No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

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

SUPPLEMENTAL BRIEF OF YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY A. MEYER
127 Wall Street
New Haven, CT 06511
(203) 432-3918

OONA A. HATHAWAY
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 436-8969
oona.hathaway@yale.edu

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CONSTITUTIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TREATIES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign relations law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of international law in this case.

SUMMARY OF ARGUMENT

The Yale Law School Center for Global Legal Challenges submits this brief solely to address whether application of the Alien Tort Statute (ATS),

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

28 U.S.C. § 1350, to conduct that occurs in the territory of a foreign state violates international law.[2] For the reasons set forth below, we conclude that it does not.

The ATS is a jurisdiction-granting statute that does not create new substantive law. In enforcing specific, universal, and obligatory norms of international law through the ATS, U.S. courts are therefore not giving U.S. law extraterritorial reach. They are instead enforcing international law. Nothing in international law prohibits such enforcement; quite the contrary. Under the *Lotus* principle of international law, each nation-state has broad authority to exercise extraterritorial criminal and civil jurisdiction to enforce international law. This authority is inherent in state sovereignty and is subject only to specific and affirmative international law limitations, such as sovereign immunity, that are not relevant in this case.

Treaty law and international tribunal jurisprudence demonstrate that extraterritorial application of the ATS does not violate international law. Torture, for example, is a clearly recognized basis for an ATS

---

[2] International law is important to this Court's interpretation of the scope and meaning of the ATS because the statute specifically grants jurisdiction over violations of the "law of nations" and because "an 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) (Marshall, C.J.).

action, and the Convention Against Torture certainly permits, and may even require, state parties to establish extraterritorial civil jurisdiction. Several other international agreements also establish civil jurisdiction without express territorial limitations. International tribunals, moreover, have expressed support for extraterritorial civil jurisdiction over violations of the law of nations.

The United States is far from alone in asserting extraterritorial civil jurisdiction over violations of international law. Many countries have exercised their power as sovereign states to provide for both civil and criminal extraterritorial jurisdiction over such violations. In addition, some foreign courts have entertained ATS-like extraterritorial civil suits. None has refused relief on the ground that extraterritorial jurisdiction would violate international law. Together, these sources demonstrate that nothing in international law prohibits the United States from exercising its inherent sovereign power to provide civil jurisdiction for its courts to redress violations of international law that occur in foreign countries.

ARGUMENT

I. STATES HAVE BROAD AUTHORITY TO EXERCISE EXTRATERRITORIAL CRIMINAL AND CIVIL JURISDICTION TO ENFORCE INTERNATIONAL LAW.

Under international law, states have broad authority to exercise extraterritorial jurisdiction over violations of international law. This authority is subject to international law limitations that are not applicable here, such as sovereign immunity. Moreover, numerous domestic doctrines safeguard international comity by preventing unwarranted assertions of extraterritorial jurisdiction by U.S. courts.

A. The Jurisdiction To Enforce International Law Is Inherent In State Sovereignty.

A sovereign state has the authority to adjudicate claims of extraterritorial violations of international law. International law does not prohibit states from exercising this inherent sovereign authority except in extraordinary circumstances not presented in this case.

A foundational principle of international law known as the *Lotus* principle provides that, in the absence of a specific prohibitive rule, "every State remains free to adopt the principles which it regards as best and most suitable." *S.S. "Lotus"* (*Fr.* v. *Turk.*), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). The *Lotus* principle is "one of the landmarks of

twentieth-century jurisprudence." Louis Henkin, *International Law: Politics, Values and Functions*, 216 Recueil des Cours 9, 278 (1989 IV). Under the principle, "when a [customary international law] norm does not restrict a nation's actions, there is not a gap in the law but rather a background rule that allows for freedom of action." Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L.J. 202, 272 (2010); see also José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 Yale L.J. 1660, 1672 (2009) (noting that the *Lotus* principle "has retained its persuasive force" and that "the jurisdiction to prosecute and punish criminal offenses is inherent in the sovereignty of nations"). International law therefore permits the United States to exercise adjudicative authority over violations of international law under the ATS unless doing so would violate a specific prohibitory norm such as sovereign immunity – an exception discussed in more detail below. See *infra* Part I.B.[3]

It is important to distinguish between the jurisdiction of a state to *prescribe* conduct and the power to *adjudicate* a violation of international law. 1 Restatement (Third) of Foreign Relations Law of the United States § 401 (1987) [hereinafter Restatement (Third)]. Extraterritorial *prescriptive* jurisdiction –

[3] For more on the relationship between international law and state sovereignty, see Oona A. Hathaway & Scott Shapiro, The Power to Refuse (2012) (unpublished manuscript).

sometimes called "legislative" jurisdiction[4] – allows a state to "make *its* law applicable to the activities, relations, or status of persons, or the interests of persons in things." *Id*. § 401(a) (emphasis added). The exercise of extraterritorial prescriptive jurisdiction may, in some cases, proscribe conduct *that is* "*lawful where carried out*." *Id*. § 402 cmt. d (emphasis added). By contrast, jurisdiction to *adjudicate* allows a court "to subject persons or things to the process of its courts or administrative tribunals." *Id*. § 401(b).

Generally, a state may exercise *prescriptive* jurisdiction over extraterritorial conduct only where that conduct causes substantial effects within its own territory, jeopardizes its security or the integrity of its government functions, or involves its own nationals. See Restatement (Third) § 402 (describing jurisdictional factors). Restrictions on the exercise of prescriptive jurisdiction serve to avoid conflict between sovereign states. A state exercising prescriptive jurisdiction over conduct outside its own territory should take care to avoid unnecessary conflict with a sovereign that might seek to regulate that very same conduct differently – for example, permitting or

---

[4] *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (noting "a type of 'jurisdiction' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction,' or 'jurisdiction to prescribe'" and "refers to 'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate'" (internal citations omitted) (quoting Restatement (Third), at 231, 235)).

requiring what the state exercising extraterritorial jurisdiction seeks to sanction. See *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004) (discussing principles of "prescriptive comity" while considering extraterritorial reach of U.S. antitrust laws).

