No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Respondents are Royal Dutch Petroleum Company (whose successor is The Shell Petroleum N.V.), and the Shell Transport and Trading Company, p.l.c. (now known as The "Shell" Transport and Trading Company, Ltd.).

Petitioners list in their caption as a Respondent Shell Petroleum Development Company of Nigeria, Ltd. But that defendant was dismissed by the district court for lack of personal jurisdiction, *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, 2010 WL 2507025, at *1 (S.D.N.Y. June 21, 2010), and was not a party to the proceeding before the court of appeals.

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INTRODUCTION

Petitioners' complaint alleges that the Nigerian government, aided and abetted by an Anglo-Dutch company, subjected Nigerian citizens to human-rights violations on Nigerian soil. Few cases could be more remote from the circumstances that prompted the First Congress to enact the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"): namely, the prospect that international-law violations committed *on U.S. soil* might prompt international conflict and even war if left without a remedy in the nascent federal courts.

Nothing in the ATS's text, structure, or history contemplates extending it to a case like this one, and, to the contrary, two well-established canons of construction foreclose that extension.

First, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). This presumption recognizes that the application of U.S. law to conduct on foreign soil "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004), and that "Congress … alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain," *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

The ATS nowhere indicates Congress's intent to overcome this presumption. Unlike the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) ("TVPA"), codified at 28 U.S.C. § 1350 note, the ATS does not provide for application to conduct on foreign soil. Nor is such application supported by the historical context surrounding the ATS's enactment, which overwhelmingly involved episodes on U.S. soil. The lone possible exception—activity related to Sierra Leone discussed in a 1795 opinion by Attorney General William Bradford—cannot overcome the presumption because, *inter alia*, that opinion is at best "amenable to different interpretations" (Supplemental Brief For The United States As Amicus Curiae In Partial Support Of Affirmance ("U.S. Supp. Br.") 8 n.1 (filed June 13, 2012)).

Several lower courts since 1980 have disregarded the presumption against extraterritoriality, permitting ATS suits to proceed even though they allege violations arising from conduct on foreign soil. See *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (Paraguay); see also *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 74-75 & n.4 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (Indonesia); *Flomo* v. *Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1015 (7th Cir. 2011) (Liberia); *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 799 (9th Cir. 2011) (*en banc*) (Kleinfeld, J., dissenting) (Papua New Guinea), petition for cert. pending (No. 11-649) (Nov. 23, 2011). This Court should now hold, however, that ATS suits alleging conduct that takes place on and causes injury on foreign soil are foreclosed. Such suits spawn the very international friction that the presumption seeks to avoid absent Congress's affirmative approval. The judgment below thus should be affirmed based on the presumption against extraterritoriality, obviating the need to reach other grounds for affirmance.

In affirming on that ground, this Court should decline to adopt the qualification the United States now urges (U.S. Supp. Br. 21) in a departure from its previous position.[1] The United States would carve out from the ATS and federal common law only an action (like the one here) against a *non-U.S.* defendant alleged to have aided and abetted a foreign sovereign's actions in that sovereign's own territory, leaving all other ATS cases involving extraterritorial

[1] See, *e.g.*, Brief For The United States As Amicus Curiae In Support Of Petitioners 12, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919); see also U.S. Supp. Br. 21-22 n.11 (acknowledging change in position).

conduct to be resolved by the courts after receiving advice from the Departments of Justice and State (*id.* at 4, 21). That approach, however, misperceives the presumption's fundamental purpose to assure that *Congress* intended any extraterritorial application in the first place. Congress, no less than the courts and the Executive, should be involved in deciding whether ATS suits based on foreign conduct will disrespect foreign sovereignty, "expos[e] … U.S. officials and nationals to exercises of jurisdiction by foreign states" (*id.* at 1-2), and harm "the Nation's commercial interests" (*id.* at 2). Correctly interpreted, therefore, the presumption bars ATS suits alleging foreign conduct whether the defendant is a U.S. or foreign citizen. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 247 (1991) ("*Aramco*").

Second, apart from the presumption against extraterritoriality, this Court has long applied a presumption against construing federal law so as to violate international law. As the Brief Of The Governments Of The Kingdom Of The Netherlands And The United Kingdom Of Great Britain And Northern Ireland As *Amici Curiae* In Support Of Neither Party ("Neth.-U.K. Br.") (filed June 13, 2012) makes clear (at 16), application of the ATS and federal common law to foreign conduct involves an assertion of universal civil jurisdiction that clearly violates international law as to foreign defendants and raises concerns under international law as to U.S. defendants as well. This canon too therefore weighs against construing the ATS and federal common law to apply to conduct that takes place within a foreign sovereign's territory.

Should the Court not resolve this case based upon either of the foregoing presumptions, it should none-

theless affirm the judgment below based on the grounds set forth in Respondents' prior brief ("Resp. Br."): that the ATS and federal common law (1) do not extend to a *corporation*'s alleged commission of arbitrary arrest and detention, crimes against humanity, or torture (Resp. Br. 16-48); and (2) do not recognize *aiding and abetting* liability at all, and in any event in the absence of any allegation that the aider/abettor acted with purpose (*id.* at 49-53; see also U.S. Supp. Br. 21 n.10).

STATEMENT

Respondents respectfully refer to their prior Statement. As relevant to the question on reargument, that Statement described (Resp. Br. 4-6) the Nigerian government's formal objection to this suit, which complained that the suit would improperly assert "extra territorial jurisdiction of a United States court … for events which took place in Nigeria"; "jeopardize the on-going process initiated by the current government of Nigeria to reconcile with the Ogoni people in Nigeria"; "compromise the serious efforts of the Nigerian Government to guarantee the safety of foreign investments, including those of the United States"; and "gravely undermin[e] [Nigeria's] sovereignty and plac[e] under strain the cordial relations that exist with the Government of the United States of America." J.A. 129-31.

Other nations have made similar objections when ATS suits were brought with respect to conduct occurring within their borders. See generally Brief Of *Amici Curiae* BP America *et al.* In Support Of Respondents App. 1a-6a (filed Feb. 3, 2012) (collecting submissions by foreign governments regarding ATS cases). The Indonesian government, for example, protested that, "as a matter of principle, we

cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution … for operations taking place in Indonesia." Diplomatic Note No. 145/VI/05/05/DN from the Embassy of the Republic of Indonesia to the U.S. Department of State at 1 (June 15, 2005) (emphasis and quotation marks removed) (filed in *Doe VIII* v. *Exxon Mobil Corp.*, No. 01 Civ. 1357 (D.D.C. July 18, 2005)); see also, *e.g.*, Diplomatic Note VRE-CEC No. 12785 at 2 (Mar. 12, 2004) (Colombia's objection that "any decision in [*Mujica* v. *Occidental Petroleum Corp.*, No. 03 Civ. 2860 (C.D. Cal.)] may affect the relations between Colombia and the US") (filed Dec. 30, 2004); Declaration by Penuell Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa at 6 (July 11, 2003) ("Maduna Decl.") ("[I]t is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed in the United States of America ….") (filed in *In re South African Apartheid Litig.*, No. 02 MDL 1499 (S.D.N.Y. July 23, 2003)).

SUMMARY OF ARGUMENT

I

The presumption against extraterritorial application of U.S. law is triggered here because Petitioners' complaint alleges injury suffered in Nigeria and caused by conduct in Nigeria. Petitioners' efforts to avoid the presumption are unpersuasive. *First*, Petitioners argue that a cause of action under the ATS and federal common law does not project U.S. law extraterritorially because such a cause suppos-

edly rests entirely on the law of nations, which applies everywhere. But, as *Sosa* recognized, in cases under ATS jurisdiction, courts apply a civil cause of action under *U.S.* federal common law to remedy a violation of an international-law norm. *Second*, Petitioners argue that the transitory-tort doctrine was well-known at the time of the ATS's enactment and allowed claims to be brought in the United States based upon conduct abroad. But the analogy is inapposite because, in transitory-tort cases, the claim is supplied by the law of the place of the conduct and merely adjudicated in the forum; it is not supplied by the forum as in ATS cases. *Third*, Petitioners contend that the presumption does not apply to a jurisdictional statute. But this ignores that federal common law, as construed by *Sosa*, allows federal courts to recognize certain claims within ATS jurisdiction.

The presumption is not overcome by the ATS's text. Unlike other federal statutes, the ATS does not refer to conduct "outside the United States" or contain similarly explicit language. Another clause of the Judiciary Act of 1789 that contains a geographic limitation is not to the contrary because, *inter alia*, that clause speaks only to district court venue, not jurisdiction.

The ATS's historical context likewise fails to overcome the presumption. Blackstone's three categories of law-of-nations violations occurred either in the forum nation or on the high seas (not on foreign soil), and the U.S. cases that preceded and closely followed the ATS's enactment similarly involved conduct on U.S. soil or the high seas. The lone potential counterexample, the Bradford opinion's discussion of conduct related to Sierra Leone, is at most ambiguous and in

any event represents the view of a single Attorney General six years after the ATS's enactment, and thus is insufficient to overcome the presumption. Finally, modern interpretations of the ATS, which rely on a purpose to promote human rights abroad, shed no light on whether the First Congress espoused that purpose and in any event do not represent a weighing by Congress of that purpose against the numerous countervailing concerns catalogued by the United States.

