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., *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF OF THE EUROPEAN COMMISSION ON BEHALF OF THE EUROPEAN UNION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

The European Commission is the executive body of the European Union, successor to the European Community as of December 1, 2009. The European Union is presently composed of twenty-seven Member States.[2] It is a treaty-based international organization[3] with the competence to develop and enforce Union-wide legislation in specified areas of policy, conferred upon the Union by its Member States.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel.

[2] These Member States are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Croatia is expected to join the European Union on July 1, 2013.

[3] The European Union (EU) is currently based on two treaties setting out its primary law: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Consolidated versions of the TEU and TFEU are published in the *Official Journal of the European Union*, which was named Official Journal of the European Communities until February 1, 2003. *See Consolidated Version of the Treaty on European Union* & *Consolidated Version of the Treaty on the Functioning of the European Union*, Mar. 30, 2010, 2010 OFFICIAL J. OF THE EUR. UNION [hereinafter O.J.] (C 83) 13, 47 (EU).

In the exercise of this competence, the European Union has adopted rules on allocation of jurisdiction regarding transnational claims for civil matters including torts, *delicts* and *quasi-delicts*.[4]

The Treaty on European Union includes an explicit commitment that its external action be guided by the rule of law, as well as the universality and indivisibility of human rights and fundamental freedoms, and that it shall work to achieve a high degree of cooperation in all fields of international relations to consolidate and support the rule of law, human rights, and the principles of international law.[5]

To preserve harmonious international relations, States and international organizations such as the European Union must respect the substantive and procedural limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.

The European Union also has a concrete interest in ensuring that EU- based natural and legal persons are not at risk of being subjected to the laws of other

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[4] The terms "tort, delict, and quasi-delict" refer to all civil matters not arising in contract. The same EU rules on allocation of jurisdiction and recognition and enforcement of judgments in civil and commercial matters also apply pursuant to international treaties to three additional non-EU States (Iceland, Norway, and Switzerland). *See* Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007, 2007 O.J. (L 339) 3 [hereinafter Lugano Convention]; *infra* Part I.B.2.c.

[5] *See Consolidated Version of the Treaty on European Union*, *supra* note 3, art. 21, paras. 1, 2(b), at C 83/28-29.

States where extraterritorial application of laws does not respect the limits imposed by international law. The European Union must ensure that its cooperation with and provision of economic, financial, and technical assistance to non-EU nations does not expose the European Union to impermissible exercises of extraterritorial jurisdiction by another State in contravention of international law.

SUMMARY OF ARGUMENT

The European Commission submits this brief on behalf of the European Union as *amicus curiae* in support of neither party.

As the European Commission has previously submitted to the Court, the Alien Tort Statute (ATS) should be interpreted by reference not only to the substantive but also to the jurisdictional limits set forth by the law of nations.[6] United States courts have consistently applied the ATS to extraterritorial conduct since the "birth of the modern line of cases" in *Filartiga*.[7] For extraterritorial application of the

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[6] *See* Brief of *Amicus Curiae* the European Commission in Support of Neither Party at 3, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), Nos. 03-339, 03-485, 2004 WL 177036 [hereinafter *Sosa* Br.].

[7] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *see also Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) ("Courts have been applying the [ATS] extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially . . . ."); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 26 (D.C. Cir. 2011); *Sarei v. Rio Tinto*, 671 F.3d 736, 745 (9th Cir.

ATS to comport with the law of nations and the *Charming Betsy* doctrine,[8] it must be confined to the limited bases for extraterritorial jurisdiction recognized by international law.

These bases include the exercise of prescriptive jurisdiction over claims involving extraterritorial conduct where the defendant has United States nationality or where the conduct threatens United States' fundamental security interests. They also include the exercise of universal jurisdiction to reach conduct and parties with no nexus to the United States—but only when the conduct at issue could also give rise to universal *criminal* jurisdiction.

This universal jurisdiction is limited to the narrow category of claims involving the most grave violations of the law of nations, such as genocide or torture, or conduct committed outside any nation's territorial borders, such as piracy. Moreover, claimants must exhaust domestic and international remedies (or demonstrate that their pursuit would be futile) before United States courts may entertain ATS cases on the basis of universal jurisdiction. These limits ensure that universal jurisdiction is appropriately exercised and that such jurisdiction comports with international law principles of comity and equality of sovereignty. The United States' exercise of universal jurisdiction under the ATS is consistent with inter-

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2011); *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338, 1345 (11th Cir. 2011); *Chavez v. Carranza*, 559 F.3d 486, 491-92 (6th Cir. 2009); *Yousef v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009).

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

national law in accordance with these well-established constraints.

ARGUMENT

I. THE JURISDICTIONAL LIMITS OF THE ALIEN TORT STATUTE SHOULD BE DEFINED BY REFERENCE TO INTERNATIONAL LAW

Under international law, the application of a State's laws must fall within its "jurisdiction to prescribe," which "refers to the authority of a state to make its law applicable to persons or activities."[9] The law of nations recognizes a State's prescriptive jurisdiction to apply its laws to conduct that occurs beyond its territorial borders only in limited circumstances. These same limitations should constrain extraterritorial application of the ATS.

Three recognized bases for extraterritorial jurisdiction may be implicated by an action brought under the ATS: nationality, the protective principle, and universal jurisdiction. If any of these circumstances is present, the assertion of extraterritorial jurisdiction will comply with international law.