The concerns and limits that apply to prescriptive jurisdiction do not extend to *adjudicative* jurisdiction of the kind granted by the ATS with respect to conduct that violates the law of nations.[5] The ATS provides jurisdiction in the U.S. federal courts for a "civil action" filed by an "alien," "for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. It does so only for those violations of the law of nations that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the

[5] Contrary to the assertions of respondents' *amici*, the ATS does not create substantive law and thus does not involve the exercise of prescriptive jurisdiction. *Cf.* Brief for Chevron Corp. *et al.* as *Amici Curiae* Supporting Respondents at 10-17, *Kiobel* v. *Royal Dutch Petroleum Co.* (No. 10-1491) [hereinafter Chevron Br.]; Brief for the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* Supporting Respondents at 30, *Kiobel* v. *Royal Dutch Petroleum Co.* (No. 10-1491). The ATS is a jurisdictional statute. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). When U.S. courts exercise adjudicative jurisdiction to apply *specific, universal, and obligatory international law*, this does not raise the same diplomatic concerns as when they exercise prescriptive jurisdiction to apply *U.S. law* to the conduct of foreign actors abroad.

18th-century paradigms" such as piracy. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725 (2004). We have previously submitted a brief explaining that this includes major prohibitory norms such as the prohibitions against torture, genocide, war crimes, crimes against humanity, extrajudicial killing, slavery, and piracy. Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, *Kiobel* v. *Royal Dutch Petroleum* (No. 10-1491), *Mohamad* v. *Palestinian Authority* (No. 11-88) [hereinafter Yale Br.].

In applying specific, universal, and obligatory norms of international law, U.S. courts are not giving U.S. law extraterritorial reach, but are instead adjudicating claims under international law. As explained in our previous brief, the ATS is a jurisdiction-granting statute and therefore does not create new substantive law.[6] Yale Br. 4. The ATS instead allows domestic courts to adjudicate violations proscribed under international law.[7] As the Court explained in

---

[6] In this respect, the ATS serves a role similar to the charters of international criminal tribunals, which "do not create substantive law; instead, they create jurisdiction for the relevant tribunals to try those who are alleged to have violated existing norms of international law." Yale Br. 5.

[7] William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 37 (2010) (noting "the fallacy that U.S. courts hearing ATS claims are exercising prescriptive jurisdiction" and explaining that "[c]ourts do not apply U.S. substantive law in ATS cases; they apply customary international law").

Sosa, "the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold *substantive* law." 542 U.S. at 713 (emphasis added).

The decision by the First Congress to provide for enforcement of international law through transitory tort reflects a choice of the means of enforcement, not an alteration of the substantive law enforced. International law does not dictate to individual nation-states the *means* of enforcing substantive rules of international law. Instead, it "leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations." *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring). Moreover, international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations." *Kadic* v. *Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); see also Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel* v. *Royal Dutch Petroleum* (No. 10-1491), at 18 ("[I]nternational law * * * establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state."); Restatement (Third) § 703 cmt. c (noting that whether individuals "have a remedy under the law of a state depends on that state's law").

Even if the ATS were an exercise of prescriptive jurisdiction, international law would not bar U.S. courts from exercising extraterritorial jurisdiction. "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 (Third) § 404 (emphasis added); see *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (indicating that "international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior," and "[t]hat subset includes torture, genocide, crimes against humanity, and war crimes" (citing Restatement (Third) § 404)). Although this consensus most strongly concerns criminal jurisdiction, "consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening." 542 U.S. at 762 (Breyer, J., concurring) (citing Restatement (Third) § 404 cmt. (b)).[8] Because "the criminal courts of many nations

[8] Citing Comment b to Restatement (Third) § 404, the Chevron Brief concedes that "[n]othing in international law precludes civil jurisdiction over causes of action for piracy occurring on the high seas." Chevron Br. 12 n.4. But Comment b is not so limited in terms of its allowance for extraterritorial civil jurisdiction. It states in full:

(Continued on following page)

combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself," it follows that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Id.* at 762-763.[9]

Indeed, as noted by several judges of the International Court of Justice, domestic courts play an important part in the enforcement of international law:[10]

> b. *Universal jurisdiction not limited to criminal law.* In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.

Restatement (Third) § 404 cmt. b; see also 1 *Oppenheim's International Law* (9th ed. 1992) 466 ("As a general rule states do not seek to exercise civil or criminal jurisdiction over foreign nationals in foreign states. Nevertheless the laws of many states do contain provision for doing so in limited categories of cases, *both civil and criminal*." (emphasis added)); *id.* at 469 n.23 (citing favorably *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), involving application of the ATS to torture committed in Paraguay).

[9] Examples of such statutes and cases are discussed in Part III, *infra*.

[10] International law generally relies on decentralized enforcement through domestic institutions. See Oona A. Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 Yale L.J. 252 (2011).

> [T]he international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters.

Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo* v. *Belg.*), 2002 I.C.J. 63, 78-79 ¶ 51 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).[11]

It was therefore fully within Congress's authority, as a matter of international law, to provide a civil remedy in U.S. courts for violations of the law of nations. In keeping with the need both to deter violations and compensate victims, the First Congress chose a civil remedy as a principal mechanism for enforcing the limited range of violations of international law that this Court has concluded are actionable under the ATS. As we discuss below, such a choice by Congress is fully in conformity with international treaties and judicial pronouncements, as well as with the practice of numerous other nations. See *infra* Parts II and III.

---

[11] As explained *infra* note 17, respondents' *amici*'s assertion that the opinion expressed disapproval of the ATS is incorrect.

B. The Jurisdiction To Prosecute And Punish Violations Of International Law Is Only Limited By Affirmative Restrictions Provided By International And Domestic Law.