The United States, departing from its prior position, argues that the presumption should inform the decision here but should place outside the ATS's and federal common law's reach only one limited species of foreign conduct: namely, "the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a [non-U.S.] country that allegedly aided and abetted the foreign sovereign's conduct." U.S. Supp. Br. 21. The United States would leave all other categories of extraterritorial conduct (including conduct by U.S. defendants) to be addressed on a case-by-case basis by courts after receiving advice from the Departments of Justice and State. This approach should be rejected, for it would cut Congress out of the picture, thwarting the main function of the presumption in the first place.

II

Because the presumption against extraterritoriality requires construing the ATS and federal common law not to apply to conduct on foreign soil, this Court need not reach the separate presumption against construing U.S. law so as to violate international law. If reached, however, that presumption also applies here because the assertion of universal civil jurisdic-

tion over a "foreign-cubed" case like this one (*i.e.*, a case involving foreign conduct, foreign plaintiffs, and foreign defendants) clearly violates international law. Such a case involves no traditional bases for U.S. jurisdiction, and as recent decisions from such tribunals as the United Kingdom's House of Lords and the International Court of Justice explain, the less traditional basis of universal jurisdiction is recognized only in the criminal, not the civil context. Petitioners' case citations do not involve universal civil jurisdiction, and in any event demonstrate at most that the nations of the world disagree on the issue.

Application of the ATS and federal common law to a "foreign-squared" case (*i.e.*, a case involving foreign conduct, foreign plaintiffs, but a U.S. defendant) also raises concerns under international law. The nationality principle (*i.e*., that a nation may apply its laws to its own nationals) is only an *exceptional* basis for the application of the forum nation's laws to conduct on foreign soil, and is subject to a test of reasonableness that will not be satisfied in the typical "foreign-squared" case. Construing the ATS and federal common law not to apply to conduct on foreign soil regardless of the nationality of the defendant avoids this problem.

III

Neither of the foregoing presumptions is avoided by application of judicially-administered, case-specific doctrines for dismissal of ATS cases. Such doctrines do not answer whether Congress intended the ATS and federal common law to have extraterritorial application or to apply despite their violation of international law.

Similarly, policy debates regarding whether U.S. law *should* afford a civil cause of action regarding alleged human-rights violations abroad are appropriately directed to Congress, not the courts, under both the above presumptions. Modern Congresses have provided certain civil causes of action and criminal offenses for international-law violations committed abroad, but have done so in modest steps with specified safeguards. Congress should likewise be permitted to decide whether to extend an additional extraterritorial remedy through the ATS and federal common law, without bypass through judicial fiat.

ARGUMENT

The presumption against extraterritoriality applies here and is not overcome. This Court need not reach the separate presumption against construing federal law to violate international law, but if reached, that presumption too applies and is not overcome.

Petitioners argue at the threshold (Petitioners' Supplemental Opening Brief ("Pet. Supp. Br.") 12-18) that *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), already resolved the question on reargument. That is incorrect, for *Sosa* did not do so. See *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (viewing as open for consideration whether to "limi[t] the reach" of the ATS); *Doe VIII*, 654 F.3d at 20 ("The issue of extraterritoriality, although briefed, was not decided in *Sosa* ...."') (footnote omitted); U.S. Supp. Br. 12 ("Nor do we believe that *Sosa* itself resolves the question ...."). Any silent assumption by *Sosa* that a cause of action might be available as to extraterritorial conduct (there, in Mexico, see 542 U.S. at 735), and any passing citation of lower-court cases that happened to involve extra-

territorial conduct, see *id.* at 732, do not constitute precedent. See, *e.g.*, *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).[2]

I. BECAUSE U.S. LAW IS PRESUMED NOT TO APPLY EXTRATERRITORIALLY, THE ATS AND FEDERAL COMMON LAW SHOULD BE CONSTRUED NOT TO APPLY TO CONDUCT ON FOREIGN SOIL

"It is a 'longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 130 S. Ct. at 2877 (quoting *Aramco*, 499 U.S. at 248 (in turn quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949))); see also, *e.g.*, *Microsoft Corp.* v. *AT & T Corp.*, 550 U.S. 437, 454 (2007); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818).

That presumption requires that Congress rather than the courts address any extraterritorial application of U.S. law in the first instance:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the pos-

[2] That lower courts have applied the ATS and federal common law extraterritorially (albeit in several instances over dissent) does not preclude this Court from reaching a different conclusion. See *Morrison*, 130 S. Ct. at 2878 (noting that lower courts had applied Securities Exchange Act § 10(b) extraterritorially); *id.* at 2881 (rejecting those decisions).

> sibilities of international discord are so evident and retaliative action so certain.

Benz, 353 U.S. at 147; see also, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). The field is "delicate" because application of U.S. law to conduct on foreign soil "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165; see also, *e.g.*, *Aramco*, 499 U.S. at 248 (presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").[3] Because "the presumption [against extraterritoriality] has a foundation broader than the desire to avoid conflict with the laws of other nations," *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993), it is not limited to situations where "there is a risk of conflict between the American statute and a foreign law," *Morrison*, 130 S. Ct. at 2877-78.

The presumption is triggered by the application of the ATS and federal common law to conduct on foreign soil, as opposed to conduct on U.S. soil or on the high seas. The presumption is not overcome by

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[3] These concerns may be exacerbated where, as here, the suit involves passing judgment on conduct by the foreign government itself, see, *e.g.*, *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) ("No one [nation] has a right to sit in judgment generally upon the actions of another…."), but that fact pattern is not a prerequisite to applying the presumption, which rests on the broader policies discussed in text. Of the many cases elaborating the presumption, only *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), appears to have involved judging a foreign government's conduct, see *id.* at 357-58.

the text or historical context of the ATS. Accordingly, the ATS and federal common law should not be construed to apply to alleged violations of the law of nations occurring within the territory of a foreign sovereign.

A. The Presumption Against Extraterritorial Application Of U.S. Law Applies Here

1. The Alleged Conduct Occurred Entirely In Nigeria

There is no dispute that the conduct alleged by Petitioners' complaint occurred entirely in Nigeria. See, *e.g.*, J.A. 42 (Petitioners resided in, and were subjected to misconduct that occurred in, "Ogoniland, Rivers State, Nigeria during any period between January 4, 1993 and May 28, 1999"); Pet. App. A22 (similar). Petitioners did allege U.S. conduct to establish personal jurisdiction, J.A. 55, but that conduct pertained to general personal jurisdiction, not to the substance of Petitioners' suit, see *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000) (observing in related case that "plaintiffs' claim is not related to defendants' contacts with New York").

Even if the U.S. conduct did relate to the substance of Petitioners' suit, the presumption against extraterritoriality would still apply, for the "focus," *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255), of the ATS and federal common law is on the last conduct that caused injury, which here occurred in Nigeria. See *Sosa*, 542 U.S. at 705 n.3 (in discussing Federal Tort Claims Act, explaining that, "'[s]ince a tort is the product of wrongful conduct and of resulting injury and since the injury follows the

conduct, the state of the 'last event' is the state where the injury occurred'") (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 412 (1969)); *Morrison*, 130 S. Ct. at 2883 (applying presumption because securities at issue were listed on foreign exchanges and transacted abroad, even though certain "deceptive conduct" occurred in the United States); *Allarcom Pay Television, Ltd.* v. *Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995) ("[F]or U.S. copyright law to apply, at least one alleged infringement must be completed entirely within the United States, and … mere authorization of extraterritorial infringement [is] not a completed act of infringement in the United States."); see generally *Morrison*, 130 S. Ct. at 2884 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.") (internal citations omitted).

2. Extending The ATS And Federal Common Law To Suits Alleging Foreign Conduct Projects U.S. Law Extraterritorially

Petitioners argue that, notwithstanding the Nigerian locus of the conduct, affording a federal-common-law claim within ATS jurisdiction does not project U.S. law extraterritorially "because in ATS cases the federal courts are enforcing universally-recognized international standards of conduct, not attempting to impose standards of conduct prescribed by U.S. substantive law." Pet. Supp. Br. 35. That is incorrect. Nations have a "choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations." 1 OPPENHEIM'S INTERNATIONAL LAW § 21, at

83 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). Under the ATS as interpreted in *Sosa*, the United States' chosen means is a civil cause of action under federal common law. Specifically, *Sosa* extended the understanding of the 1789 Congress—"that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," *Sosa*, 542 U.S. at 724—to incorporate post-1789 developments by allowing federal courts to recognize a federal-common-law cause of action within ATS jurisdiction if such a cause satisfies *Sosa*'s stringent standard, see *id.* at 732-33. That cause of action, while it looks in part to the law of nations for its substantive content, is an application of *U.S.* law. As the United States explains, "a private right of action fashioned by a court exercising jurisdiction under the ATS constitutes application of the substantive and remedial *law of the United States, under federal common law*, to the conduct in question—albeit based on an alleged violation of an international law norm." U.S. Supp. Br. 2 (emphasis added).[4]

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[4] In the initial briefing, Petitioners recognized as much. See Pet. Br. 24-25 ("the *Sosa* Court held that the tort cause of action recognized under the ATS derives from federal common law, not international law"). Petitioners erred only in concluding that whether a corporation may be sued under the ATS for violation of a given international-law norm is a question of remedy governed by U.S. law; to the contrary, as explained at Resp. Br. 17-24, that is a substantive question of "who may be liable" governed in the first instance by international law. If, however, Petitioners were correct that U.S. law governed whether a corporation is an eligible ATS defendant for a given international-law violation, see Pet. Br. 21 ("'by 1789 corporate liability in tort was an accepted principle of tort law in the United States'") (quoting *Doe VIII*, 654 F.3d at 47-48), that would only under-

Sosa confirms the incorrectness of Petitioners' assertion by prescribing two necessary steps before a court may recognize a federal-common-law cause of action within ATS jurisdiction: *first*, determining whether an international-law norm proscribes the alleged conduct (including by the perpetrator being sued) and, *second*, deciding whether U.S. federal common law *should* afford a cause of action given "the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33 (footnote omitted); see also *id.* at 738 n.30 (international-law inquiry raises only "the possibility of a private cause of action").[5] Thus, *Sosa* makes clear that extraterritorial application of the ATS and federal common law amounts to extraterritorial application of U.S. law.