A. United States Courts Apply International Law When Determining the Extraterritorial Reach of a Statute

For over two centuries, this Court has upheld the now-familiar *Charming Betsy* doctrine that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction re-

[9] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting in part).

mains."[10] This principle assists the courts in "avoid[ing] unreasonable interference with the sovereign authority of other nations" when applying United States law to cases implicating foreign concerns.[11] The *Charming Betsy* doctrine requires courts to "assume" that "Congress ordinarily seeks to follow" "principles of customary international law."[12]

The doctrine is most frequently implicated where, as here, the extraterritorial application of a statute is in question.[13] In many such cases, the doctrine works hand in hand with the presumption against extraterritoriality,[14] which requires courts to presume that a statute is "meant to apply only within the territorial jurisdiction of the United States" unless "a contrary intent appears."[15]

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[10] *Charming Betsy*, 6 U.S. at 118.

[11] *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004).

[12] *Id.*

[13] *See United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (quoting *United States v. Vasquez–Velasco*, 15 F.3d 833, 839 (9th Cir. 1994) ("In determining whether a statute applies extraterritorially, we also presume that Congress does not intend to violate principles of international law.")).

[14] *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883-84 (2010).

[15] *Id.* at 2877 (citation omitted); *see also F. Hoffman-La Roche*, 542 U.S. at 164-65 (Sherman Act does not apply to independent foreign effects of foreign price-fixing conduct); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (National Labor Relations Act does not apply to maritime operations of foreign

The presumption against extraterritoriality, however, is no "limit upon Congress's power to legislate" with respect to "foreign matters" should it intend to do so.[16] If the presumption against a statute's extraterritorial application is overcome, the *Charming Betsy* doctrine operates to avoid conflict with the law of nations. Under international law, an extraterritorial statute can reach no further than the regulating State's prescriptive jurisdiction would permit. Thus, when a statute is given extraterritorial effect, the *Charming Betsy* doctrine becomes "relevant to determining the substantive reach of the statute because 'the law of nations,' or customary international law, *includes limitations on a nation's exercise of its jurisdiction to prescribe*."[17]

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flagships employing alien seamen under articles of a foreign sovereign).

[16] *Morrison*, 130 S. Ct. at 2877.

[17] *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting in part) (emphasis added). The majority in *Hartford Fire* did not consider prescriptive jurisdiction because the parties did not contest it. *See id.* at 796 n.22. However, Justice Scalia's opinion dissenting in part, joined by three other Justices, explained *Charming Betsy*'s implications for an extraterritorial statute and the State's jurisdiction to prescribe, and has been relied on by the Courts of Appeals when addressing these issues. *See In re Hijazi*, 589 F.3d 401, 408-09 (7th Cir. 2009); *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1363-64 (Fed. Cir. 2008); *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1103 (9th Cir. 2005); *United States v. Nippon Paper Inds. Co., Ltd.*, 109 F.3d 1, 11 (1st Cir. 1997). Justice Scalia's opinion has also been relied on by this Court for the broader principle that interpretation of federal stat-

Accordingly, international law governs not only the "substantive principle" that conduct is "universally wrong" but also the "jurisdictional principle" that a nation may "prosecute" the alleged perpetrator.[18] To comply with the law of nations, the ATS must derive both its substantive claims and its jurisdictional limits from customary international law.[19]

B. International Law Authorizes the Extraterritorial Application of the ATS When Confined to Internationally-Recognized Bases for Jurisdiction

Under international law, a State's authority to "make its law applicable" to activities, relations, and persons must comport with certain generally recognized bases for jurisdiction.[20] Under customary international law, bases for jurisdiction are merely *permissive*: a State is not obligated to exercise jurisdiction to the full extent available under interna-

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utes is constrained by international law. *See F. Hoffman-La Roche*, 542 U.S. at 164; *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143 (2005) (Ginsburg, J., concurring) (quoting Justice Scalia's *Hartford Fire* dissent in part for the principle that "statutes 'should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law'") (quoting 509 U.S. at 815 (Scalia, J., dissenting in part)).

[18] *Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

[19] *See Sosa* Br. at 4-5.

[20] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT].

tional law.[21] Thus, international law tolerates "a wide measure of discretion" by a State to "adopt the principles which it regards as best and most suitable" within prescribed limitations.[22]

Under the *Lotus* principle regularly invoked by the International Court of Justice ("ICJ"),[23] the recognized bases for jurisdiction sometimes permit States to apply their laws to "persons, property and

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[21] 1 OPPENHEIM'S INTERNATIONAL LAW § 136 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 63, 76, ¶ 45 (Feb. 14) (Higgins, Kooijmans & Buergenthal, JJ., Joint Separate Opinion) ("But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law . . . .").

[22] *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

[23] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 9 (Oxford University Press 2008); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 331 (2012) ("The International Court of Justice has reaffirmed the enduring force of this rule as recently as 2010, noting that the rule articulated in Lotus remains a cornerstone of the international law of jurisdiction."); *Accordance with Int'l Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 1, 21, ¶ 56 (July 22) (noting that the answer to the question "whether the declaration of independence was 'in accordance with' international law," "turns on whether or not the applicable international law prohibited the declaration of independence").

acts outside their territory."[24] However, a State's extraterritorial application of its laws violates international law if it extends "jurisdiction beyond a legal basis for it" or contravenes "a specific legal limit" on jurisdiction.[25]

There are five internationally recognized bases for prescriptive jurisdiction over "transnational" conduct: territoriality, nationality, passive personality, the protective principle, and universal jurisdiction.[26] All but the last require some nexus between the conduct to be regulated and the regulating State.

Of these five traditional bases for jurisdiction, one will generally be inapplicable to the ATS. Passive personality, which supplies jurisdiction where the victim is a national of the forum State, will not apply to the ATS, which provides a cause of action solely to aliens.[27] A second basis, territoriality, *does*

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[24] *S.S. Lotus*, 1927 P.C.I.J. at 19.