Under the *Lotus* principle discussed above, a state has inherent sovereign authority to exercise extraterritorial adjudicative jurisdiction unless there is a prohibitory norm against it. The salient inquiry, then, is whether any prohibitory norm of international law bars application of the ATS to conduct that occurs in a foreign state. If there is no such prohibitory norm, then extraterritorial application of the ATS is a valid exercise of sovereign authority under international law.

International law imposes only limited restrictions on the capacity of states to remedy violations of international law.[12] Principles of sovereign immunity limit the authority of one state to sit in judgment of the conduct of foreign governments or their officials in some cases. See, *e.g.*, *Arrest Warrant*, at ¶¶ 51-71 (concluding that customary international law barred issuance of arrest warrant by Belgium against

[12] In fact, "[c]ustomary international law limits on a nation's regulation of extraterritorial events are less clear [than the power of an individual U.S. state to regulate conduct outside its borders] because there are few international decisions on point, and because state practice does not reveal a settled custom." Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1207-1208 (1998). The absence of precedent bespeaks the absence of limits.

incumbent foreign minister of the Democratic Republic of Congo for his alleged participation in war crimes and crimes against humanity in the Congo); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (barring ATS jurisdiction over foreign sovereign defendant in absence of specific exceptions to the Foreign Sovereign Immunities Act).[13]

Although international law provides few mandatory limits on extraterritorial jurisdiction, individual states may choose to restrict the jurisdiction of their courts. Indeed, U.S. courts have personal jurisdiction requirements that serve this precise purpose. Most notably, foreign defendants are subject to suit in U.S. courts only if they have sufficient contacts with the United States to allow the court to assert personal jurisdiction consistent with constitutional due process. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846 (2011) (holding that foreign corporate defendants from Luxembourg, Turkey, and France did not have sufficiently substantial contacts to allow North Carolina courts to assert general jurisdiction over them in connection with

[13] Similarly, U.S. courts have dismissed some actions against foreign government officials on grounds of the State Department's suggestion of immunity, see, *e.g.*, *Matar* v. *Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (dismissing ATS claim against former Israeli government official stemming from bombing of Gaza apartment building), and treaty-based diplomatic immunity from service of process, *Tachiona* v. *United States*, 386 F.3d 205, 216 (2d Cir. 2004) (dismissing ATS claims when process was served on visiting head of state).

vehicular crash in France that killed North Carolina plaintiffs).

In addition, U.S. courts have developed a series of domestic prudential doctrines that curb excessive assertions of extraterritorial jurisdiction. For example, under U.S. law, the act of state doctrine may in some cases furnish a defense from lawsuits that concern the public acts of a foreign government within a foreign state. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Glen* v. *Club Mediterranee*, 450 F.3d 1251 (11th Cir. 2006) (holding that act of state doctrine precluded civil liability against corporate resort owner arising from its use of property in Cuba that had been illegally expropriated by government of Cuba).

This Court has also suggested that it may be appropriate for a U.S. court to abstain from resolving an ATS claim if the plaintiff has not exhausted available legal remedies in the domestic legal system where the alleged misconduct took place. See *Sosa*, 542 U.S. at 733 n.21; see also *Sarei* v. *Rio Tinto*, 671 F.3d 736, 754 (9th Cir. 2011) (en banc) (noting that "[t]he lack of a significant U.S. 'nexus' is an important consideration in evaluating whether plaintiffs should be required to exhaust their local remedies in accordance with the principle of international comity" and that "in ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion, particularly – but not exclusively – with respect to claims that do not involve matters of

'universal concern'" (internal citations and quotation marks omitted)).

The political question doctrine may also be available in some cases. This Court in *Sosa* identified a "possible limitation" for federal courts to engage in "case-specific deference to the political branches," and indicated that in some cases "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21; see also *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 58-62 (D.C. Cir. 2011) (discussing potential "case-specific deference" factors in ATS case arising from corporate activities in Indonesia).

In addition, for all manner of lawsuits concerning torts and injuries in foreign lands, the U.S. courts regularly entertain motions to dismiss on the common law grounds of *forum non conveniens*. See, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (affirming *forum non conveniens* dismissal of action between Asian companies stemming from alleged misrepresentations in China); *Aguinda* v. *Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming *forum non conveniens* dismissal of ATS action against corporate defendant stemming from corporate activities in Ecuador); see also Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 529 (2011) (presenting empirical study of "forum shopping" behavior in transnational litigation and concluding in part that "U.S. district court judges aggressively use the forum non

conveniens doctrine to dismiss transnational litigation, thereby offsetting the incentives created by permissive personal jurisdiction doctrine" and that "the current system is unlikely to encourage transnational forum shopping into U.S. courts to the extent suggested by the conventional understanding").

Simply put, a host of judicial tools exists to ensure that ATS cases have sufficient connection to the United States and to maintain proper respect for sovereign equality. A further jurisdictional limitation based on extraterritoriality is therefore unnecessary and has no basis in international law.

II. TREATY LAW AND INTERNATIONAL TRIBUNAL JURISPRUDENCE DEMONSTRATE THAT EXTRATERRITORIAL APPLICATION OF THE ALIEN TORT STATUTE DOES NOT VIOLATE INTERNATIONAL LAW.

Treaty law and international tribunal jurisprudence confirm that states have broad sovereign authority to exercise extraterritorial jurisdiction over violations of international law. International treaty law permits, and in some cases may even require, states to exercise extraterritorial civil jurisdiction to enforce the norms of international law that fall within the scope of the ATS's jurisdictional grant. Extraterritorial application of the ATS is also fully consistent with the jurisprudence of international criminal tribunals, the International Court of Justice

(ICJ), and the European Court of Human Rights (ECHR).

A. International Treaty Law Certainly Permits, And In Some Cases May Require, Extraterritorial Civil Jurisdiction For Fundamental Violations Of The Law Of Nations.