That conclusion is further confirmed by the response of the nations to which the ATS has been so extended. Those nations have objected that such an application of U.S. law interferes with their own different remedial choices. South Africa, for example, explained that it had "enacted legislation … [that] deliberately avoided a 'victors' justice' approach to

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score that an ATS claim regarding extraterritorial conduct projects U.S. law abroad.

[5] See also *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (analyzing the ATS under Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987) ("RESTATEMENT"), which concerns "jurisdiction to prescribe"). A nation's "jurisdiction to prescribe" means its ability "to make its substantive laws applicable to particular persons and circumstances." RESTATEMENT, Part IV, Introductory Note. Such jurisdiction is distinct from "jurisdiction to adjudicate," *i.e.*, "the authority of a state to subject particular persons or things to its judicial process," *id.*, not necessarily under that state's substantive laws.

the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Maduna Decl. at 2; see also J.A. 130 (Nigeria's objection that the instant case "jeopardize[s] the on-going process initiated by the current government of Nigeria to reconcile with the Ogoni people in Nigeria"). These examples illustrate that, "even where nations agree about primary conduct, … they [may] disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 167; see also *Morrison*, 130 S. Ct. at 2885 ("[T]he regulation of other countries often differs from ours as to … what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.").

3. The Transitory-Tort Doctrine Is Inapposite

Petitioners' invocation (Pet. Supp. Br. 27-31) of transitory-tort cases likewise fails. In such cases, the cause of action is afforded by the law of the place of the conduct; the forum state does not append its own cause of action to another state's substantive norm. See, *e.g.*, *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479 (1912) ("[T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place."); *Slater* v. *Mexican Nat'l R.R. Co.*, 194 U.S. 120, 126 (1904) (similar).[6] A similar approach was employed in the

[6] See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 124 & cmt. a (forum nation's law determines only the "form" in which "a *proceeding on a foreign claim* shall be brought")

pre-ATS era. See, *e.g.*, *Mostyn* v. *Fabrigas*, 98 E.R. 1021, 1029 (1774) (cited at Pet. Supp. Br. 27-28) ("whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried").[7]

A federal-common-law action within ATS jurisdiction is different. As the United States correctly explains, whereas transitory-tort "cases would be heard, if at all, under the law of the foreign state[,] [t]his case involves the distinct question whether a cause of action should be recognized as a matter of federal common law …." U.S. Supp. Br. 18-19 n.7. And unlike transitory-tort cases, ATS cases trigger the presumption's underlying concern with respecting the sovereignty of foreign nations. See *supra*, at 16-17. While it is consistent with such sovereignty to apply the foreign nation's own cause of action (if one

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(emphasis added). Although some pre-Restatement cases arguably gave greater breadth to forum law in *contract* cases, see, *e.g.*, *De la Vega* v. *Vianna*, [1830] 109 Eng. Rep. 792 (K.B.), that approach was not uniformly adopted, see JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 571 n.4 (3d ed. 1846), and in any event was not followed in *tort* cases, see *Recent Cases, Conflict of Laws—Statutory Tort Committed in Foreign Country—Jurisdiction of Federal Court*, 14 Yale L.J. 51, 51-52 (1904) (comparing *De la Vega* with *Slater*, 194 U.S. 120).

[7] Professors Casto *et al.*, in asserting that "eighteenth century English courts adjudicat[ing] transitory torts … applied English common law without regard to where the tort took place" (Supplemental Brief Of *Amici Curiae* Professors Of Legal History William R. Casto *et al.* 13 (filed June 13, 2012)), ignore *Mostyn*'s statement regarding application of the law of the place of the conduct. See also MOFFATT HANCOCK, TORTS IN THE CONFLICT OF LAWS 6-7 (1942) (citing *Blad's Case*, 36 Eng. Rep. 991 (1673), and *Dutton* v. *Howell*, 1 Eng. Rep. 17 (1693), as endorsing the "doctrine[] that the defendant may 'justify' his actions under the law of the place of wrong").

exists), it offends such sovereignty to afford a cause of action, such as a federal-common-law claim within ATS jurisdiction, where that claim is unavailable under the law of the foreign nation or international law.

4. The Presumption Applies Even Though The ATS Is Jurisdictional

Petitioners finally contend that the presumption does not apply because the ATS is a "jurisdictional statut[e]." Pet. Supp. Br. 34; see also *Doe VIII*, 654 F.3d at 23 ("As a jurisdictional statute, [the ATS] would apply extraterritorially only if Congress were to establish U.S. district courts in foreign countries."). That contention, however, ignores that, as *Sosa* held, federal courts have authority *under federal common law* to recognize causes of action within ATS jurisdiction. See *supra*, at 15-16. Other jurisdictional provisions, such as 28 U.S.C. §§ 1331 and 1332 (cited at Pet. Supp. Br. 34), are not so accompanied by federal common-lawmaking authority, and are therefore inapposite.

Indeed, *Sosa* cites as one reason for exercising caution in federal common-lawmaking in the ATS context that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727. That observation confirms that the presumption applies in this sphere no less than it does to non-jurisdictional federal statutes like those addressed in *Morrison*, 130 S. Ct. at 2877, and *Aramco*, 499 U.S. at 249. If anything, the presumption applies "[*a*] *fortiori*" in the ATS context, for the courts making federal common law are less suited than Congress to making delicate foreign policy determinations. Brief For The United States As Amicus Curiae In Support Of Petitioners

12, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) ("U.S. *Ntsebeza* Br.").[8]

B. Petitioners Cannot Overcome The Presumption Here

To overcome the presumption, there must be a "clear indication of extraterritoriality," *Morrison*, 130 S. Ct. at 2883, in the "language [of] the [relevant Act]," *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285) (second alteration in original), or its "context," *Morrison*, 130 S. Ct. at 2883. Petitioners fail to sustain their burden of making such an "affirmative showing." *Aramco*, 499 U.S. at 250.

1. The ATS's Text Does Not Overcome The Presumption

The ATS contains no language akin to that in other federal statutes explicitly providing for application of U.S. law to conduct on foreign soil. See, *e.g.*, 18 U.S.C. § 2340A ("Torture") ("Whoever *outside the United States* commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years ...") (emphasis added); 18 U.S.C. § 2441 ("War crimes") ("Whoever, *whether inside or outside the United States*, commits a war crime ... shall be fined under this title or imprisoned for life or any term of years ...") (emphasis added). Similarly,

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[8] Because *Sosa* treated the jurisdictional and common-lawmaking inquiries as coextensive, see 542 U.S. at 732 (describing "criteria for accepting a cause of action subject to jurisdiction under § 1350"), the presumption means here that courts lack jurisdiction to apply the ATS extraterritorially, see Resp. Br. 12-15. In any event, the presumption surely applies to the "merits" aspect of suits within ATS jurisdiction under federal common law. See *Morrison*, 130 S. Ct. at 2877.

in perhaps the most instructive recent example, the TVPA, Congress expressly adverted to extraterritorial application. See TVPA § 2(a), (b) (defining defendant as an "individual who, under actual or apparent authority, or color of law, *of any foreign nation*," commits "torture" or "extrajudicial killing," and requiring a plaintiff to "exhaus[t] adequate and available remedies *in the place in which the conduct giving rise to the claim occurred*") (emphasis added).

The ATS, by contrast, contains no similar language overcoming the presumption: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In an effort to avoid the force of this congressional silence, Petitioners seek to draw a favorable inference (Pet. Supp. Br. 21-22 & n.14) from the fact that Congress imposed a geographic limitation in another clause of Section 9 of the Judiciary Act of 1789 while choosing not to do so in the ATS clause. Petitioners point specifically to the clause that provided jurisdiction to the district courts over "'all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas*.'" *Id.* at 22 n.14 (quoting Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77) (emphasis by Petitioners).

But that clause cannot support the inference that ATS jurisdiction is geographically unlimited. *First*, the clause was a bare grant of jurisdiction, unlike the ATS, which furnished jurisdiction but also (according to *Sosa*) is accompanied by the federal common-lawmaking power of the federal courts. Accordingly, any extraterritorial reach would have

been authorized not by that clause, but by the substantive criminal offenses defined by other federal statutes. See *Morrison*, 130 S. Ct. at 2877; *supra*, at 19-20 & n.8. *Second*, the geographic limitation in the clause went to *venue* of the *district courts*, not jurisdiction of all federal courts, as evident from Section 11, which granted the *circuit courts* jurisdiction over the same (and more) federal offenses without geographic limitation. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78-79 ("[T]he circuit courts … shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, … except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein."). *Third*, the geographic limitation in the ATS *is* textually supported by the words "violation of the law of nations," which, as shown in Point I.B.2, *infra*, Congress understood to address only conduct on U.S. soil or the high seas.