[25] John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 355-56 (2010).

[26] RESTATEMENT § 402 & cmts. c-g, § 404. Federal Courts of Appeals consistently apply these five principles to constrain the United States' exercise of jurisdiction in cases implicating the interests of foreign sovereigns. *See United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("International law permits extraterritorial jurisdiction under five theories: territorial, national, protective, universality, and passive personality."); *see also United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003); *United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000); *United States v. MacAllister*, 160 F.3d 1304, 1308 n.9 (11th Cir. 1998).

[27] *See* 28 U.S.C. § 1350; RESTATEMENT § 402 cmt. g.

provide a ground for jurisdiction under the ATS, but only for "conduct that wholly or in substantial part, takes place within [the] territory" of the United States, so it is not relevant to the question presented here.[28]

Accordingly, the ATS may be applied extraterritorially only when the requirements of nationality, the protective principle, or universal jurisdiction are met.

1. Prescriptive Jurisdiction Based on Nationality or the Protective Principle Is Consistent with International Law

Under the nationality principle, international law permits a State to regulate "the activities, interests, status or relations of its nationals outside as well as within its territory."[29] The United States may therefore exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law. This uncontroversial basis for jurisdiction under international law is regularly

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[28] RESTATEMENT § 402(1)(a). Although the territorial principle has been extended by some forums to include extraterritorial activity "having or intended to have substantial effect within the state's territory," *id.* at § 402 cmt. d, the validity of this so-called effects doctrine as a matter of international law is subject to substantial controversy. *See, e.g.*, Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, & the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799, 812 (2008) (the "admissibility" of "the effects doctrine" "under international law is controversial").

[29] RESTATEMENT § 402(2).

applied by United States courts as a ground for extraterritorial application of laws.[30]

Although far less likely to arise under the ATS, the protective principle may also provide a basis for jurisdiction in limited circumstances. Under the protective principle, a State may exercise jurisdiction over "acts abroad that threaten 'the security of the state or other offenses threatening the integrity of governmental functions . . . .'"[31] Because the acts giving rise to ATS liability are limited to a narrow set of conduct violating norms "accepted by the civilized world,"[32] the oft-identified threats to national security under the protective principle, such as espionage and counterfeiting, would be insufficient to give rise to an ATS claim. Conceivably, however, universally condemned behavior that occurs abroad, such as State-sanctioned torture of an alien, could endanger the security of the United States.[33] Juris-

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[30] *See*, *e.g.*, *United States v. Weingarten*, 632 F.3d 60, 67 (2d Cir. 2011) (relying on "[t]he nationality principle" as "among the most firmly established bases for jurisdiction recognized by international law"). The application of the nationality principle was also contemplated in Justice Breyer's concurring opinion in *Sosa*. *See* 542 U.S. at 761 (noting that "comity concerns normally do not arise (or at least are mitigated) if the conduct in question . . . involves that country's own national").

[31] Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1078 (2011) (quoting RESTATEMENT § 402(3) cmt. g).

[32] *Sosa*, 542 U.S. at 725.

[33] Although this Court has not yet identified any specific norm that may give rise to an ATS claim, the recognition that official torture is universally prohibited under cus-

diction over such conduct would be permitted under the protective principle.

2. Limited Universal Civil Jurisdiction Is Consistent with International Law

The universality principle permits a State to exercise jurisdiction over an offense even where there is no nexus between that State and the nationality of the alleged perpetrator or victim, or the place of the offense.[34] Universal jurisdiction is instead founded on the sheer reprehensibility of certain crimes of "universal concern," which international law permits States to "punish without regard to territoriality or the nationality of the offenders."[35] Customary international law sanctions the application of universal jurisdiction as a means to enforce the fundamental norms violated by these heinous crimes—norms that, "at the present stage of national and international enforcement mechanisms are not at risk of overen-

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tomary international law has been codified by Congress in the Torture Victim Protection Act of 1991 (TVPA), which provides a cause of action for official torture and extrajudicial killing committed abroad. Pub. L. 102-256, 106 Stat. 73 (1992); *see* H.R. REP. 102-367 at *85 (1991) ("Official torture and summary execution violate standards accepted by virtually every nation."); *Filartiga*, 630 F.2d at 878.

[34] *See* RESTATEMENT § 404 cmt. a; *see also* LUC REYDAMS, UNIVERSAL JURISDICTION: INT'L & MUNICIPAL LEGAL PERSPECTIVES 5 (Oxford University Press 2004).

[35] *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008); *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

forcement."[36] These internationally-recognized justifications for universal jurisdiction, although typically articulated in the criminal context, also contemplate and support a civil component where limited, as here, to the circumstances that could give rise to universal criminal jurisdiction.

a. Universal Criminal Jurisdiction Is Well-Established Under International Law

Universal criminal jurisdiction permits a State to prosecute universally condemned international crimes even when committed by aliens against aliens in the territory of another sovereign.[37] The extension of such jurisdiction to a limited number of crimes—torture, genocide, crimes against humanity, and war crimes, as well as piracy—is generally accepted by the international community, even if not widely exercised.[38] Illustrating this general acceptance,

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[36] Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 156 (2006).

[37] *See* AU-EU Report, Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction, *AU-EU Expert Report on the Principle of Universal Jurisdiction*, ¶ 8, 8672/1/09 REV1 (Apr. 2009) [hereinafter AU-EU Report].