International law does not prohibit states from exercising extraterritorial civil jurisdiction, as evident from the fact that many treaties specifically provide for civil jurisdiction of domestic courts without setting territorial limits on that jurisdiction. Indeed, the Convention Against Torture has been understood by the Committee Against Torture and others to *require* state parties to establish extraterritorial civil jurisdiction. This is particularly noteworthy given that petitioners' complaint alleges respondents' complicity in torture among other violations of the law of nations.

1. The Convention Against Torture May Require, And Certainly Permits, Extraterritorial Civil Jurisdiction For Torture.

The Convention Against Torture, a convention with 150 state parties, including the United States, requires parties to provide a civil remedy for the fundamental law of nations violation of torture. See Convention Against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85; Status of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, United Nations Treaty Collection (June 10, 2012), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.[14]

Article 14 of the Convention Against Torture provides that:

> Each State Party shall 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. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Convention Against Torture art. 14(1). Article 14 also protects states' ability to provide compensation

---

[14] The Chevron Brief mistakenly characterizes *Al-Adsani* v. *United Kingdom*, 34 Eur. Ct. H.R. 11 (2001), as "conclud[ing] that the Torture Convention creates universal jurisdiction for criminal prosecutions against perpetrators of torture, but only territorial jurisdiction for civil litigation." Chevron Br. 14. First, *Al-Adsani* was decided on sovereign immunity grounds, not jurisdictional grounds. *Al-Adsani* ¶ 66. Second, *Al-Adsani* involved application of the European Convention on Human Rights, not the Convention Against Torture. *Al-Adsani* did not cite or discuss the civil remedy provision of Article 14 of the Convention Against Torture. See *id.*

beyond what the Convention requires. *Id.* art. 14(2) ("Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."). Unlike some articles of the Convention, Article 14's civil remedy requirement does not include any territorial limit. *Cf. id.* art. 2(1) (obligating state party to prevent torture in "territory under its jurisdiction"); art. 11 (requiring state to review detention practices "in any territory under its jurisdiction"); art. 12 (requiring investigation of suspected torture "in any territory under its jurisdiction").

The United Nations Committee that is authorized to interpret the Convention, see Convention Against Torture art. 19, has explained that state parties ought to provide for civil compensation to victims, without territorial limits. It has expressed concern at "[t]he absence of effective measures to provide civil compensation to victims of torture in all cases," and has encouraged a state party under review to "ensure the provision of compensation through its civil jurisdiction to all victims of torture." Conclusions and Recommendations, Comm. Against Torture, 34th Sess., May 2-20, 2005, ¶¶ 4(g), 5(f), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).

The Torture Victim Protection Act reflects this reading of the Convention. It furnishes a civil remedy in U.S. courts for individuals who are subject to torture under color of law of any foreign nation in the territory of a foreign state. See Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note; see

also H.R. Rep. No. 102-367, pt. 1, at 2-5 (1991) (noting the intent of Congress in enacting the TVPA to complement the ATS while implementing Article 14, citing with approval the Second Circuit's ruling in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and noting that, under the Convention, states are obliged "to provide means of civil redress to victims of torture"). "Hence, the [TVPA] statute takes the Convention [Against Torture] to permit, if not require, the exercise of universal civil jurisdiction over torture." Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 149 (2006); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 342 (2001).

The Chevron *amicus* brief contends that the TVPA, as enacted by Congress, "conflicts with international law." Chevron Br. 14 n.6. It does not, however, identify any language in the Convention Against Torture to support this view, much less point to any evidence that Congress intended to violate international law. This Court should not lightly conclude that Congress has chosen to violate international law. Instead, the TVPA is significant evidence that Congress did not regard the decision to exercise extraterritorial civil jurisdiction to enforce the prohibition on torture as inconsistent with international law. Indeed, Congress has since affirmatively authorized extraterritorial civil jurisdiction in similar contexts. See 28 U.S.C. § 1605A (creating cause of action against certain foreign states designated as state

sponsors of terrorism for extraterritorial acts of torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such acts).

While there remains some debate over whether Article 14 of the Convention Against Torture *compels* signatories to provide extraterritorial civil remedies,[15] it has never been suggested that the treaty *prohibits* – or reflects a prior prohibition against – such a remedy. A review of the Convention's text and drafting history, and the United States' subsequent legislation, makes clear that the only question is whether extraterritorial civil jurisdiction is required, not whether it is permitted under international law. Therefore, the Convention Against Torture demonstrates that there is no categorical prohibition of

---

[15] For instance, a U.S. understanding upon ratification of the Convention Against Torture, notably *before* the contrary authoritative interpretation of the Committee Against Torture and the contrary statement of congressional intent in the Torture Victim Protection Act, indicated 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." Report of the Comm. on Foreign Relations, S. Exec. Rep. No. 101-30, at App. A, 37 (1990); see also *Jones* v. *Ministry of Interior of Kingdom of Saudi Arabia,* [2006] UKHL 26, ¶ 25; *Bouzari* v. *Islamic Republic of Iran,* [2004] 71 O.R. 3d 675, ¶ 81 (Can.). *Jones* and *Bouzari* are readily distinguishable from the *Kiobel* case because they involved actions against foreign government actors as defendants, thus implicating international law prohibitions of sovereign immunity. See *infra* Part III.B.

extraterritorial civil jurisdiction for violations of the law of nations in international treaty law.

2. Other International Agreements Establish Civil Jurisdiction For Violations Of The Law Of Nations Without Express Territorial Limits.

Other treaties also specifically provide for civil jurisdiction of domestic courts over violations of the law of nations without imposing explicit territorial limits on that jurisdiction. See, *e.g.*, International Convention for the Protection of All Persons from Enforced Disappearance art. 24(4), G.A. Res. A/61/177 (2006), *reprinted in* 14 Int'l. Hum. Rts. Rep. 528 (2007) ("Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."); Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex art. 3, Oct. 18, 1907, 36 Stat. 2277 ("A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.").