Turning to the ATS itself, Petitioners argue (Pet. Supp. Br. 22-23) that its seemingly broad language shows Congress's intent to apply it extraterritorially. Petitioners point to the phrases "all causes" in the original ATS and "any civil action" in the current codification. But this Court has "repeatedly held that even statutes that contain broad language," *Aramco*, 499 U.S. at 251, do not overcome the presumption, *ibid*. See also, *e.g.*, *id.* at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption."); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909) ("Words having universal scope … will be

taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch.").

Petitioners also contend that the word "alien" implies an extraterritorial reach for the ATS because "'alien' as used in the ATS includes non-citizens living abroad." Pet. Supp. Br. 23 (citing *Rasul* v. *Bush*, 542 U.S. 466, 484 (2004)). The aliens in *Rasul*, however, were not living "abroad," but in the U.S. naval base at Guantanamo Bay, which qualifies as "'the territorial jurisdiction' of the United States." 542 U.S. at 480 (quoting *Foley Bros.*, 336 U.S. at 285). That rendered the presumption inapposite to 28 U.S.C. § 2241, the principal provision addressed in *Rasul*, see 542 U.S. at 473-84. *Rasul*'s subsequent reference to "nonresident aliens," *id.* at 484-85, in an abbreviated discussion of the ATS, does not require the inference that such aliens' claims arose on foreign soil. In any event, *Rasul* did not address or reject the application of the presumption *to the ATS* and therefore is not precedent on the issue. See *Cooper Indus.*, 543 U.S. at 170.[9]

2. The ATS's Historical Context Does Not Overcome The Presumption

Sosa addressed in detail the First Congress's understanding of the term "violation of the law of nations." See 542 U.S. at 714-21, 724. Although *Sosa* did not focus on the location of such violations,

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[9] Petitioners' other textual arguments (Pet. Supp. Br. 23) are unavailing. Their invocation of "for a tort only" relies on the transitory-tort doctrine and thus fails for the reasons discussed *supra*, at 17-19, and their quotation of *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133 (1795), ignores that *Talbot* was a piracy case, see *id.* at 136-37.

the evidence discussed overwhelmingly involved conduct on U.S. soil. The only possible counter-example, the Bradford opinion, is, at best for Petitioners, "amenable to different interpretations" (U.S. Supp. Br. 8 n.1) and thus fails to overcome the presumption.

Blackstone. Blackstone's "principal offences against the law of nations," 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) ("BLACKSTONE"), are an appropriate starting point because they were likely the only "examples in [Congress's] mind," *Sosa*, 542 U.S. at 724, of a "tort … in violation of the law of nations," 28 U.S.C. § 1350. Blackstone clearly described the first two offenses, "[v]iolation of safe-conducts" and "[i]nfringement of the rights of ambassadors," 4 BLACKSTONE at 68, as occurring within the forum nation (in Blackstone's case, England). Blackstone described the former to include "acts of hostilities against such as are in amity, league, or truce with us, who are *here* under a general implied safe-conduct." *Ibid.* (emphasis added); see also *id.* at 69 ("foreign merchants should be entitled to safe-conduct and security *throughout the kingdom*") (emphasis added).[10] Similarly, as to the second offense, Blackstone understood the ambassadors whose rights were not to be infringed as persons resident in the forum nation.

[10] Blackstone also referred to "the sea," 4 BLACKSTONE at 69, as a possible location of this offense. "[T]he sea" likely meant English territorial waters rather than "the high seas," *id.* at 71, a term used in Blackstone's third offense (piracy). In any event, the high seas are distinct from the territory of a foreign sovereign. See *infra*, at 26.

1 BLACKSTONE at 253 (discussing the "state wherein [ambassadors] are appointed to reside").[11]

The third of Blackstone's categories, "piracy," occurred outside the forum nation, but not within the territory of a foreign sovereign.[12] Instead, it occurred

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[11] This, along with the lack of any contrary historical precedent, disposes of Petitioners' suggestion that the law of nations would have required the United States to afford a civil cause of action in a hypothetical variant of the Marbois affair where Marbois "had been assaulted in London [rather than Philadelphia] and his attacker had been found in the United States." Pet. Supp. Br. 26.

Vattel's reference to "[p]oisoners, assassins, and incendiaries by profession," 1 EMMERICH DE VATTEL, THE LAW OF NATIONS § 233 (Joseph Chitty ed., T. & J. W. Johnson 1852) (1758) ("VATTEL") (quoted at Pet. Supp. Br. 20-21), as exceptions to the general rule that "the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories," *ibid.*, appears at first blush broader than Blackstone's three categories of law-of-nations violations. But Vattel immediately used a "pirate" as an example, see *ibid.*, and, so narrowed, his approach is consistent with Blackstone's. Insofar as Vattel intended land-based offenses to come within the exception to the territoriality principle, he may have envisioned extradition of the wrongdoer to the law of the place of the conduct as a complementary (and preferred) remedy to a criminal or civil action in the forum nation. See 2 VATTEL § 76 ("Assassins, incendiaries, and robbers, are seized everywhere, at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice."). To that extent, his views are a questionable guide to the First Congress's intent, as Vattel considered extradition a duty of all nations under customary international law, *ibid.*, whereas extradition in the United States has been treaty-based since the founding, see *Holmes* v. *Jennison*, 39 U.S. 540, 548 (1840).

[12] *Sosa* did not affirmatively hold that piracy is within the ATS, instead noting only that "piracy may well have also been contemplated." 542 U.S. at 720.

"upon the high seas." 4 BLACKSTONE at 71; see also *id.* at 72 ("The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.") (footnote omitted). Petitioners mistakenly equate (Pet. Supp. Br. 35-36) the high seas with the territory of a foreign nation. The two are distinct in a way that aligns with the presumption's purpose to avoid "interfer[ing] with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. Whereas the territory of a foreign nation is plainly within that nation's sovereign authority, the "high seas" is a "regio[n] subject to no sovereign." *American Banana*, 213 U.S. at 355; see also *The Apollon*, 22 U.S. at 371 (the "ocean" is "the common highway of all nations"). Accordingly, a forum nation's adjudication of high-seas conduct runs little risk of interfering with the sovereignty of another nation. See *Doe VIII*, 654 F.3d at 79 (Kavanaugh, J., dissenting).[13]

But even if, as Petitioners assert (Pet. Supp. Br. 35), the presumption against extraterritoriality were

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[13] To be sure, some possibility of interference may still exist in the piracy context, for example where forum law is applied to a pirate who is a foreign national and attacks a foreign-flag vessel. See *Palmer*, 16 U.S. (3 Wheat.) at 632 (applying presumption and finding broadly worded federal piracy statute not to apply on such facts), superseded by Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510; *Sale*, 509 U.S. at 173-74 (applying presumption and finding certain federal immigration-law rights inapplicable to Haitians captured by Coast Guard on the high seas, which rights might conflict with Haiti-U.S. agreement to return such captured persons to Haiti). But the risk of interference is materially greater when forum law is applied to conduct on foreign soil.

framed as a "presumption against applying U.S. law to conduct outside U.S. soil," the ATS's application to the high seas would not render the presumption inapplicable to conduct within the territory of a foreign sovereign. To the contrary, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 130 S. Ct. at 2883 (citing *Microsoft*, 550 U.S. at 455-56).

ATS-era precedents. Both before and after the ATS's 1789 enactment, with the possible exception of the Bradford opinion (discussed below), every U.S. case involving a law-of-nations violation or the ATS involved conduct on U.S. soil or U.S. waters. The Marbois affair, which *Sosa* described as the key catalyst to the ATS's enactment, involved an "assaul[t] [on] the Secretary of the French Legion in Philadelphia." *Sosa*, 542 U.S. at 716-17 (describing *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (O.T. Phila. 1784)). A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred when the Dutch Ambassador was assaulted in New York City, *ibid*.

In the early years following the ATS's enactment, it was invoked on two occasions: one involved conduct on U.S. territorial waters, and the other conduct on U.S. soil that related to prior conduct on the high seas. In *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793), the owners of a British ship sought to recover a vessel that had been seized "in United States waters," *Sosa*, 542 U.S. at 720 (discussing *Moxon*), by a French privateer. And in *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795), a Frenchman who had seized a slave-bearing Spanish vessel on the high seas sued after the defendant seized the slaves from him in

South Carolina. See *Sosa*, 542 at 720 (discussing *Bolchos*).

Petitioners claim that Attorney General Bradford's 1795 opinion "demonstrates that the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign." Pet. Supp. Br. 33. But the opinion is more plausibly viewed as supporting ATS jurisdiction (1) for conduct on the high seas (as opposed to conduct on foreign soil); or (2) for conduct in violation of an expressly extraterritorial treaty (as opposed to the law of nations).

First, Bradford appears to have concluded that the ATS was available as to conduct on the high seas, not conduct on the soil or territorial waters of the Sierra Leone colony. The background materials he reviewed in preparing his opinion allege both sorts of conduct. Compare Pet. Supp. Br. at App. B2 (U.S. citizen "assist[ed] in piloting the said French fleet from the Isle de Loss to the river Sierra Leone"),[14] with *ibid*. (misconduct at "the house of the acting Governor" in Freetown, Sierra Leone). Bradford in turn mentioned both in his opinion:

> So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed

[14] The "Isle de Loss" refers to the Îles de Los, islands off present-day Guinea-Conakry, which borders Sierra Leone to the north. See OXFORD ATLAS OF THE WORLD: DELUXE EDITION 268 (2005). A voyage from the Îles de Los to the Sierra Leone River would have traversed the high seas over more than 60 nautical miles.