[38] *See id.* at ¶ 9; RESTATEMENT § 404; COMMITTEE ON INT'L HUMAN RIGHTS LAW & PRACTICE, INT'L LAW ASS'N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES 4-9 (2000) (discussing genocide, war crimes, crimes against humanity, and torture as the "four categories of offences" to which universal jurisdiction extends); U.N. General Assembly, Report of the Secretary- General, *The Scope and Application of the Principle of Universal*

several treaties *require* States to extend universal jurisdiction over defined crimes where the alleged perpetrator is present within their territory.[39]

Jurisdiction, U.N. Doc. A/66/93 (June 20, 2011) (surveying codification of universal jurisdiction by several States). In 2009, the European Court of Human Rights permitted the exercise of universal criminal jurisdiction, concluding that it does not violate the European Convention on Human Rights and Fundamental Freedoms, which currently binds 47 States. *See Ould Dah v. France,* Decision on Admissibility, App. No. 13113/03 (Eur. Ct. H.R. Mar. 17, 2009) (available only in French).

[39] *See* AU-EU Report ¶ 9. For example, universal jurisdiction is mandatory under these circumstances, unless the State extradites the alleged offender to another State, for grave breaches of the 1949 Geneva Convention and 1977 Addition Protocol I, for torture under the 1984 Convention Against Torture, for attacks on United Nations personnel under the 1994 Convention on Crimes Against UN Personnel, and for enforced disappearance as defined in the 2006 Convention Against Enforced Disappearance. *See* International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, sec. 2, G.A. Res. A/61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006); Convention on the Safety of United Nations and Associated Personnel, art. 10, sec. 4, Dec. 9, 1994, 2051 U.N.T.S. 363; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, sec. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T.

Universal jurisdiction is premised on the rationale that the universally condemned crimes to which it extends are so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them.[40] This rationale reflects the broad consensus under international law on the relative importance of State sovereignty and fundamental human rights. International acceptance of universal criminal jurisdiction is bolstered by the fact that such prosecutions remain rare and therefore do not upset comity between nations.[41]

When properly exercised, universal jurisdiction affirms fundamental principles of international law. As Congress recognized in sanctioning universal jurisdiction under the TVPA, "[j]udicial protections

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3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[40] *See* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 975 (2006).

[41] Even aside from local forums, States that recognize universal criminal jurisdiction rarely exercise it, increasing the likelihood that heinous crimes of "universal concern" will go unpunished. *See, e.g.*, AU-EU Report ¶¶ 19, 26 (no African State has ever exercised universal criminal jurisdiction effectively, despite attempts, and the exercise of universal jurisdiction by European Union Member States remains rare).

against flagrant human rights violations are often least effective in those countries where such abuses are prevalent."[42] Universal jurisdiction allows a State to overcome such "negative conflicts of jurisdiction," where no State is able or willing to prosecute heinous conduct, and increases the likelihood that the perpetrators will be brought to justice.

While the content and scope of universal criminal jurisdiction is subject to the evolving standards of present-day customary international law,[43] its existence is well-established.

b. Universal Civil Jurisdiction for ATS Claims Comports with the Justifications for Universality Under International Law

The exercise of universal *civil* jurisdiction is less established in international law than its criminal counterpart.[44] Nonetheless, the assertion of universal civil jurisdiction is consistent with international law if confined by the limits in place for universal criminal jurisdiction.[45] Accordingly, an ATS action based on universal jurisdiction should operate solely to provide civil remedies to the victims

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[42] H.R. REP. 102-367, at *85.

[43] *See Sosa*, 542 U.S. at 725 (requiring that "claim[s] based on the present-day law of nations" rest on norms defined with specificity and accepted by civilized nations).

[44] *See Sosa* Br. at 17-22.

[45] *Cf.* RESTATEMENT § 404 cmt. b (international law "does not preclude" the exercise of universal civil jurisdiction to provide a private tort remedy for criminal conduct).

of repugnant *criminal* acts of universal concern. It should, in other words, extend solely to those "certain crimes" defined by their "sheer heinousness" and "universal condemn[ation]."[46]

This application of the ATS is consistent with the growing recognition in the international community that an effective remedy for repugnant crimes in violation of fundamental human rights includes, as an essential component, civil reparations to the victims.[47] This principle undisputedly applies to those States, including those within the European Union, that currently permit victims of crime to seek monetary compensation in *actions civiles* within criminal proceedings based on universal jurisdiction.[48] Similarly, outside the European Union, numerous States around the world permit

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[46] Donovan, *supra* note 36, at 143.

[47] *Id.* at 153.

[48] *See* Kathryn Metcalf, *Reparations for Displaced Torture Victims*, 19 CARDOZO J. INT'L & COMP. L. 451, 468-70 (2011); *see also* Cedric Ryngaert, *Universal Tort Jurisdiction Over Gross Human Rights Violations*, 38 NETHERLANDS YEARBOOK OF INT'L LAW 25-27 (2007). Such proceedings are available in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, and Sweden. *See* Amnesty International, *Universal Jurisdiction: The scope of universal civil jurisdiction*, AI Index: IOR 53/008/2007, at 5-6 (July 2007); 3 YVES DONZALLAZ, LA CONVENTION DE LUGANO DU 16 SEPTEMBRE 1998 CONCERNANT LA COMPÉTENCE JUDICIAIRE ET L'EXÉCUTION DES DÉCISIONS EN MATIÈRE CIVILE ET COMMERCIALE ¶¶ 5203-72 (Stämpfli 1998).

civil claims to be brought within criminal proceedings based on torts committed abroad.[49]

In addition, the rules of the International Criminal Court (ICC), which was established under the Rome Statute to "exercise its jurisdiction over persons for the most serious crimes of international concern,"[50] also confirm that universal jurisdiction may include a civil dimension. When a person is convicted of a serious crime of international concern, the ICC is empowered to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[51] In fact, several international human rights treaties and instruments now oblige member States to afford an effective remedy, including compensatory relief, to victims of human rights violations.[52]

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[49] These countries include Argentina, Bolivia, China, Colombia, Costa Rica, Myanmar, Panama, Senegal, and Venezuela. *See* Amnesty International, *supra* note 48, at 6; Christopher Keith Hall, *The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT'L L. 921, 934 n. 55 (2007).

