contemporaries" for limiting the scope of the 1790 statute and stunting the

[7] 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. 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.

United States's ability to prosecute piracy under the law of nations.[8] 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." J. Q. Adams, diary entry for May 11, 1819, *in* 4 THE MEMOIRS OF JOHN QUINCY ADAMS 363 (C. Adams ed., 1874-77).

In direct response to *Palmer*, Congress passed a new piracy statute the very next year to mend the hole *Palmer* had hewn and affirmatively create universal jurisdiction over piracy against the law of nations.[9] 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*." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14 (emphasis added).

In short, to overrule *Palmer* and affirmatively indicate universal jurisdiction, Congress expressly

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

[9] *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 158 (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]. . . .").

invoked the definition of piracy under "the law of nations." *Id*. 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. . . ." Act of Sept. 24, 1789, ch. 20 § 9, 1 Stat. 77. It would be passing strange for this Court to find 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.

Indeed, 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. The presumption aims "to protect against unintended clashes between our laws and those of other nations which could result in international discord," *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991), and to heed the presumption that when Congress legislates, it "is primarily concerned with domestic conditions." *Id*. Although the ATS is a primarily jurisdictional statute, *Sosa*, 542 U.S. at 712, the presumption could in principle apply if courts were to use purely domestic U.S. common law principles as rules of decision. In that situation, it would be courts, not Congress, crafting "our laws." Yet those laws could still

"clash[ ]" with foreign laws inside foreign territory. *Aramco*, 449 U.S. at 248.

But when U.S. courts apply the law of nations, the potential for true conflicts of laws largely disappears. Unlike, for example, the Securities Exchange Act at issue in *Morrison*, or the Sherman Antitrust Act at issue in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) – both of which involved projecting purely U.S. domestic laws into foreign territory – the same law of nations applies at home and abroad. Concerns about extraterritorial applications of U.S. law conflicting with foreign law inside foreign territory thus largely vanish since U.S. law authorizes application of an international law already operative inside the foreign territory.[10] And

[10] 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." 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.

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. *Morrison* explained that courts could consider "context" in determining the geographic scope of statutes. 130 S. Ct. at 2883. Here the context is that the statute authorizes application of international, not domestic, law. In that connection, the relevant canon of construction should be *Charming Betsy*, under which courts construe ambiguous statutes in conformity with international law, *see Murray v. The Schooner Charming Betsy (The Charming Betsy)*, 6 U.S. (2 Cranch) 64, 118 (1804), and which would allow and sometimes even encourage U.S. jurisdiction, even where there is no U.S. connection to the violation of the law of nations.

In sum, when Congress authorizes application of the law of nations, it should be presumed to authorize application of *all* of the law of nations, including the relevant law of jurisdiction. As the next two Parts explain, the law of nations permits universal jurisdiction in civil suits. In fact, historical authorities from the Middle Ages through the 19th Century suggest that 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.

II. The Law of Nations Imposes a Duty to Provide Foreigners Access to Justice for Claims Arising Anywhere

In the 20th and 21st Centuries there has been a superfluity of sensitivity regarding territorial sovereignty. But from the Middle Ages through the 19th Century, the consideration that dwarfed all others was the avoidance of war. Armed hostilities were unrestrained by rules; civilian noncombatants were not spared if they were near the war zones; the fighting was savage and cruel. Brigands roamed the countryside.[11] The basic rules of international law were respected because their observance tended to reduce friction that might lead to unwanted war. Territorial sovereignty (the term "sovereignty" was not used much) could be compromised by incursions like capitulatory regimes, which today we would find almost inconceivable.[12] Yet there was no rule of customary international law prohibiting recourse to war; such a rule did not arise until 1928.[13] The only rule

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[11] *See* Barbara Tuchman, A DISTANT MIRROR (1978).

[12] One of the last capitulatory regimes, that of the United States in Morocco, came to an end in the 1950s.

[13] Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

about war was that unjust wars were prohibited.[14] But this rule had no practical effect since every party to a war claimed that justice was on their side. Yet the concept of justice had a very strong role to play in avoiding war and establishing national courts.

A. The Law of Nations Historically Required Access to Justice[15]

For clarity, the discussion that follows uses generic identifiers:

A, B, C, D = independent states
B = state within which the tort takes place
J = national of A and plaintiff
K = national of B

In the Middle Ages when trade between European nations and the Far East became a huge source of new wealth, and caravans of 10,000 camels were not uncommon, armed gangs of thieves and brigands would strike quickly against part of the caravan,

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[14] JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (2000).