In addition, the Rome Statute of the International Criminal Court provides for civil remedies without territorial limit for victims of crimes covered under the statute, including genocide, crimes against humanity, and war crimes. Rome Statute of the

International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, arts. 5 & 75. The Statute establishes a system of reparations that in many ways mirrors the process for appending civil claims to criminal prosecutions found in many states' domestic legal systems. See *infra* Part. III.A.

The draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters explicitly allows for universal civil jurisdiction for fundamental human rights violations in Article 18(3). Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, Prel. Doc. No. 11 (Aug. 2000), *available at* http://www.hcch.net/upload/wop/jdgmpd11.pdf. While the Convention has not been made law, the proposed extraterritorial civil jurisdiction provisions provide clear evidence of international support "for the exercise, subject in some cases to conditions, of universal jurisdiction to provide civil remedies for a narrow category of serious offenses." Donovan & Roberts, *supra*, at 152.[16]

In sum, a range of international agreements including the Convention Against Torture demonstrate that international law does not prohibit – and in at least some cases actively promotes – extraterritorial civil jurisdiction for fundamental violations of the law

[16] Work on the draft convention was postponed in 2001. Donovan & Roberts, *supra*, at 152.

of nations. That not all states exercise extraterritorial jurisdiction over cases alleging fundamental international law violations does not mean that such jurisdiction violates international law. Under the *Lotus* principle, sovereign states are *permitted*, but not *required*, to exercise extraterritorial civil jurisdiction. See *id.* at 144.

B. Extraterritorial Civil Jurisdiction For Fundamental Violations Of The Law Of Nations Is Consistent With The Jurisprudence Of International Tribunals.

Extraterritorial application of the ATS is not only fully consistent with international treaty law, but it is also fully consistent with the jurisprudence of international criminal tribunals, the ICJ, and the ECHR. None of these international law authorities has expressed disapproval of extraterritorial civil jurisdiction over fundamental violations of the law of nations. To the contrary, they have implied active *support* for such jurisdiction.

In *Prosecutor* v. *Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) explicitly supported the imposition of extraterritorial civil jurisdiction for violations of fundamental international human rights norms. The court indicated that, if the law of a given state allowed such a violation, "the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national

authorising act." *Prosecutor* v. *Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

The ICJ has also implied support for extraterritorial civil jurisdiction for *jus cogens* violations – that is, for violations of peremptory principles of international law that are binding on all states at all times. As noted in Part I, *supra*, in its *Arrest Warrant* decision, the ICJ was asked to rule on whether Belgium's issuance of an arrest warrant for the Minister of Foreign Affairs of the Democratic Republic of the Congo on account of his violations of human rights in the Congo was in accordance with international law. *Arrest Warrant*, at ¶ 1. The majority of the court held that the arrest warrant was barred by sovereign immunity, without considering whether Belgium's exercise of extraterritorial jurisdiction was itself legal. See *id.*

The influential concurring opinion from Judges Higgins, Kooijmans, and Buergenthal argued that the majority should have addressed the underlying question of extraterritorial jurisdiction. *Id.* ¶¶ 2-4 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). In addressing the issue themselves, the concurring judges expressed approval of universal criminal jurisdiction for *jus cogens* violations – even *in absentia* jurisdiction – provided certain conditions, like respect for sovereign immunity, were met. See *id.* ¶ 59; see also *id.* ¶ 48 ("In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction."); *id.* ¶ 47 ("The movement is

toward bases of jurisdiction other than territoriality.").[17]

Indeed, extraterritorial civil suits are not only permitted by international courts, but "the argument [is] increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*." International Law Commission, *Report of the Working Group on Jurisdictional Immunities of States and Their Property, Appendix*, ¶¶ 3, 6, U.N. Doc. A/54/10 (May 23-July 23, 1999) (noting that "national courts, in some cases, have shown some sympathy for this argument").

The ECHR faced this question in *Al-Adsani* v. *United Kingdom*, which arose from a claim against Kuwait in the British courts arising from the torture of plaintiff Al-Adsani in Kuwait. *Al-Adsani* v. *United Kingdom*, 34 Eur. Ct. H.R. 11, ¶¶ 9-19 (2001). The question was not whether extraterritorial civil

---

[17] The discussion also references the ATS, stating that "[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally." *Arrest Warrant*, at ¶ 48 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). Although respondents' *amici* imply that this statement questions the legality of extraterritorial civil jurisdiction, see, *e.g.*, Chevron Br. 7, it is clear from the full opinion that this is no more than an acknowledgement that extraterritorial civil jurisdiction for *jus cogens* violations has not been widely adopted in an ATS-like form.

jurisdiction for *jus cogens* violations was appropriate, as the Chevron Brief incorrectly claims, Chevron Br. 14, but rather whether torture was such a deeply embedded norm as to overcome the sovereign immunity provided by a domestic statute. *Al-Adsani*, 34 Eur. Ct. H.R. 11, ¶ 66. The majority of the Court held over substantial dissent, *id.* (dissenting opinions of Rozakis and Caflisch; Bravo; and Loucaides), that the application of the domestic statute "to uphold Kuwait's claim to immunity" did not amount to "an unjustified restriction on the applicant's access to a court." *Id.* ¶ 67. Hence, the ECHR, like the ICJ and the ICTY, does not deny the appropriateness of extraterritorial civil jurisdiction for fundamental human rights violations when consistent with sovereign immunity.

III. THE STATUTES AND JUDICIAL DECISIONS OF OTHER COUNTRIES ALLOW EXTRATERRITORIAL CIVIL JURISDICTION TO ENFORCE INTERNATIONAL LAW.

A. The Statutes Of Numerous Other States Provide For Both Criminal And Civil Extraterritorial Jurisdiction To Enforce International Law.