[50] Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[51] *Id.* art. 75, sec. 2.

[52] *See*, *e.g.*, Convention Against Torture, art. 14 ("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 includ-

Those who would limit the universality principle to criminal jurisdiction principally rely on the different purposes and administration of civil and criminal law.[53] Most importantly, criminal law is administered by the State to protect the public, comporting with the rationale for universal jurisdiction, which permits any State to protect the interests of the international community against universally sanctioned offenses.[54] In contrast, civil law, and particularly tort law, is concerned with the redress of harm to private individuals, which has less resonance with the justifications for universal jurisdiction.[55] Against this backdrop, one three-judge opinion in a 2002 ICJ case noted that "the beginnings of a very broad form of extraterritorial jurisdiction" in the United States' application of the

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ing the means for as full rehabilitation as possible."); International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Sept. 28, 1966, 660 U.N.T.S. 195 (requiring that State Parties assure, as part of "effective protection and remedies," "the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination" in violation of human rights and fundamental freedoms under the Convention); *see also* Brief of *Amicus Curiae* Navi Pillay, the United Nations High Commissioner for Human Rights in Support of Petitioners at 5-9, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Dec. 21, 2011).

[53] *See, e.g.*, Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 346-48 (2001).

[54] *See id.* at 346.

[55] *See id.*

ATS had "not attracted the approbation of States generally."[56]

To the extent such apprehensions existed, they have since been allayed in significant part by this Court's decision in *Sosa*, which restricted the facially expansive ATS to comply with substantive norms of international law.[57] Recognition that universal civil jurisdiction under the ATS extends *only* where consistent with universal *criminal* jurisdiction would further align the ATS's private tort remedies with the international interests that underlie the universality principle. Moreover, the constraints on prescriptive jurisdiction imposed by international law will be supplemented by other doctrines available to United States courts in determining whether it is appropriate to adjudicate a particular extraterritorial case, including, personal jurisdiction, comity, *forum non conveniens*, the political question doctrine, and sovereign immunity.[58]

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[56] *Arrest Warrant*, 2002 I.C.J. at 77, ¶ 48 (Higgins, Kooijmans, & Buergenthal, JJ., Joint Separate Opinion).

[57] 542 U.S. at 732.

[58] Several States impose similar constraints when exercising universal criminal jurisdiction, such as requiring the presence of the alleged perpetrator within the territory of the State asserting jurisdiction or, with respect to civil claims, the existence of minimum contacts between the alleged conduct and the forum State. *See* Donovan, *supra* n.36, at 144. Such additional requirements are consistent with the discretion afforded States to legislate within—and not necessarily up to—the outer bounds of jurisdiction permitted by international law. They are also consistent with the United States' doctrines of personal jurisdiction and due process, which prohibit courts from is-

Extraterritorial applications of the ATS under the universal jurisdiction principle are therefore likely to encounter relatively little resistance in the international community. Notably, as far as the European Commission is aware, not a single State appears to have objected to the United States' exercise of jurisdiction over the extraterritorial ATS claim brought in *Filartiga*, by an alien against an alien, for the universally condemned crime of official torture, which had occurred in a foreign country.[59] Nor, apparently, as far as the European Commission is aware, has any State objected to the enactment of the TVPA, which on its face provides universal jurisdiction over civil claims based on the crimes of official torture and extrajudicial killing.[60] These

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suing "a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945); *see Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011). Indeed, *Filartiga* recognized the additional constraints that such considerations may place upon courts' ability to hear extraterritorial claims under the ATS by requiring that the alleged perpetrator be "found and served with process by an alien within our borders." 630 F.2d at 878. Accordingly, these separate considerations further enable United States courts to safeguard against adjudicating extraterritorial claims where inappropriate.

[59] *See id.* at 878-79.

[60] Specifically, the defendant in a TVPA action will almost always be an alien since he must have acted under color of law of a foreign nation, the plaintiff may (but need not) be an alien, and the TVPA's exhaustion requirement con-

exercises of universal jurisdiction are consistent with international law and have not engendered opposition.[61]

In sum, "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery"[62] and therefore authorizes the United States' exercise of universal jurisdiction for ATS claims based on crimes of universal concern. Such jurisdiction enables U.S. courts to provide a forum in which to condemn the narrow category of crimes that attack the fundamental values of the international community and is sanctioned under international law.

c. Relevant European Union Law and Practice

The twenty-seven European Union Member States and three other European States—Switzerland, Norway, and Iceland—are currently

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templates that the conduct in question took place outside of the United States. *See* Pub. L. 102-256 § 2(a)-(b).

[61] Indeed, in the years since, some States have expressly accepted exercises of universal civil jurisdiction by the United States federal courts under the ATS. These include States that had a traditional territorial nexus to the case in question. *See*, *e.g.*, Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law*, 85 NOTRE DAME L. REV. 1931, 1959 (2010) (South Africa changed its position to support the United States' entertainment of ATS claims based on apartheid in South Africa); *Sarei*, 671 F.3d at 756 (noting that the government of Papua New Guinea changed its position to support the United States' jurisdiction over the *Sarei v. Rio Tinto* litigation).