[15] Among the many books and articles consulted for this historical review, the following are the most salient: ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW (4th ed. 1960); EMMERICH DE VATTEL, THE LAW OF NATIONS (Joseph Chitty ed., Philadelphia, T. & J. W. Johnson 1853) (1758).

gather loot, and run away. Suppose an attack took place in B as J's caravan passed through to its home in A. The traders who with J suffered property losses and in many cases personal injuries, appealed to the king of A to order an armed expedition against B to recover the worth of the stolen property. The king, terrified of starting a war, refused. J and his fellow merchants resorted to self-help. They hired mercenaries and formed a mini-army that entered B's territory and killed the people of the nearest cities and towns. They collected money and valuables until J decided that the loot was sufficient to repay his losses and also pay the salaries of the mercenaries. They returned to A, having completed their reprisal against B.

Although theoretically sound, reprisals in practice were subject to many abuses: for example, the mercenaries got greedy and turned to all-out aggression against B; or the mercenaries' motives were misinterpreted leading to B's initiation of a full-fledged war. The practical problems were solved by one of the most ingenious devices in the history of international relations: the unilateral issuance of letters of marque and reprisal. Let us go back to the king's refusal to use his armies to invade B. Instead of remitting J to self-help, the king issues to J a letter of marque if the reprisal is going to involve vessels in and around the Mediterranean Sea, or a letter of

reprisal if the hostilities will be land-based.[16] A typical Letter of Reprisal authorized the trader (J, in our example) to mount an expedition to invade the host country (B, in our example) and to engage in forcible reprisals as described and sworn to by J. The Letter would recite that the trader had tried to petition the king of B for restitution, that his property had been unjustly taken from him by nationals of B within B, that J was justified by the king of A in mounting a limited-purpose expeditionary force. The Letter also provided that the target of the expedition was strictly confined to named towns and villages; the maximum monetary value of the property the trader could take (to cover his losses plus the costs of the expedition) was specified; an assurance was given that once the trader achieved his goal, the expeditionary force would not engage in self-serving acts of violence but rather would depart; and a time limit was specified during which the Letter of Reprisal remained valid. If any of these conditions were violated by J, then the king of B had the right to send in his armies to fight J and his mercenaries. Additional clauses, express or implied in various letters, stated the general understanding that if host country citizens were killed defending their property, it was an inevitable by-product of the reprisal and not its purpose. In sum, the Letter of Reprisal served to require that the

[16] The United States Constitution provides that Congress shall have Power to "grant Letters of Marque and Reprisal." U.S. Const. art. I, sec. 8, cl. 11.

reprisal be proportional to the injury the trader suffered, thus reducing the risk of runaway tit-for-tat sanctioning.

The conditions specified in a letter of reprisal could have been violated by J and his mercenaries when they were in the territory of B, but then, when they wanted to go home to A, the king of A could be waiting to arrest them for transgressing the terms of the reprisal. Thus the terms of the reprisal were efficiently enforced even without the participation of the king of B. Although the act of reprisal might have looked like a war, it was the opposite: it helped maintain the peace. Evidence of this remarkable success of the reprisal mechanism is found in the references to reprisals in treaties of peace. Those treaties would be the last place to find approval of reprisals if the reprisals were viewed as prolongations of war. For example, the Treaty of Ryswick provided:

> The ordinary course of Justice shall be free and open on both sides, and the Subjects both of the one and the other Dominion may pursue their Rights, Suits and Pretensions, according to the Laws and Statutes of each Country; and then without any Distinction obtain all the Satisfaction that is justly due to them;[17]

[17] Treaty of Ryswick, Between France and the United Provinces, Sept. 20, 1697, Art. 12.