> on the high seas *are* within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in either of those courts, in any district wherein the offenders may be found. But some doubt rests on this point, in consequence of the terms in which the "Act in addition to the act for the punishment of certain crimes against the United States" is expressed. But there can be no doubt that the company or individuals who have been injured by *these acts* of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States ….

1 Op. Att'y Gen. 57, 58-59 (1795) (emphasis added to "these acts"). The question is whether "these acts" in the final sentence concerning the ATS refers back to the first sentence ("transactions … in a foreign country") or the second sentence ("crimes committed on the high seas"). Proximity suggests that it refers to the second. See Pet. App. A66 n.44 (so concluding); *Doe VIII*, 654 F.3d at 80-81 (Kavanaugh, J., dissenting) (same).

Second, even if Bradford had concluded that the ATS applied to the portion of the conduct on Sierra Leonean soil or waters, that conclusion was likely based upon an explicitly extraterritorial treaty, not

the law of nations.[15] See *Sosa*, 524 U.S. at 721 ("it is conceivable that Bradford … assumed that there had been a violation of a treaty"). Specifically, the 1783 treaty between the United States and Great Britain provided, *inter alia*, that "[t]here shall be a firm and perpetual peace between his Britannic Majesty and the said [United] States, and between the subjects of the one and the citizens of the other, wherefore *all hostilities, both by sea and land*, shall from henceforth cease." Definitive Treaty of Peace, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80 (emphasis added). This language plainly applies to the "land" of a British colony, and the prohibition would have been violated by the alleged conduct addressed by Bradford. That a particular treaty may have some extraterritorial reach sheds no light on whether Bradford understood the "law of nations" in the ATS to cover conduct on foreign soil; nor does it render the presumption against extraterritoriality inapplicable to ATS cases invoking the "law of nations," see *Morrison*, 130 S. Ct. at 2883.

The Bradford opinion thus is either consistent with declining to apply the ATS to international-law violations on foreign soil or, at best for Petitioners, ambiguous concerning Congress's intent to allow such application. Accord U.S. Supp. Br. 8 n.1; *Doe VIII*, 654 F.3d at 24. But even if the Bradford opinion plainly supported Petitioners' position, it is merely an isolated opinion of an Attorney General issued six years after the ATS's enactment, and thus in all events is too attenuated to overcome the presumption as to the 1789 Congress's intent.

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[15] The ATS refers to a "violation of the law of nations or of a treaty of the United States." 28 U.S.C. § 1350.

Congressional Purpose. The First Congress's purpose in enacting the ATS in 1789 was to *avoid* "threatening serious consequences in international affairs." *Sosa*, 542 U.S. at 715; see also U.S. Supp. Br. 16 (Congress's "predominant purpose … was to 'avoid[], not provok[e], conflicts with other nations'") (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (alterations in original)). While that purpose is served by using the ATS and federal common law to redress law-of-nations misconduct on U.S. soil, it is undermined by using them to regulate alleged misconduct abroad, which use is far more likely to foment conflict with foreign sovereigns than to prevent it. See Brief For Professors Of International Law, Foreign Relations Law And Federal Jurisdiction As *Amici Curiae* In Support of Respondents 7-15 (filed Feb. 3, 2012); *supra*, at 5-6.[16]

Modern interpretations of the ATS by lower courts and individual members of recent Congresses shed no light on the intent of the First Congress, and thus fail to overcome the presumption against extraterritoriality. Arising after "over 170 years" of ATS dormancy, *Sosa*, 542 U.S. at 712, the progenitor of the modern wave of ATS litigation, *Filartiga*, 630 F.2d 876, treated the ATS as extending to torture committed within the borders of a foreign sovereign (Paraguay). In doing so, *Filartiga* relied, *inter alia*, on a purpose

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[16] Even if *Sosa* did contemplate extraterritorial application of the ATS, but see *supra*, at 10-11, *Sosa* did so in a unique context involving less affront to a foreign sovereign: The *U.S. government* hired Mexican agents to abduct a Mexican national in Mexico and bring him to the United States. See *Sosa*, 542 U.S. at 698. Here, by contrast, Petitioners' suit alleges that a *foreign* government was the primary wrongdoer.

to "fulfil[l] … the ageless dream to free all people from brutal violence." *Id.* at 890.[17] But there is no evidence to suggest that the First Congress considered this goal, or even if it did, deemed it worth pursuing at the cost of incurring objections from foreign nations.[18]

As to statements in the TVPA's legislative history regarding the ATS (see U.S. Supp. Br. 10-11), these too fail to overcome the presumption because "'the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) (quoting *Public Employees Retirement Sys. of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989)); see also *Sosa*, 542 U.S. at 728 (despite TVPA's legislative history, "Congress as

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[17] The United States' suggestion that, if federal courts did not recognize ATS jurisdiction in *Filartiga*, our nation could be perceived "as having harbored or otherwise provided refuge to an actual torturer" (U.S. Supp. Br. 19), incorrectly assumes that another nation or multinational body wanted to take action against the defendant. While extradition to the place of the conduct (Paraguay) was available, see Extradition Treaty Between the United States and the Republic of Paraguay, U.S.-Para., May 24, 1973, 25 U.S.T. 967, it apparently was not pursued by the government of Paraguay.

[18] In addition to that cost, the extraterritorial application of the ATS and federal common law may well "expos[e] … U.S. officials and nationals to exercises of jurisdiction by foreign states" (U.S. Supp. Br. 1-2), and have an adverse impact upon "the Nation's commercial interests" (*id.* at 2). There is no evidence that the First Congress or any subsequent Congress has weighed these concerns. The 1991 Congress did provide, in the TVPA, for "an express, but carefully circumscribed" (*id.* at 20) extraterritorial claim that would be available on the facts of *Filartiga*.

a body has done nothing to promote [ATS] suits"). The explicit extraterritorial language in the TVPA as enacted in 1992 overcomes the presumption for the TVPA, but fails to do so for the ATS.

C. The Presumption Should Have Its Ordinary Categorical Effect, Not The Qualified Effect Proposed By The United States' New Position

In 2008, after *Sosa*, the United States argued to this Court that the presumption against extraterritoriality applies to the ATS and federal common law and warrants interpreting them categorically not to apply to foreign conduct:

> When construing a federal statute, there is a strong presumption that Congress does not intend to extend U.S. law over conduct that occurs in foreign countries. . . . *A fortiori*, there should be a compelling presumption against recognizing a power in the courts to project U.S. law into foreign countries through the fashioning of federal common law.

U.S. *Ntsebeza* Br. 12.

In this case, however, the United States departs from that position. See U.S. Supp. Br. 21-22 n.11 (so acknowledging). While the United States continues to assert that the principles underlying the presumption against extraterritoriality "should inform the decision whether to recognize new federal common-law causes of action … under the ATS" (U.S. Supp. Br. 16), the United States no longer endorses the presumption's ordinary, categorical effect of prohibiting "extraterritorial application" of federal law, *Morrison*, 130 S. Ct. at 2878. Instead, the United

States identifies only one narrow species of foreign conduct as precluded from ATS suits under the presumption against extraterritoriality: "the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct." U.S. Supp. Br. 21.[19] According to the United States, all other species of foreign conduct—including "where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas" (*ibid.*)—"should be considered [by courts] in light of the circumstances in which they arise" (*id.* at 5), apparently with advice from the Department of Justice after being "informed by the Department of State" (*id.* at 4).

The United States' new, qualified approach to the presumption should be rejected, for it would proceed without any involvement from Congress and on an unworkable case-by-case basis. The presumption against extraterritorial application is designed to ensure that *Congress*, not just the courts and the Executive Branch, focuses on the costs and benefits of extraterritorial application in light of all competing concerns. See, *e.g.*, *McCulloch*, 372 U.S. at 20-22; *Benz*, 353 U.S. at 147; see also U.S. Supp. Br. 17 (acknowledging need for "the political Branch*es* to weigh the relevant considerations") (emphasis added). To take just one example, Congress might disagree with the Executive's potential position (U.S. Supp. Br. 21) that U.S. corporations, but not foreign cor-

[19] The United States recognizes (U.S. Supp. Br. 5, 13-14, 27), and Respondents agree, that application of this rule would require affirmance here.

porations, may be sued under the ATS for conduct committed abroad.

The United States' own catalogue of the policy concerns that would have to be balanced under its new qualified "presumption" illustrates the problem with excluding Congress from the balancing task. The United States lists: the risk that extending the ATS and federal common law to conduct on foreign soil will "expos[e] … U.S. officials and nationals to exercises of jurisdiction by foreign states" (*id.* at 1-2); the impact on "the Nation's commercial interests" (*id.* at 2); the necessity of "a determination about whether the [foreign] Government or its agents have transgressed limits imposed by international law" (*id.* at 17); the strength of "the perpetrator's ties to the U.S." (*id.* at 20); and the possibility that other nations have a "more direct connection to the alleged offense or the alleged perpetrator" (*ibid.*). These concerns about effects on foreign sovereignty and the national interest warrant Congress's consideration before the ATS and federal common law are extended to conduct within foreign sovereign territory.