[62] *Sosa*, 542 U.S. at 763 (Breyer, J., concurring).

governed by common rules[63] on allocation of jurisdiction established through the "Brussels I" Regulation and the 2007 Lugano Convention.[64] Many of the European Union's Member States can exercise universal civil jurisdiction through *actions civiles* when brought within criminal proceedings.[65] In addition, the national legislation of several States bound by the Brussels/Lugano regime expressly allows for universal *civil* jurisdiction in exceptional circumstances.[66]

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[63] Fully harmonized rules cover cases where the defendant is domiciled in one of the governed States. National laws on jurisdiction currently still apply when the defendant is not domiciled within one of the governed States.

[64] *See* Council Regulation 44/01 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1-17 (EC); Lugano Convention, *supra* n.4.

[65] *See supra* n.48.

[66] At least ten States also have jurisdictional rules allowing civil courts to assume jurisdiction in exceptional circumstances on a "necessity basis" (*forum necessitatis*) where the claimant has no other forum available and the State has a sufficient nexus to the dispute in order to protect against a denial of justice. *See* Arnaud Nuyts, *Study on Residual Jurisdiction* (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), GENERAL REPORT (final version dated Sept. 3, 2007) ch. 16, 21, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (last visited June 11, 2012).

Importantly, *all* thirty States currently governed by the regime are obligated to recognize and enforce judgments for civil damages entered in any of the other thirty States bound by the regime and are expressly prohibited from challenging the jurisdiction of the issuing State, even on grounds of public policy.[67]

As a result, even those States that do not recognize universal civil jurisdiction on a national basis can be required to enforce a judgment on such basis by courts of other States bound by the regime.

For example, in 2007, the Belgian court of Assises (a criminal court) awarded damages to non-Belgian citizens for killings relating to genocide committed outside Belgium by a non-Belgian citizen in an *action civile* during criminal proceedings based on the Belgian universal jurisdiction law.[68] In addition, on March 21, 2012, a Dutch civil court awarded a Palestinian doctor—a non-Dutch citizen—€1,000,000 in damages for torture and inhumane treatment to which he had been subjected in Libya by twelve Libyan state agents.[69] Notably, this case was unconnected to a criminal proceeding.[70] These

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[67] Council Regulation 44/01, *supra* n.64, arts. 33(1), 35(3); Lugano Convention, arts. 33(1), 35(3).

[68] *See* Cour d'Assises [Cour. ass.] [Court of Assizes] Brussels, July 5, 2007, THE CASE OF THE MAJOR, (Belg.).

[69] *See* Rechtbank's Gravenhage, 21 maart 2012, No. 400882/HA ZA 11-2252 (El-Hojouj/Derbal et al.) (Neth.).

[70] Judgment was rendered on the basis of article 9(c) of the Dutch procedural law, which allows assumption of jurisdiction in exceptional cases on a necessity basis where the case is sufficiently connected with the Dutch

judgments can be recognized and enforced in any of the 29 other Brussels/Lugano States—even in those states whose national laws do not recognize the jurisdictional ground pursuant to which the judgment was issued.

In sum, while EU law does not require States to exercise universal civil jurisdiction, this requirement of mandatory recognition and enforcement of judgments illustrates that universal civil jurisdiction comports with both the laws of the European Union and international law generally.

II. THE UNITED STATES' EXERCISE OF UNIVERSAL CIVIL JURISDICTION MUST BE CONSTRAINED BY SUBSTANTIVE AND PROCEDURAL LIMITATIONS IMPOSED BY INTERNATIONAL LAW

To comply with international law, the exercise of universal civil jurisdiction must satisfy both a substantive and a procedural requirement: the nature of the tort must rise to the level of the most serious crimes recognized under international law; and the plaintiff must demonstrate that local remedies have been exhausted or that the local forum is unwilling or unable to provide relief. Accordingly, the ATS should not be read to authorize universal civil jurisdiction in the absence of these international law constraints, which appropriately limit its jurisdictional reach.

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legal order and it is unacceptable to require the plaintiff to pursue his claims in a foreign state. *See* Dutch Code of Civil Procedure, art. 9(c). In this case, however, the court did not identify the connection between the dispute and the State.

A. When Universal Civil Jurisdiction Arises Under the Alien Tort Statute, International Law Must Define the Narrow Category of Cognizable Claims

As noted, universal civil jurisdiction is limited to conduct that also gives rise to criminal jurisdiction under the universality principle.

Universal criminal jurisdiction traditionally extends to two categories of conduct under contemporary principles of international law. The first category encompasses conduct so heinous that every State has a legitimate interest in its suppression and punishment. Such conduct includes only core crimes of universal concern, such as torture, genocide, crimes against humanity, and certain war crimes.[71]

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[71] *See supra* n.38. For example, universal criminal jurisdiction is mandatory for States that are parties to the Geneva Conventions for grave breaches, including willful killing, torture, or inhumane treatment and willfully causing great suffering. *See* First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146. These offenses are also listed under Article 8(2)(a) of the Rome Statute of the International Criminal Court. *See* Rome Statute, art. 8(2)(a). Universal criminal jurisdiction exists over crimes against humanity that were recognized in art. 6(2)(c) of the Nuremberg Charter of the International Military Tribunal, Aug. 8, 1945, 8 U.N.T.S. 279, including murder, extermination, enslavement, deportation, and other inhumane acts. There is indication that universal jurisdiction may be extended beyond the category of conduct over which it has been traditionally exercised consistent with evolving notions of international law. *See, e.g.*, Africa Legal Aid, *The Cairo-Arusha Principles of Universal Jurisdiction in Respect of Gross Human*

Universal jurisdiction over this category of conduct helps to enforce the most fundamental norms of international law.[72]

The second category includes crimes that occur outside sovereign territorial boundaries—such as piracy—that could not be prosecuted in courts under traditional jurisdictional bases.[73] Universal jurisdiction over this category of conduct helps to ensure

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Rights, pmbl., princ. 4 (2002), *available at* http://www.kituochakatiba.org/index2.php?option=com_docman&task=doc_view&gid=116&Itemid=27 (last visited June 11, 2012) (stating that in addition to crimes currently recognized under international law, "certain other crimes that have major adverse economic, social or cultural consequences" should be subject to universal jurisdiction).