And the Treaty of Utrecht contained this provision:

> That the ordinary Distribution of Justice be restored and open again thro' the Kingdoms and Dominions of each of their Royal Majestys; so that it may be free for all the Subjects on both sides to prosecute and obtain their Rights, Pretensions and Actions; according to the Laws, Constitutions, and Statutes of each Kingdom: and especially, if there be Complaints concerning any Injurys or Grievances which have been done contrary to the Tenor of the Treatys, either in time of Peace, or at the beginning of the War lately ended, care shall be taken that the Damages be forthwith made good, according to the Rules of Justice.[18]

The biggest flaw, or hole, in the system of reprisals was not in how they were carried out, but in how they were procured. A trader might misrepresent to his home-state king that his caravan was attacked and suffered significant losses in property. The king might have no way of checking whether the trader was telling the truth. This impasse was solved by the rise of two of the most significant and enduring rules of international law: (1) the rule that a state's courts

[18] Treaty of Utrecht, Between Great Britain, France, Ireland, and Spain, July 13, 1713, Art. VII.

must be open to foreigners on a fair and nondiscriminatory basis, and (2) the rule known as denial of justice.

1. Primary Function of Courts

The most fundamental reason for a state to establish courts is to prevent parties to controversies from resorting to self-help or taking private revenge.[19] Over the long term this worked so long as the courts were perceived as unbiased, uncorrupted, and acting according to fair rules of procedure. Since there would always be a number of plaintiffs who were aliens, and because prior to the 20th Century there were no international courts, a rule of customary international law developed early to the effect that a nation's courts must be open to aliens on a procedurally fair and uncorrupted basis.[20]

In cases where both parties were nationals, there was little that a losing party could do about an unfair judgment. But if the losing party was a foreigner, then that person might go back to his home state and persuade the king to take military action against the

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[19] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 86 HARV. L. REV. 1089 (1972).

[20] The U.S. Constitution embodies this rule of customary international law in Article III, Section 2, which provides that judicial power shall extend to all cases "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. Const. art. III, sec. 2.

host state.[21] Customary international law quickly developed a supplement to the rule requiring national courts to be open fairly to aliens. This additional rule established the important requirement that whatever the procedures of national courts might be, there should be no procedural discrimination against aliens.[22] Aliens should not be treated below the "national standard." If nevertheless there was discrimination against aliens, then the rapidly developing rule of "denial of justice" entered the picture.

2. The Rule of Denial of Justice

Emmerich de Vattel – whom the Framers of the Constitution relied upon as the authoritative text on the law of nations – defined "denial of justice" as follows:

> (1) A refusal to hear the complaints of a [foreign] State or of its subjects or to allow the subjects to assert their rights before the ordinary tribunals.

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[21] This sounds strange today, but in the climate of opinion in the Middle Ages, states were small and had limited military power, and foreign plaintiffs might be traders whose business was vitally important to the economy of host states and home states.

[22] The rule did not work in reverse. Nationals that were party to lawsuits in their own state could not demand higher procedural standards that were accorded to aliens. Compare the (misguided) perception voiced by some commentators today that the ATS treats aliens better than citizens.

> (2) By pretended delays, for which no good reason can be given; delays equivalent to a refusal or even more injurious than one.
>
> (3) By a decision manifestly unjust and one-sided. But the injustice must be evident and unmistakable.[23]

It was with the rapid growth of the practice of denial of justice that kings found a solution to the initial corroboration necessary before taking a trader's word for it that he had been robbed in another state and wanted a Letter of Reprisal. In the space of less than a hundred years, kings had made a denial of justice into a condition precedent to the issuance of letters of marque and reprisal. The flaw in the system was repaired. Henceforth, an application by an aggrieved national for a Letter of Reprisal had to be supported by papers showing a denial of justice. Thus if trader J is injured and robbed while taking his caravan through B, he would first have to sue the government of B before J could mount a reprisal

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[23] VATTEL, THE LAW OF NATIONS, Bk. II, Ch. XVIII, § 350. As stated by the Harvard Research Draft of 1929: "A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. Article 9, *Harvard Research Draft*, 23 AM. J. INT'L L. 173 (Spec. Suppl. 1929).

mission against B. If the lawsuit is successful, J's claim would be deemed satisfied. If unsuccessful, J would have to prove that the lawsuit violated one of the three Vattelian criteria for denial of justice.