When this case was initially argued before the Court, Justice Kennedy asked counsel if any other nation exercises civil jurisdiction for international offenses committed by a foreign person against a foreign victim in a foreign territory. Oral Argument at 0:56, *Kiobel* v. *Royal Dutch Petroleum, Co.* (No. 10-1491). In fact, many nations do.

Many states have exercised their sovereign authority to pass extraterritorial criminal jurisdiction statutes to enforce international law.[18] Furthermore, many countries allow victims to make *civil* claims for damages in criminal proceedings, including any criminal proceedings based on universal jurisdiction. "Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Sosa*, 542 U.S. at 763 (Breyer, J., concurring). As explained in the *amicus* brief for the European Commission in *Sosa*, "[i]n these [legal] systems, civil jurisdiction would extend to the same category of cases as universal criminal jurisdiction." Brief for the European Commission as *Amicus Curiae* Supporting

---

[18] See, *e.g.*, Strafgesetzbuch [Criminal Code] § 64 (Austria); Crimes Against Humanity and War Crimes Act § 6 (Can.); Straffeloven [Criminal Code] § 8(5) (Den.); Rikoslaki [Criminal Code] ch. 1, § 7 (Fin.); Code de Procédure Pénale [Code of Criminal Procedure] art. 689 (Fr.); Völkerstrafgesetzbuch [Code of Crimes Against International Law] pt. 1, § 1 (Ger.); Poinikou Kodika [Criminal Code] art. 6(k) (Greece); Codice Penale [Criminal Code] art. 7(5) (It.); Wet Internationale Misdrijven [International Crimes Act] pt. 1, § 1 (Neth.); Lei penal relativa às violações do direito internacional humanitário [Law on Criminal Violations of International Humanitarian Law] (Port.); Ley Número 1/2009, amending Ley Orgánica del Poder Judicial [Judicial Power Organization Act] art. 23.4 (Spain); Brottsbalken [Criminal Code] ch. 2, § 3(6)-(7) (Swed.); Criminal Justice Act (1988) § 134(1) (U.K.) (providing for universal criminal jurisdiction over torture); International Criminal Court Act 2001 § 51(2)(b) & 68 (U.K.) (exercising criminal jurisdiction over genocide, crimes against humanity, and war crimes committed "outside the United Kingdom").

Neither Party at 21-22, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

Such civil redress takes on various forms. For example:

- In France, the Code of Criminal Procedure provides that a "civil action may be exercised at the same time as the public prosecution and before the same court. It is admissible for any cause of damage, whether material, bodily or moral, which ensues from the actions prosecuted." Code de Procédure Pénale [Code of Criminal Procedure] art. 3.

- In Greece, victims can likewise bring civil claims for damages within criminal proceedings and can choose to bring all or only part of their claims. Kodikas Poinikes Dikonomias [Code of Criminal Procedure] arts. 63-70, 82-88, 108, 468, 480, 488. Additionally, claims that are brought before civil courts can be discontinued and then brought within criminal proceedings against the same defendant. *Id.* art. 66.

- In Spain, any criminal complaint filed by a victim is also automatically a civil claim unless the claimant expressly renounces it. The law also allows a claimant to file a separate civil action after criminal responsibility has been proven. Código Penal [Criminal Code] art. 118-119, *available at* http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html; Ley de Enjuiciamiento Criminal [Code of Criminal Procedure] arts. 13, 299, 615-621,

625, *available at* http://noticias.juridicas.com/base_datos/Penal/lecr.html.

- In Sweden, a prosecutor is obligated to pursue any civil claims requested by the victim if this can be done without considerable inconvenience and if the claim is not manifestly unfounded; however, when this is not possible, a court may order that the claim be brought instead through a civil action. See Rättegångsbalk [Code of Judicial Procedure] ch. 22, *available at* http://www.sweden.gov.se/content/1/c6/02/77/78/30607300.pdf.

Many other states have both universal jurisdiction statutes and laws for appending civil claims to criminal prosecutions – for example, Argentina,[19] Austria,[20] Belgium,[21] Bolivia,[22] Canada,[23] China,[24]

---

[19] Constitución Nacional [National Constitution] art. 118; Law No. 26.200 (Implementing the Rome Statute) arts. 3(d), 4; Código Procesal Penal de la Nación [National Code of Criminal Procedure] arts. 14-17.

[20] Strafgesetzbuch [Criminal Code] arts. 64-65; see also REDRESS, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union* 73-74 (2010).

[21] Code Pénal [Criminal Code] art. 136, 417; Code de Procédure Pénale [Code of Criminal Procedure] arts. 4, 66, 67; see also REDRESS, *supra* note 20, at 81-82.

[22] Código Penal [Criminal Code] art. 1(7); Código de Procedimiento Penal [Code of Criminal Procedure] arts. 36-41.

[23] Crimes Against Humanity and War Crimes Act § 9, para. 3, S.C. 2000, c. 24.

[24] Zhonghua Renmin Gonghe Guo Xingfa [Criminal Law of the People's Republic of China] arts. 9, 36.

Colombia,[25] Costa Rica,[26] Denmark,[27] Finland,[28] Germany,[29] Italy,[30] Luxembourg,[31] Myanmar,[32] the Netherlands,[33]

---

[25] Código Penal [Criminal Code] art. 16; Código de Procedimiento Penal [Code of Criminal Procedure] arts. 45-49.

[26] Código Penal [Criminal Code] art. 7; Código Procesal Penal [Code of Criminal Procedure] art. 37.

[27] Straffeloven [Criminal Code] § 8(5)-8(6); Lov om Rettens Pleje Retsplejeloven [Administration of Justice Act] § 991; see also REDRESS, *supra* note 20, at 112.

[28] Rikoslaki [Criminal Code] ch. 1 § 7; Laki oikeudenkäynnistä rikosasioissa [Criminal Procedure Act] ch. 3 § 1; see also REDRESS, *supra* note 20, at 123-124.