This Court rejected a similarly malleable approach to extraterritoriality in *Morrison*. There, the United States proposed that a "transnational securities fraud" might violate Securities Exchange Act § 10(b), notwithstanding congressional silence on the matter, "when the fraud involves significant conduct in the United States that is material to the fraud's success." 130 S. Ct. at 2886 (internal quotation marks omitted). This Court rejected the Government's proposed "significant and material conduct" test as lacking support in "what Congress has done." *Id.* at 2887. Instead, this Court followed the presumption to its ordinary categorical result, construing § 10(b) not to

apply unless "the purchase or sale [of the security] is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 2886.

So too, in applying the Foreign Trade Antitrust Improvements Act in *Empagran*, this Court rejected a "case by case" approach to "comity considerations." 542 U.S. at 168. That approach was "too complex to prove workable," *ibid.*, because it would involve courts "in resolving … empirical … matter[s] potentially related to impact on foreign interests," *id.* at 169. Instead, the Court applied the presumption to hold, categorically, that U.S. antitrust law does not apply to "conduct [that] causes independent foreign harm … that … alone gives rise to a plaintiff's claim." *Id.* at 166. Cf. *McCulloch*, 372 U.S. at 19 (National Labor Relations Board's "purely ad hoc weighing of contacts" to determine application of federal statute to foreign-flag ships "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice").

In each of these cases, the bright-line approach to the presumption ensured that courts would not engage in the extraterritorial extension of U.S. law absent express guidance from Congress. So too here, restricting the ATS and federal common law to conduct on U.S. soil (and possibly the high seas) will allow Congress to decide in the first instance whether, and to what extent, to amend the statute to cover international-law violations on foreign soil. For example, Congress might decide, as it did in the TVPA, to limit civil claims within ATS jurisdiction to certain species of conduct, see TVPA § 2(a) (torture and extrajudicial killing), and to clarify as a matter of U.S. law who is an eligible defendant (*e.g.*, only individuals), *ibid.*; see *Mohamad* v. *Palestinian Auth.*,

132 S. Ct. 1702 (2012). And, to the extent that Congress did provide for extraterritorial application, it would be able to determine whether to impose other restrictions on the claim, such as the statute of limitations and exhaustion requirements of the TVPA, see TVPA § 2(b), (c).

Absent such congressional guidance, however, the presumption bars extraterritorial application of the ATS and federal common law.

II. BECAUSE U.S. LAW IS PRESUMED NOT TO VIOLATE INTERNATIONAL LAW, THE ATS AND FEDERAL COMMON LAW SHOULD BE CONSTRUED NOT TO APPLY TO CONDUCT ON FOREIGN SOIL

Because the presumption against extraterritoriality resolves this case, this Court need not reach the separate presumption (the "*Charming Betsy*" canon) against construing U.S. law to violate international law. In any event, the *Charming Betsy* canon also bars application of U.S. law to a "foreign-cubed" ATS case that, like the one here, involves alien plaintiffs, alien defendants, and alleged conduct on foreign soil. That is because adjudication of such a case in a U.S. court clearly violates the international-law norm against universal civil jurisdiction. And even a "foreign-squared" ATS case (in which the conduct and plaintiffs are foreign but the defendant is a U.S. citizen) raises concerns under international law.

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains …." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (reaffirming this "maxim"). Application of the ATS and fed-

eral common law in the circumstances here would clearly violate international law, as explained below. But even if the violation of international law were not clear, there would at least be an *arguable* violation, which is the relevant standard under *Sosa*. See 542 U.S. at 727 (imposing "high bar" to recognition of post-1789 causes of action under the ATS); *id.* at 762 (Breyer, J., concurring in part and concurring in the judgment) (*Sosa*'s demand for international consensus applies not just to "substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior"); *Ma* v. *Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (applying *Charming Betsy* presumption where proposed construction of federal statute "might violate international law").

Affording a federal-common-law claim under ATS jurisdiction in the "foreign-cubed" circumstances here would violate international law because there is no accepted basis on which the United States may prescribe its law to govern such a case. "Jurisdiction to prescribe" entails "the authority of a state to make its law applicable to persons or activities." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part IV, Introductory Note (1987) ("RESTATEMENT").[20] The traditional bases for the exercise of jurisdiction to prescribe, as set forth in Restatement § 402, are as follows:

[20] As explained *supra*, at 14-17, affording such a claim in a case arising from conduct on foreign soil constitutes an extraterritorial prescription of U.S. law.

§ 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

RESTATEMENT § 402. Subsection (1)(a) describes the "territoriality principle," *id.* cmt. c; subsections (1)(c) and (3) the "effects" or "protective" principles, *id.* cmts. d, f; and subsection (2) the "nationality" principle, *id.* cmt. e.

None of those traditional § 402 bases is present here. The territoriality and effects/protective principles are not available because the alleged conduct took place entirely abroad and produced no effects in the United States. See J.A. 42; Pet. App. A22; *supra*, at 13-14. The nationality principle is not available because both Petitioners and Respondents are aliens. J.A. 44-56.[21]

[21] Petitioners suggest (Pet. Supp. Br. 42) that their post-conduct establishment of residence in the United States pro-

Absent any traditional basis for a U.S. court to exercise prescriptive jurisdiction here, Petitioners invoke (Pet. Supp. Br. 48-51) universal jurisdiction, under which

> [a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

RESTATEMENT § 404. But this principle refers to universal *criminal* jurisdiction and offers no support for the assertion of universal *civil* jurisdiction.

To the contrary, foreign governments and tribunals view the assertion of civil—as opposed to criminal—universal jurisdiction as a violation of international law. In *Jones* v. *Ministry of Interior for the Kingdom of Saudi Arabia*, [2006] UKHL 26, the United Kingdom's House of Lords observed that "there is no suggestion that [universal civil jurisdiction] represents current international law." *Id.* at ¶ 98 (opinion of Lord Hoffman). And on the specific matter of the lower U.S. federal courts' use of the ATS and federal common law to assert universal civil jurisdiction,

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vides a basis for a U.S. court to exercise prescriptive jurisdiction, but the basis that Petitioners appear to invoke—a species of the nationality principle known as the "passive personality principle," RESTATEMENT § 402 cmt. g—applies only when the victim was a U.S. national *at the time of the conduct*. See INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 146 (Oct. 2008) ("The victim must have been a national … at the time of the crime."); RESTATEMENT § 402 cmt. g (similar).

three judges of the International Court of Justice ("ICJ") observed that "this unilateral exercise of the function of guardian of international values … has not attracted the approbation of States generally." *Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo* v. *Belg.)*, 2002 I.C.J. 3, 77 ¶ 48 (Feb. 14) (joint separate opinion of Higgins, Kooijmans, and Buergenthal, JJ.). An Australian appellate court similarly explained, in rejecting a plaintiff's contention "that international law confers universal jurisdiction on the Australian courts to hear and determine a civil claim of torture[,] … [t]here is a considerable body of authority denying the existence of such jurisdiction, despite the recognition of the prohibition of torture as *jus cogens*." *Zhang* v. *Zemin*, [2010] NSWCA 255, ¶¶ 120-21 (Austl.) (collecting authorities).[22] Relying on several of these authorities, the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland explain in this case that, under international law:

> An allegation of an abuse of a "jus cogens" norm committed anywhere in the world, cannot alone justify the civil jurisdiction of the U.S. courts. Such jurisdiction, without any underpinning of a clear connection with the forum (i.e. truly "universal" jurisdiction), is only well established in the criminal context.

Neth.-U.K. Br. 16.

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[22] *Zhang* noted an Italian decision as an "exception" to this view. *Zhang*, ¶ 121 (discussing *Ferrini* v. *Fed. Rep. of Germany*, Cass., 11 March 2004, n.5044/4, ILDC 19 (IT 2004)). The ICJ subsequently reversed *Ferrini* on sovereign-immunity grounds, without addressing whether universal civil jurisdiction was available. See *Jurisdictional Immunities of the State (Ger.* v. *It.)*, Judgment (ICJ Feb. 3, 2012).

The distinction between universal criminal and civil jurisdiction makes sense because a private civil cause of action lacks "the check imposed by prosecutorial discretion," *Sosa*, 542 U.S. at 727, and thus poses a more substantial threat to foreign sovereignty. See Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 347 (2001) ("Whereas the government is responsible in the criminal context for considering the foreign policy costs of exercising universal jurisdiction, private plaintiffs in civil cases have no such responsibility and, in any event, are unlikely to have the incentive or expertise to do so.").

To be sure, some countries allow civil claims to be brought within the context of a criminal proceeding. See, *e.g.*, *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment); Brief Of Professor Juan E. Méndez U.N. Special Rapporteur On Torture As *Amicus Curiae* On Reargument In Support Of Petitioners ("Méndez Br.") 29 (filed June 13, 2012). But such systems typically impose the powerful screen of prosecutorial discretion before any civil claim can be brought. For example, in France, where victims may seek certain reparations within a criminal proceeding, "only the prosecutor—not the victim or NGOs as civil parties—may launch formal criminal proceedings." Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 25 (2011); see also *id.* at 31 (same in Belgium); Rome Statute of the International Criminal Court, Arts. 15, 53, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (July 17, 1998) (only the "Prosecutor may initiate investigations," with decisions not to do so reviewable only by the Court's

Pre-Trial Chamber), 75 (reparations to victims are made from a defendant only after he is "convicted").