[72] *See supra* Part I.B.2.a; RESTATEMENT § 404, cmt. a ("Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations.").

[73] Under customary international law, and historically, the term "piracy" refers to conduct occurring on the high seas outside sovereign territorial boundaries. *See* United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397. Acts similar to piracy that take place in the territorial and internal waters of a coastal State are considered traditional crimes (*e.g.*, armed robbery). Such acts, therefore, are not cognizable under principles of universal jurisdiction. Similar acts that occur in the exclusive economic zones of States that have proclaimed such maritime zones, pursuant to Article 58(2) of the U.N. Convention on the Law of the Sea, are treated as though they had occurred on the high seas.

that perpetrators of such crimes do not escape punishment.

As *Sosa* confirms, the jurisdiction conferred by the ATS does not extend to all claims arising under the law of nations but only to a "relatively modest set of actions."[74] Claims arising under the ATS pursuant to universal jurisdiction must be limited to conduct meeting the rigorous international law standards that would justify the ATS's extraterritorial reach.

This Court and lower federal courts entertaining ATS litigation have previously applied the universality principle to identify customary international law norms that state cognizable claims under the ATS.[75]

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[74] 542 U.S. at 720.

[75] *See Sosa*, 542 U.S. at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal, and obligatory norms"); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.")); *Flomo*, 643 F.3d at 1016 (concluding that *Sosa* "limit[ed] the statute's scope to 'the customs and usages of civilized nations' that are 'specific universal, and obligatory'" (citing *Sosa*, 542 U.S. at 732); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (holding that "[i]n an ATS suit, we may only apply those norms that are specific, universal, and obligatory" and only recognize those norms "that … could be regarded as universal" (internal quotation marks omitted) (citing *Sosa*, 542 U.S. at 732)); *see also* K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 40-41 (2004) (noting that in

Claims giving rise to extraterritorial applications of the ATS pursuant to universal jurisdiction must qualify as international law violations of universal concern under this same rigorous analysis.

B. International Law Contemplates Mandatory Exhaustion of Claims Giving Rise to Universal Civil Jurisdiction

Separately, universal jurisdiction must be limited to "conduct that would otherwise fall beyond effective sanction."[76] Accordingly, before the United States may exercise universal jurisdiction under the ATS, international law requires exhaustion of local and international remedies or, alternatively, the claimant's demonstration that such remedies are unavailable or their pursuit is futile.[77]

This requirement derives from a general rule of international law that before a claim may be asserted in an international tribunal or forum, the claimant must have exhausted remedies in the domestic legal system.[78] For example, prosecutions in the In-

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evaluating ATS claims, "courts have routinely found that the list of offenses for which [statutory] jurisdiction exists is limited by the universality principle").

[76] *Sosa* Br. at 22-26; *see also id.* at 23 ("[A]pproaches to universal civil jurisdiction are emerging that favor the pursuit of remedies in States that may regulate the offensive conduct on traditional bases of jurisdiction.").

[77] For purposes of this discussion, exhaustion of "local" remedies requires a demonstration by the claimant that those states with a traditional jurisdictional nexus to the conduct are unwilling or unable to proceed.

[78] *See* RESTATEMENT § 713 cmt. f ("Under international law, ordinarily a state is not required to consider a claim

ternational Criminal Court must be preceded by a showing that States with a jurisdictional nexus to the crime based on territory or nationality are "unwilling or unable genuinely to proceed."[79] Exhaustion is thus a fundamental and firmly-rooted principle of international law.

Moreover, exhaustion is consistent with established notions of comity[80] and equality of sovereign-

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by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged."); Int'l L. Comm'n, 58th Sess., May 1—June 9, July 3—August 11, 2006, *Draft Articles on Diplomatic Protection*, U.N. Doc. A/61/10, GAOR 61st Sess., art. 14 (2007) (recognizing exhaustion as a "principle of general international law" and noting that "exhaustion of local remedies . . . ensures that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system" (internal quotation marks omitted)) available at http://untreaty.un.org/ilc/texts/ instruments/english/commentaries/9_8_2006.pdf (last visited June 11, 2012); Rep. of the Int'l L. Comm'n, 53rd Sess., April 23—June 1, July 2—August 10, 2001, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10, art. 44 (2001).

[79] Rome Statute, art. 17.

[80] "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aeropatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

ty[81]—ensuring that those States with traditional jurisdictional bases have authority to remedy international law violations within their borders.[82] By pro-

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[81] Equality of sovereignty recognizes "a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply the law there," RESTATEMENT § 404 cmt. b., and confirms that "every sovereign is to be treated as the equal of every other in its entitlement to govern persons within its own territory," *Sarei*, 671 F.3d at 803 (Bea, J., concurring in part and dissenting in part) (citing *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1280 (2011) (recognizing that "states are supposed to respect each other's exclusive authority to regulate behavior within their territorial boundaries")); *see also United States v. Diekelman*, 92 U.S. 520, 524 (1875) ("[A sovereign's] own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereign[], except in performance of his obligations, by treaty or otherwise, voluntarily assumed.").