[29] Strafgesetzbuch [Criminal Code] § 6; Völkerstrafgesetzbuch [Code of Crimes Against International Law] pt. 1, § 1; Strafprozessordnung [Code of Criminal Procedure] § 404.

[30] Codice Penale [Criminal Code] arts. 7, 10, 185; Codice di Procedura Penale [Code of Criminal Procedure] arts. 74, 90, 101, 394, 396; Legge 3 novembre 1988, n.498 [Law No. 498 of 3 November 1988] art. 3(1)(c).

[31] Code d'Instruction Criminelle [Code of Criminal Investigation] arts. 3, 7-3, 7-4, *available at* http://www.legilux.public.lu/leg/textescoordonnes/thema/J/index.html#code_instruction_criminelle.

[32] Criminal Code of 1861 art. 3; Code of Criminal Procedure arts. 545, 546.

[33] Wet Internationale Misdrijven [International Crimes Act] § 2; Wetboek van Strafrecht [Criminal Code] § 36(f); Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure] art. 9 ("When [earlier] Articles * * * indicate that Dutch courts have no jurisdiction, then they nevertheless have if: * * * a civil case outside the Netherlands appears to be impossible or; the legal proceedings * * * have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court.").

Panama,[34] Poland,[35] Portugal,[36] Romania,[37] Senegal,[38] and Venezuela.[39]

The countries that provide for extraterritorial criminal jurisdiction (many of which provide for appending civil claims) all agree on the legality of extraterritorial jurisdiction over violations of international law. They still vary, however, with regard to how they regulate exercises of extraterritorial jurisdiction by their courts. For example, many states simply require the defendant's presence in the territory of the state prior to the initiation of prosecution. This presence requirement parallels the personal jurisdiction requirement in U.S. federal law. Canada, France, the

---

[34] Código Penal [Criminal Code] arts. 19, 20(4), 21, 431-445; Código Judicial Procesal Penal [Judicial Code of Criminal Procedure] art. 1986.

[35] Kodeks Karny [Criminal Code] arts. 5, 110 (2), 111, 113; Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L. 1, 19 n.62 (2002) (noting that civil claims can be attached to criminal prosecution in Poland).

[36] Código Penal [Criminal Code] art. 5; Código de Processo Penal [Criminal Procedure Code] arts. 68, 71, 74; see also REDRESS, *supra* note 20, at 215-216.

[37] Codul Penal [Criminal Code] arts. 11-15 (universal criminal jurisdiction); arts. 173-175 (genocide, war crimes, and crimes against humanity); Codul de Procedura Penala [Criminal Procedure Code] art. 15.

[38] Code de Procédure Pénale [Code of Criminal Procedure] arts. 2, 3, 669.

[39] Código Penal [Criminal Code] arts. 4 (9), 113; Stephens, *supra* note 35, at 19 n.62.

Netherlands, and Sweden are all "pure presence" states.[40] Some countries exercise far more expansive jurisdiction and have practically no express nexus requirements – not even requiring presence. These countries include Finland and Greece.[41]

Italy has different nexus requirements depending on the crime. Note from the Permanent Mission of Italy to the United Nations, ¶ 3, *available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Italy.pdf (last visited June 10, 2012). For example, Italy's implementing legislation for the Convention Against Torture, Law No. 498, November 3, 1988, art. 3, "requir[es] the presence of the defendant, the non-extradition (sic.) and the request of the Minister of Justice." *Id.*

Spanish law provides that, except where international treaty obligations require Spain to exercise jurisdiction,

---

[40] See Crimes Against Humanity and War Crimes Act § 8(b), S.C. 2000, c. 24 (Can.); Code de Procédure Pénale [Code of Criminal Procedure] art. 689 (Fr.); Wet International Misdrijven [International Crimes Act] § 2(1) (Neth.); Brottsbalken [Criminal Code] ch. 2 (Swed.).

[41] Rikoslaki [Criminal Code] ch. 1, § 7 (Fin.); Verbal Note from the Permanent Mission of Finland to the United Nations on the Application of Chapter 1, Section 7 of the Criminal Code (627/1996) (May 17, 2010); Poinikou Kodika [Criminal Code] ch. 8 (Greece); Kodikas Poinikes Dikonomias [Code of Criminal Procedure] arts. 270, 340(2) (Greece).

> it must be established that the alleged perpetrators are present in Spain, that there are victims of Spanish nationality or that there is some relevant link with Spain and, in any event, that no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.

Ley Número 1/2009, amending Ley Orgánica del Poder Judicial [Judicial Power Organization Act] art. 23.4 (Spain). These standards are similar to the personal jurisdiction requirement and prudential doctrines of *forum non conveniens* and exhaustion applied by U.S. courts. See *supra* Part I.B.

Countries also vary with regard to whether individuals may determine which suits are brought. In the Netherlands, for example, an interested party may challenge the exercise of prosecutorial discretion in an appellate court. See REDRESS, *supra* note 20, at 195. Spain gives a significant role to private interested parties, allowing for private citizens to request the prosecutor and the investigating judge to initiate charges or an investigation. See Constitución Española [Spanish Constitution of 1978] § 124(1); REDRESS, *supra* note 20, at 240.

In short, many states have enacted extraterritorial civil jurisdiction statutes that extend to international crimes committed by foreigners against foreign victims. States vary with regard to how they regulate the exercise of such jurisdiction. Some do so with strong prosecutorial discretion, others with nexus

requirements (such as the presence of the defendant within the forum's territory). Although the ATS exercises and regulates extraterritorial jurisdiction in its own particular way, it has analogs in other states' practice. At the very least, these varied statutes providing for extraterritorial criminal and civil jurisdiction over violations of international law support the proposition that extraterritorial jurisdiction of the kind provided for in the ATS does not violate international law.

B. Foreign Courts Have Entertained ATS-Like Extraterritorial Tort Suits, And None Questions The Legality Of Extraterritorial Civil Jurisdiction.