Aware of such examples, foreign courts and governments continue to recognize a distinction between civil and criminal cases that bears on the scope of universal jurisdiction. See *Jones*, ¶ 20 (opinion of Lord Bingham) ("[T]he claimants refer to and rely on the doubts expressed by Breyer J in [*Sosa*], about the need for a strict demarcation in the immunity context between criminal and civil cases. … The [U.S.] decisions are for present purposes important only to the extent that they express principles widely shared and observed among other nations. As yet, they do not."); Neth.-U.K. Br. 17 ("Importantly, it is widely recognized that criminal and civil jurisdiction are two distinct regimes. Extrapolating universal civil jurisdiction from the existence of universal criminal jurisdiction is not a proper application of international law ….").[23]

Petitioners may point to isolated expressions of the view that universal civil jurisdiction is permissible. See, *e.g.*, Brief Of The European Commission On Behalf Of The European Union As *Amicus Curiae* In Support Of Neither Party 21 (filed June 13, 2012) (acknowledging the joint separate opinion in *Arrest Warrant*, but arguing that, "[t]o the extent such apprehensions existed, they have since been allayed in significant part by this Court's decision in *Sosa*"); RESTATEMENT § 404 cmt. b (asserting without citation that "international law does not preclude the applica-

[23] The ATS does potentially contemplate universal civil jurisdiction for one violation of the law of nations, piracy. See *Sosa*, 542 U.S. at 724. But that does not offend international law because no nation has sovereignty over the high seas. See *supra*, at 26.

tion of non-criminal law on this basis"). But, absent consensus among the nations of the world, such assertions cannot overcome the *Charming Betsy* presumption; at most, they demonstrate that universal civil jurisdiction has *not* been universally accepted, as *Sosa* and *Charming Betsy* require.[24]

Similarly, Petitioners' authorities (Pet. Supp. Br. 44-47 & n.35), even if they supported universal civil jurisdiction, at most would show that the nations of the world disagree on the issue. In fact, Petitioners' authorities are inapposite either because they exercised adjudicative (rather than prescriptive) jurisdiction[25] or because they involved significant contacts

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[24] Several of Petitioners' *amici* invoke the "*Lotus* principle" that, absent an express prohibition in international law, a state is free to exercise prescriptive jurisdiction as it pleases. See, *e.g.*, Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support of Petitioners 6-7 (filed June 14, 2012) (citing *S.S. Lotus (France* v. *Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-20 (Sept. 7)). But that principle, if it ever was good law, has been abandoned. As the joint separate opinion in *Arrest Warrant* explained, "the [*Lotus*] dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies." 2002 I.C.J. at 78 ¶ 51 (joint separate opinion of Higgins, Kooijmans, and Buergenthal, JJ.); see also Neth.-U.K. Br. 11 n.14 ("The modern International Court of Justice has required States to prove a relevant basis of jurisdiction.") (citing, *inter alia*, *The Nottebohm Case (Liech.* v. *Guat.)*, 1955 I.C.J. 4 (Apr. 6); MALCOLM N. SHAW, INTERNATIONAL LAW 656 (6th ed. 2008)).

[25] "[J]urisdiction to adjudicate [is] the authority of a state to subject particular persons or things to its judicial process," RESTATEMENT, Part IV, Introductory Note, not necessarily under that state's substantive laws. See also *supra*, at 16 n.5. It resembles personal jurisdiction under U.S. law, see *id*. § 421, Reporter's Note 2, and is addressed as a matter of international law by Restatement §§ 421-23.

between the case and the forum and thus did not involve an assertion of universal civil jurisdiction:

In Rb. Gravenhage [Court of the Hague] 30 december 2009, JOR 2010, 41 m nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.), the Dutch court asserted adjudicative rather than prescriptive jurisdiction, applying Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) (EC).[26]

In *Guerrero* v. *Monterrico Metals PLC*, [2009] EWHC (QB) 2475 (Eng.), the British court asserted adjudicative jurisdiction by applying Peruvian law to the first defendant and prescriptive jurisdiction by applying English law to the second defendant, but the latter was an English national.

In Bundesgerichtshof [BGH] [Federal Court of Justice] July 2, 1991, Neue Juristische Wochenschrift [NJW] 3902, 1991 (Ger.), the German court appeared to exercise adjudicative jurisdiction, and in any event held that the case must have a more substantial connection with Germany than the mere presence of the defendant's assets in Germany.[27]

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[26] See, *e.g.*, Olivier De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations* 8 (2006), available at http://www.corporatejustice.org/IMG/pdf/Extraterritorialityreport_DeSchutter.pdf ("the 'Brussels' Regulation adopted within the European Union … is an instance of adjudicative extraterritorial jurisdiction rather than of prescriptive extraterritorial juri[s]diction").

[27] See Gerhard Dannemann, *Jurisdiction Based on the Presence of Assets in Germany: A Case Note*, 41 Int'l & Comp. L.Q. 632, 632 (1992).

In Rb. Gravenhage [Court of First Instance of the Hague] 21 maart 2012, m nt. Van Der Helm, Case 400882/HA ZA 11-2252 (El-Hojouj/Derbal) (Neth.), the Dutch court asserted adjudicative jurisdiction by applying Libyan law.

In *Hiribo Mohammed Fukisha* v. *Redland Roses Ltd.* [2006] KLR Civil Suit 563 of 2000 (Kenya), the conduct adjudicated by the Kenyan court occurred in Kenya.

In *Lubbe* v. *Cape PLC*, [2000] UKHL 41, 1 W.L.R. 1545 (H.L.) (Eng.), the British court reserved the question whether the case might involve application of South African law (and thus an exercise only of adjudicative jurisdiction), and in any event addressed an English defendant. See also *Dagi* v. *Broken Hill Proprietary Co.*, [2000] VSC 486 (Austl.) (Australian law applied by virtue of a private contractual choice-of-law provision).[28]

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[28] Petitioners' *amici* argue that article 14 of the Convention Against Torture demonstrates international acceptance of universal civil jurisdiction, at least regarding torture. See, *e.g.*, Méndez Br. 16-18. Article 14 provides that each state party must "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. In ratifying the Convention, however, the United States Senate expressly stated its understanding "that article 14 requires a State Party to provide a private right of action for damages *only for acts of torture committed in territory under the jurisdiction of that State Party*." U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, II.3, 136 Cong. Rec. S17486 (daily

For the reasons set forth in Point I.B, *supra*, the *Charming Betsy* presumption is not overcome by the text or historical context of the ATS, neither of which affirmatively indicates that federal courts should assert universal civil jurisdiction or indeed any prescriptive jurisdiction with respect to conduct on foreign soil. Accordingly, the only remaining question is how to construe the ATS and federal common law to avoid violating international law. The narrowest approach would be to construe them not to authorize universal civil jurisdiction. That approach would require affirmance of the court of appeals' judgment here, where the plaintiffs, defendants, and conduct are all foreign and thus none of the bases for prescriptive jurisdiction set forth in Restatement § 402 is present, see *supra*, at 39.

A U.S. court's exercise of prescriptive jurisdiction under the ATS and federal common law as to conduct on foreign soil typically will violate international law even in cases where the defendant is a U.S. individual or corporation. That is so because, while nationality can, in the abstract, supply a basis for the exercise of prescriptive jurisdiction in an "exceptional" case, RESTATEMENT § 402 cmt. b, nationality does not suffice "when the exercise of such jurisdiction is unreasonable," *id.* § 403(1), and reasonableness turns on such factors as a "substantial, direct,

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ed. Oct. 27, 1990) (emphasis added); see also *Jones*, ¶ 20 (noting that no country objected to that statement). Although the Committee Against Torture has recently advanced a broader interpretation, see Draft General Comment: Working Document on Article 14 for Comments, Committee Against Torture, 46th Session, 9 May–3 June 2011, that interpretation is not authoritative and does not dispel international disagreement on the permissibility of universal civil jurisdiction.

and foreseeable effect upon or in the territory"; "the connections … between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect"; "the importance of regulation to the regulating state"; "the extent to which another state may have an interest in regulating the activity"; and "the likelihood of conflict with regulation by another state." *Id.* § 403(2). In the typical "foreign-squared" ATS case, the exercise of prescriptive jurisdiction will be unreasonable because, while the U.S. has a connection with the defendant, the activity being regulated neither takes place in the United States nor has direct effects here; the plaintiffs have no connection with the United States; the foreign state has a strong interest in regulating the alleged conduct; and U.S. attempts to regulate may conflict with that foreign state's law.

III. PETITIONERS' REMAINING ARGUMENTS FOR APPLYING THE ATS AND FEDERAL COMMON LAW TO FOREIGN CONDUCT ARE UNPERSUASIVE

The above presumptions are designed to ensure that *Congress* act clearly before U.S. law is extended within a foreign sovereign's territory or in violation of international law. The availability of case-specific doctrines applied by *courts* to allow dismissal of some ATS cases is no substitute for Congress's own affirmative decision-making in this area. Nor can policy arguments that the United States *should* afford a civil cause of action for human-rights violations abroad supply a substitute for Congress's affirmative expression of will.