[82] *See* Donovan, *supra* n.36, at 157-58. Germany has also affirmed the exhaustion principle. *See* Brief of *Amicus Curiae* the Federal Republic of Germany in Support of Respondents at 13, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 2, 2012) ("While it certainly would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process, it is certainly reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction."). It bears further mention that under the jurisprudence of the European Court of Justice of the European Union, the rules allowing a defendant domiciled in an EU State to be sued

moting a preference for domestic resolution of disputes, exhaustion encourages the development of meaningful remedies in countries with a nexus to the tortious conduct, while also preserving the judicial resources of those States that lack such a nexus from unnecessary intervention.

In addition, as a practical matter, exhaustion acknowledges that disputes often can be most efficiently resolved in States where the parties live or the conduct occurred[83] and that local fora provide victims the opportunity to speak in the State concerned, thereby encouraging those States to redress conduct within their territorial borders.[84] As opposed to "remote justice," such "in-country justice" may be more likely to inspire accountability in the afflicted nation, and, where needed, to generate remedial policy reforms.[85] However, to prevent wasteful resort to ineffective remedies and protect against

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in the state of domicile apply even where the plaintiff is domiciled outside the EU. *See* Case C-412/98, Group Josi Reinsurance Co. v. Universal General Ins. Co., 2000 E.C.R. I-05925.

[83] For example, universal criminal jurisdiction is generally exercised in a manner that accords deference to local remedies over transnational ones. While the duty to extradite or prosecute does not establish a legal hierarchy, deference is usually paid to states exercising jurisdiction under traditional bases. *See* PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001).

[84] *See* Donovan, *supra* n.36, at 157-58.

[85] *See id.*

a denial of justice, exhaustion is not required where local redress is either unavailable or obviously futile.

Some lower federal courts have incorporated exhaustion as a prudential limitation on their jurisdiction in ATS cases involving extraterritorial conduct. Interpreting *Sosa*'s statement that an exhaustion requirement might be considered "in an appropriate case,"[86] the Ninth Circuit in *Sarei v. Rio Tinto* concluded that the "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."[87] But, in accordance with international law, exhaustion of claims is mandatory, not prudential, for all claims over which the United States seeks to exercise universal jurisdiction.

The mandatory nature of the exhaustion requirement accords with the purpose of universal jurisdiction to ensure that certain execrable conduct may not escape punishment. The availability of local or international fora to effectively remedy international law violations of universal concern eliminates the need for the United States, when lacking a nexus to such violations, to exercise universal jurisdiction under the ATS. Accordingly, a showing of exhaustion of local or international remedies (or the futility of their pursuit) is essential in order to constrain the category of cognizable ATS claims under principles of universal jurisdiction.

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[86] *Sosa*, 542 U.S. at 733 n.21.

[87] 550 F.3d at 831.

Exhaustion finds further support in the Torture Victim Protection Act,[88] which expressly requires claimants to exhaust local remedies in the State where the alleged conduct occurred.[89] Indeed, Congress's imposition of the exhaustion requirement in the TVPA indicates its cognizance of international law principles that must restrict the United States' exercise of jurisdiction over extraterritorial conduct.[90] Exhaustion of claims involving torture can naturally extend to ATS claims involving other international law violations of universal concern that may give rise to universal jurisdiction under international law.[91]

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[88] Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992).

[89] *Id.* § 2(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

[90] *See Enahoro v. Abubakar*, 408 F.3d 877, 890 (7th Cir. 2005) ("[W]hile not directly applicable to the [ATS], the TVPA scheme is surely persuasive since it demonstrates that Congress not only assumed that the exhaustion requirements imposed by customary international law were discernible and effective in themselves, but also that they should be reflected in U.S. domestic law."); *id.* at 889-90 (noting that "incorporating an implicit exhaustion requirement in the [ATS] would . . . among other things, bring the Act into harmony with both the provisions of the TVPA (with which it is at least partially coextensive) and with the *acknowledged tenets of international law*" (emphasis added)).

[91] *See Sarei*, 550 F.3d at 832 ("While the TVPA is not dispositive of the question of whether exhaustion is *required* by the ATS, the TVPA nonetheless provides a useful, con-

In sum, just as the ATS incorporates the full body of the law of nations to define the content of substantive claims, the statute must also adopt and rigorously apply jurisdictional limitations of international law to constrain the United States' exercise of universal jurisdiction under the ATS.

CONCLUSION

The European Commission on behalf of the European Union respectfully requests that the Court interpret the ATS with reference to the jurisdictional framework and limitations of international law. Accordingly, the United States may exercise prescriptive jurisdiction to reach claims based on extraterritorial conduct where the defendant is a United States national or the conduct implicates United States security interests of fundamental importance. In addition, the United States can assume universal jurisdiction over a narrow category of the most grave international law violations involving conduct of universal concern so long as the ATS claimant demonstrates that those States with a nexus to the case are unwilling or unable to provide a forum and no international remedies are available.

The ATS's extraterritorial reach is consistent with international law provided that the statute's coverage of conduct occurring in the territory of another sovereign implements these constraints. In doing so, extraterritorial applications of the ATS not only respect principles of comity but also ensure that courts remain open to claimants who might otherwise be subject to a denial of justice.

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gressionally-crafted template to guide our adoption of an exhaustion principle for the ATS." (emphasis in original)).

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