The courts of other countries have exercised jurisdiction over ATS-like lawsuits. In the few decisions in which courts have declined to hear extraterritorial human rights claims, they have done so not because the cases preclude extraterritorial jurisdiction but because the suits were barred by sovereign immunity.

In a recent decision, a Dutch court awarded a Palestinian citizen civil damages against Libyan defendants for torture committed in Libya. See *Ashraf Ahmed El-Hojouj* v. *Harb Amer Derbal et al*., Hague District Court, No. 400882 (Mar. 21, 2012). This decision together with the statutes cited above refute the contention that "[n]o other nation in the world" would allow ATS-type lawsuits. Chevron Br. 6. In fact, the *el-Hojouj* case appears to go beyond the ATS:

the defendants in this case were not present in the Netherlands, whereas ATS lawsuits require personal jurisdiction over any defendants before the case may proceed. See *el-Hajouj*, at 1.2; *supra* Part I.B.

Italian courts have similarly asserted universal civil jurisdiction over the types of norms enforced by the ATS. In *Ferrini* v. *Ger.*, Cass., 11 marcia 2004, no. 5044/4, ILDC 19 (IT 2004), the Italian Supreme Court asserted civil jurisdiction over German war crimes, some of which were committed in Germany. *Id.* ¶ 9 (holding that "there can be no doubt that the principle of universality of jurisdiction also applies to civil suits relating to [*jus cogens*] crimes"). Although the ICJ subsequently held that sovereign immunity prevented Germany from being held civilly liable in the Italian courts, it did not hold that extraterritorial civil jurisdiction was barred generally. See *Jurisdictional Immunities of the State* (*Ger.* v. *It.*), Judgment, ¶¶ 91-97 (Feb. 3, 2012).

Where national courts have refused to hear extraterritorial human rights actions, it was not due to a bar against extraterritorial civil jurisdiction. In *Bouzari* v. *Islamic Republic of Iran*, [2004] 71 O.R. 3d 675 (Can.), the Ontario Court of Appeal considered an Iranian citizen's action against the government of Iran for torture committed in Iran. The court held that it was not *required* by international law to provide an *exception* to its domestic sovereign immunity statute to ensure civil redress for torture committed abroad. *Id.* ¶ 60-95. The court never reached the question of whether it would have provided civil

redress in the absence of sovereign immunity, though it noted that, "[g]iven that the appellant is now connected to Ontario by his citizenship, the requirement of fairness that underpins the real and substantial connection test would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere." ¶ 37.

The U.K. House of Lords employed a similar analysis in *Jones* v. *Ministry of Interior of Kingdom of Saudi Arabia,* [2006] UKHL 26. The court considered whether to permit a suit alleging torture to proceed even though the defendants possessed sovereign immunity under the State Immunity Act. The Lords reasoned that the domestic sovereign immunity statute had to give way in cases involving criminal proceedings because such jurisdiction was *mandated* by the Torture Convention. *Id.* ¶ 19. The Lords concluded, however, that the same Convention does not *require* the exercise of extraterritorial civil jurisdiction, *id.* ¶ 25, so international law did not mandate an exception to the domestic sovereign immunity statute in cases asserting civil jurisdiction over a foreign state defendant. *Id.* ¶ 27.[42] The *Jones* decision did not "embrace[ ]" an international-law prohibition on the extraterritorial application of the ATS. Chevron Br. 7. Where the Lords criticized ATS decisions,

[42] As noted earlier, *supra* Part II.B, the same was true in *Al-Adsani*, 34 Eur. Ct. H.R. 11, where the ECHR concluded that the suit was barred by a domestic immunity statute and did not address the possibility of an extraterritoriality bar.

they were merely objecting to the failure to grant immunity to state officials. The Lords' statements about conflict between international law and the ATS pertained solely to U.S. sovereign immunity doctrine (which is narrower than that of Great Britain), not to extraterritoriality.[43]

The Australian decision *Zhang* v. *Zemin*, [2010] 243 FLR 299 ¶¶ 120-21 – involving a lawsuit brought against former Chinese state officials for torture and other harms – also turned on sovereign immunity under a domestic immunity statute. The court concluded that "a considerable body of authority," *id.* ¶ 121, denied the existence of mandatory universal jurisdiction. Hence, as in *Jones*, the Court concluded that the prohibition on torture did not require the court to override the domestic sovereign immunity statute. Nowhere did the court suggest that extraterritorial civil jurisdiction was prohibited where suit was not barred by the sovereign immunity statute.

Extraterritorial application of the ATS is therefore in accord with the practice of Dutch and Italian

---

[43] Lord Hoffmann's statement that ATS cases are "contrary to customary international law and the Immunity Convention" pertains to those cases that "circumvent[ ] the FSIA [Foreign Sovereign Immunities Act]," *Jones*, ¶ 99 (internal quotations omitted); see also ¶ 98 (distinguishing between "assumption of jurisdiction under the ATCA" and questions of state immunity). These statements do not independently address extraterritoriality but are criticisms of the American doctrine that state officials lose their sovereign character for immunity purposes when they violate the law of nations.

courts, both of which would exercise jurisdiction over the types of international law violations permitted by *Sosa*; it is also consistent with the Canadian, British, and Australian decisions. The only extraterritorial civil jurisdiction that any foreign court has rejected is a *mandatory* jurisdiction of the sort that would abrogate domestic sovereign immunity statutes. In short, the decisions of foreign courts support the *Lotus* principle permitting sovereign states to exercise extraterritorial jurisdiction to enforce international law except where specifically prohibited.

CONCLUSION

Extraterritorial application of the ATS is consistent with international law. Accordingly, for these reasons and those set forth by petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JEFFREY A. MEYER
127 Wall Street
New Haven, CT 06511
(203) 432-3918

OONA A. HATHAWAY
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 436-8969
oona.hathaway@yale.edu

Counsel for Amicus Curiae

JUNE 2012