A. Case-Specific Doctrines Administered By Courts Cannot Substitute For Congressional Line-Drawing

Petitioners suggest that courts can apply such doctrines as international comity (Pet. Supp. Br. 57) and *forum non conveniens* (*id.* at 54-56) to moderate the adverse effects on foreign sovereignty and national interest of extending the ATS and federal common law extraterritorially. But such judicially-administered doctrines are unworkable, and in any event inadequate to overcome the presumptions in the absence of Congress's involvement. See *supra*, Point I.C. *A fortiori*, the presumptions cannot be overcome by other doctrines, like personal jurisdiction,[29] that do not even purport to consider the foreign sovereign's interests or international law.[30]

B. Whether U.S. Law *Should* Provide A Cause Of Action For Alleged International-Law Violations That Occur Abroad Is Likewise A Matter For Congress

Petitioners and their *amici* argue that U.S. law *should*, as a matter of policy, provide a cause of action for human-rights violations that occur abroad in contravention of international law. See, *e.g.*, Pet. Supp. Br. 60; Brief For The Government Of The

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[29] Contrary to Petitioners' assertions that "Respondents did not challenge the district court's personal jurisdiction over them" (Pet. Supp. Br. 4) and "waived this defense" (*id.* at 54), Respondents did make such a challenge, see J.A. 111-12.

[30] In any event, these case-specific doctrines do not always lead to dismissal, and if they do, it often takes years. See, *e.g.*, *Aldana* v. *Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1286-87 (11th Cir. 2009) (affirming *forum non conveniens* dismissal of case filed 8 years previously).

Argentine Republic As *Amicus Curiae* In Support Of Petitioners ("Argentina Br.") 6 (filed June 13, 2012). Again, the presumptions direct such policy arguments to Congress, which "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz*, 353 U.S. at 147. The policy debate here involves complex and competing considerations that are especially appropriate for Congress to resolve.[31]

First, the nations of the world disagree on whether a private right of action under U.S. law is the best way to achieve the goal of promoting international human rights worldwide. Whereas the Government of Argentina submits that it is (see Argentina Br. 6),

> the Governments [of the Netherlands and the United Kingdom] are concerned that, by allowing ATS claims with little nexus with the U.S., some States might be given reason to down-play or even ignore their own responsibilities for implementing their human rights law obligations. They will also come under less pressure to provide a remedy for, and indeed prevent, abuses, if plaintiffs have recourse to redress elsewhere.

Neth.-U.K. Br. 35. Relatedly, different nations have different preferences concerning *how* to address international human-rights violations. For example,

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[31] Even if the presumptions were overcome, these policy issues nonetheless would inform the analysis at *Sosa*'s second step, counseling against judicial exercise of discretion to afford a federal-common-law claim under ATS jurisdiction. See *Sosa*, 542 U.S. at 732-33, 738 n.30; Resp. Br. 45-48 (discussing policy consequences weighing against allowing such a claim against corporations for the international-law violations alleged here).

as discussed *supra*, at 16-17, nations like South Africa have expressed a desire to address such violations through approaches under their own law, rather than by relying upon private plaintiffs pursuing redress in U.S. courts under adversarial U.S. procedures.

Second, advancing international human rights through extraterritorial ATS actions poses significant risks to the interests of the United States. Providing a federal-common-law cause of action under ATS jurisdiction for conduct in foreign nations may "expos[e] … U.S. officials and nationals to exercises of jurisdiction by foreign states" over U.S. conduct (U.S. Supp. Br. 1-2). This concern has prompted the United States to object to even the exercise of universal *criminal* jurisdiction lest U.S. nationals be hauled before foreign tribunals to answer for U.S. policy decisions alleged to violate international law. See, *e.g.*, News Release No. 233-02, U.S. Dep't of Defense, *Secretary Rumsfeld Statement on the ICC Treaty* (May 6, 2002), available at http://www.defense.gov/releases/release.aspx?releaseid=3337 ("The U.S. has a number of serious objections to the ICC—among them, … the lack of an effective mechanism to prevent politicized prosecutions of American service-members and officials.") (last visited July 31, 2012); *US attacks Belgium war crimes law*, BBC News (June 12, 2003), available at http://news.bbc.co.uk/2/hi/europe/2985744.stm (last visited July 31, 2012) (similar objection to Belgian law).

Moreover, application of the ATS and federal common law to foreign conduct risks adverse impacts upon "the Nation's commercial interests" (U.S. Supp. Br. 2). Contrary to Petitioners' assertion that "there have been relatively few corporate ATS cases … since *Filartiga*" (Pet. Supp. Br. 59), there have in fact been

more than 115 such cases (see Brief Of Product Liability Advisory Council, Inc. As *Amicus Curiae* In Support Of Respondents App. 6-37 (filed Feb. 3, 2012)). And ATS suits involving foreign conduct frequently entail "invasive discovery that … could coerce settlements that have no relation to the prospect of success on the ultimate merits." Pet. App. D9 (Jacobs, C.J., concurring in denial of panel rehearing). Settlement pressure is further exacerbated by the high-profile nature of ATS suits, which provides a platform for plaintiffs or their proxies to engage in aggressive public-relations campaigns that inflict significant reputational harm on corporate defendants. See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 515-16 (2011). Indeed, the mere filing of an ATS suit can have an adverse effect on a company's stock price and debt rating. See Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Pol'y J. 60, 63-64 (2004); see Resp. Br. 45-48.

Such adverse effects from foreign-based ATS suits give corporations strong incentives to divest from foreign nations, disserving U.S. foreign policy interests and harming foreign beneficiaries of that investment. See Brief For The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Respondents 4-5 (filed Feb. 3, 2012). For example, one long-running ATS suit, even though ultimately rejected, see *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), led a Canadian company to sell its assets in Sudan, see Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 426 (2004), only to be replaced by Chinese

companies that announced they would defer to the internal policies of the Sudanese government, see Stephanie Hanson, Council on Foreign Relations, *Backgrounder: China, Africa, and Oil* (June 6, 2008), available at http://www.relooney.info/SI_Oil-Politics/China-Energy-Security-Africa_3.pdf (last visited July 31, 2012). In other words, "an American tort statute had the effect of replacing a Canadian company with a Chinese company, all in the name of human rights." Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis* 23 (draft Apr. 13, 2012; forthcoming, Geo. L.J.), available for download at http://www.ssrn.com/abstract=1983445 (last visited July 31, 2012).

Any disagreement whether the *Talisman* episode is representative of the ATS's impact on commercial activity, see Brief Of Joseph Stiglitz As *Amicus Curiae* In Support Of Petitioners 5-7 (filed Dec. 21, 2011), is best addressed by Congress. As this Court observed regarding a similar issue in *Empagran*, "How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?" 542 U.S. at 169; see also *supra*, at 35 (discussing various policy factors that bear on whether to extend the ATS and federal common law to conduct on foreign soil).

Third, Congress is free to amend the ATS in light of these policy considerations if this Court precludes application of the ATS and federal common law to foreign conduct. For example, after this Court applied the presumption against extraterritoriality in *Aramco*, 499 U.S. 244, Congress amended Title VII to "provid[e] explicitly for [such] … extraterritorial

effect[] [yet] limi[t] that effect to particular applications," *Morrison*, 130 S. Ct. at 2883 n.8. Congress took a similarly "modest," *Mohamad*, 132 S. Ct. at 1711, approach in the TVPA. Specifically, Congress made a TVPA claim "available only against an individual for acts of torture or extrajudicial killing and only when acting under color of foreign law" (U.S. Supp. Br. 20-21 (citing TVPA § 2(a))), and further imposed a statute of limitations and an exhaustion requirement, TVPA § 2(b). See also *Mohamad*, 132 S. Ct. at 1710 ("Congress appeared well aware of the limited nature of the cause of action it established in the [TVPA]."). The ATS and federal common law, if applied wholesale to extraterritorial conduct without similar limiting guidance from Congress, are anything but "modest."

Finally, whether it is desirable to afford a U.S.-law civil tort claim for alleged international human-rights violations abroad should be evaluated within the broader context of statutory remedies that already exist, underscoring further why Congress should make that evaluation. In addition to enacting the TVPA, Congress has provided at least one other narrowly focused civil cause of action regarding foreign international-law violations, see 18 U.S.C. § 2333(a) ("Any national of the United States injured in his or her person, property, or business *by reason of an act of international terrorism*, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.") (emphasis added); see also *id.* § 2331(1)(C) (defining "international terrorism" as acts that "occur primarily outside the territorial jurisdiction of the

United States, or transcend national boundaries"),[32] and proscribed numerous criminal offenses regarding foreign conduct that violates international law, see, *e.g.*, 18 U.S.C. §§ 1091 (genocide), 2340A (torture), 2441 (war crimes).

As to defendants who commit violations abroad and seek refuge here (see Pet. Supp. Br. 26), the United States has entered into extradition treaties with more than 100 countries, see 18 U.S.C. § 3181 (notes), that provide an evident remedy. Given the foreign-relations and international-law consequences, Congress, not the courts, should decide whether to provide an additional extraterritorial remedy under the ATS.

[32] The plaintiffs in *In re Terrorist Attacks On September 11, 2001*, No. 03 MDL 1570 (S.D.N.Y.), express concern that they need ATS remedies against foreign financing of the 9/11 attacks (see Brief Of *Amici Curiae* Certain Plaintiffs In *In Re: Terrorist Attacks On September 11, 2001* In Support Of Neither Party 4 (filed June 13, 2012)), but fail to explain why the explicitly extraterritorial civil remedies in the TVPA and 18 U.S.C. § 2333(a), which they have invoked, see Sixth Amended Consolidated Master Complaint, *Ashton* v. *Al Qaeda Islamic Army*, No. 03 MDL 1570 (S.D.N.Y. Sept. 30, 2005) (Counts Four and Five), are inadequate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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