Using the judicial decision as a condition precedent gave new powers of authority to the judiciary. First, there was no need for a court to enforce a judgment when the judgment itself had the power either of triggering or of suppressing a potential reprisal. Second, the judicial procedures became open to sharp scrutiny; it was no longer easy for judges to vote their biases against foreign parties. (Even so, the judges themselves might be biased. A strong impetus for the ATS was the realization that Europeans did not want to prosecute U.S. tortfeasors in U.S. state courts; the ATS provided a federal (and ostensibly fairer) forum for alien plaintiffs in the United States.) Third and most important is the fact that two torts, not just one, are involved in cases of potential denial of justice. Let us call the first tort the "underlying tort," and the second one the "derivative tort." Suppose J, a trader carrying merchandise, is assaulted and robbed by K. Although the parties are from different states, international law never took cognizance of ordinary torts such as these. J would typically sue K in an ordinary court in whatever country J found K. But if J did not receive justice in the court he chose (injustice has to go farther than merely losing the case), then a second, derivative tort arises. It is the tort perpetrated by the judicial system of the country where J is suing. The evidence of this judicial tort is

defined by the customary law of nations. Since the criteria of the derivative tort are the same everywhere, J could file suit in any state's court where he could find and serve K.

J's choice of venue is salient in respect of the question addressed by this *Amicus* Brief. Suppose, first, that J brings suit in his home state A. J's evidentiary showing would be tainted, perhaps unfairly, by the fact that J is choosing the home court advantage. Suppose, second, that J sues K and B in B. Since the derivative tort occurred in B (our original definition), J would suspect B of being unable to deliver an unbiased result through its court system. Suppose, third, that J sues B in C for the derivative tort. The courts of C would have to take the case (rule of customary international law). J may prefer the courts of C because of C's neutral position, and also if B has assets in C that J could attach.[24] (C represents the United States in the present Question Presented.)

The importance to the international legal system of having judicial resolutions of all cases and controversies (lest they escalate into wars) is thus proved by the considerations involved in the triangular set of case ▶denial of justice ▶letter of reprisal. J, the aggrieved party, had his choice of national courts. All the courts would be applying the same law, namely, the international law of derivative torts.

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[24] B's public assets in C, such as B's embassy building, were, according to Vattel, not attachable.

III. The Law of Nations Contemplates Universal Jurisdiction in Civil Suits

The duty to provide access to justice endured through the 19th Century and supports universal jurisdiction in civil suits between foreigners under the ATS. As this Court acknowledged in *Sosa*,[25] the law of nations traditionally included both public and private international law[26] and linked torts and crimes. *See Sosa*, 542 U.S. at 723 (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. LAW REV. 59, 59 (1996)

[25] 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.").

[26] *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 § 4 (Little, Brown and Co., 5th ed. 1857) (describing "the importance of . . . international principles in matters of mere private right and duty"); *id*. at § 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. . . ."); *id*. at § 30 (including private international law as part "of the acknowledged law of nations").

("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).

Then, as now, transitory torts can be brought in U.S. courts. In fact, as the previous Part above and the writings of Joseph Story quoted below explain, 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. As to the ATS in particular, under longstanding principles of public and private international 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 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.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 542 (Little, Brown and Co., 5th ed. 1857) (emphasis added). This has been so throughout U.S. history. *See Filártiga,* 630 F.2d at 885 (collecting cases). In other words, all that is needed is personal jurisdiction. *See id*; *see also* STORY, COMMENTARIES at § 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."). 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 fit to acknowledge in its own municipal code for natives and residents.

Id. at § 557 (emphasis added). According to Story, private international law was a matter of "international justice." *Id.* at § 3; *see also id*. at § 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."). 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 was a matter of international justice. *Id*. at §§ 542, 547.

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 law applies to foreign violations of the law of nations. As Part I of this Brief explained, when courts exercise universal jurisdiction they do not apply national law but 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. 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*.

Id. at § 556; *see also, e.g.*, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 34, 41 (1961) ("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.") (Desmond, J.). To be sure, "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 domicile of the parties, the origin of the right, or the country of the act*." STORY, COMMENTARIES at § 558 (emphasis added). 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." *Id*. at § 557.

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." STORY, COMMENTARIES at § 571. 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. (1830), 109 Eng. Rep. 792 (K.B.); 1 B. & Ad. 284. 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. *Id*. The House of Lords flatly rejected this argument. *Id*. at 793. 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." *Id*. *See also* STORY, COMMENTARIES at § 571. The same should hold 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." *De la Vega v. Vianna,* (1830), 109 Eng. Rep. 792-93 (K.B.); 1 B. & Ad. 284; STORY, COMMENTARIES at § 571.

CONCLUSION

In conclusion, the ATS expressly invokes the law of nations, and that law authorizes and sometimes requires jurisdiction over causes of action arising

anywhere in the world. It would compromise the statute's text as well as ignore longstanding canons of construction to limit the ATS to claims arising in the United States.

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