No. 10-1491

IN THE

Supreme Court of the United States

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

v.

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

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

SUPPLEMENTAL BRIEF FOR US-CHINA LAW SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Treaties:

Miscellanious:

INTERSET OF *AMICUS CURIAE*[1]

Amicus, US-China Law Society, is a charitable organization incorporated in Connecticut. Its members include legal scholars and practitioners in the United States and China. The Society seeks to promote the mutual understanding of the legal systems of the United States and China, the economic and general relations between the two countries and the rule of law in international relations. The US-China bilateral relationship is considered among the most important in the world and the bilateral economic relationship provides great opportunities to the two countries as well as to the world at large.

The interpretation and application of the ATS, particularly in the context of the case *sub judice* where the alleged violations occurred in the territory of a sovereign other than the United States will have implications for both United States and Chinese multinational corporations operating around the globe and have the potential to affect the bilateral economic and political relations between the two nations.

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[1] The parties have filed blanket consent to the filing of *amicus* briefs with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party wrote this Brief in whole or in part, and that no person or entity, other than *Amicus*, or its counsel made a monetary contribution to the preparation or submission of this Brief.

Amicus condemns violations of international law and is of the view that the associated bundle of international law norms applies to such violations and provides for applicable remedies as appropriate.

For these reasons, *Amicus* is greatly interested in the outcome in this case and respectfully submits this Brief to present its views to this Honorable Court. In doing so, *Amicus* does not attempt to be comprehensive.

SUMMARY OF ARGUMENTS

The question presented for re-argument is whether and under what circumstances the Alien Tort Statute (ATS), 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. That provision states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Amicus argues that that no cause of action shall be recognized for violations of the law of nations occurring within the territory of a sovereign other than the United States because the ATS must be interpreted under the presumption against extraterritoriality as having no application beyond the borders of the United States. The evidence

presented by Petitioners to show clear congressional intent for extraterritoriality is unpersuasive. In particular, their argument based on the express geographical limitation in other clauses in § 9 of the Judiciary Act of 1789 would turn the default geographical scope for the application of a United States statute and the presumption against extraterritoriality upside down and treat the entire world as that default scope. However, the proper default scope is the territory of the United States.

Amicus further argues that if the ATS applies extraterritorially to a violation occurring within the territory of a foreign sovereign, it should be interpreted as having incorporated the entire bundle of international law norms with respect to that particular violation, substantive, remedial and jurisdictional and the recognition of a cause of action under the ATS must meet the requirements from that bundle of norms. Applying these conditions, no cause of action shall be recognized for corporate liability because international law not recognize corporate liability for torts for violations of customary international law and because any such alleged international law norm does not meet the *Sosa* clear definition requirement. Similarly no cause of action shall be recognized for violations with which the United States has no direct and substantial connection because ATS jurisdiction cannot be exercised over them. Furthermore, ATS Jurisdiction cannot be built upon universal jurisdiction since

international law recognizes neither universal criminal jurisdiction except over piracy nor universal civil jurisdiction. Finally, ATS jurisdiction cannot be built upon the transitory tort doctrine because it is a peculiarly special doctrine having no general applicability and is contrary to international law.

ARGUMENT

In this case, Petitioners sought vindication of their rights under the Alien Tort Statute, 28 U.S.C. 1350 for alleged serious violations of international law including human rights law committed by the Nigerian government, aided and abetted by the Respondents, entirely within the territory of Nigeria. A dispositive question for re-argument is whether and under what conditions courts should recognize a right of action for such violations under the ATS. At issue is only the first "law of nations" component. This Brief accordingly addresses only this component and will treat the "law of nations" as having the same content as international law for this purpose. This Brief will first address the issue of whether the ATS should have extraterritorial application and then address if it has, what conditions may apply to such application.

I. No cause of action shall be recognized for violations of the law of nations occurring within the territory of a sovereign other than the United States because the ATS must be interpreted under the presumption against extraterritoriality as having no application beyond the borders of the United States

In *Morrison v. National Australian Bank, Ltd.*, 130 S. Ct. 2869 (2010), the Court gave a comprehensive summation of the presumption against extraterritoriality:

> It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (*Aramco*) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)). This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate, see *Blackmer v. United States*, 284 U.S. 421, 437, 52 S.Ct. 252, 76 L.Ed. 375 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.

> *Smith v. United States*, 507 U.S. 197, 204, n. 5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993). Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Aramco, supra*, at 248, 111 S.Ct. 1227 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, see *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.

Ibid., 2877-2878. Furthermore, "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Ibid.*, 2881. As the Court held earlier, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Aramco*, 499 U.S., at 248. The application of this presumption thus promotes the deliberative sovereign decision-making and clear expression of those decisions when Congress attempts to affect international relations.

As a statute with language of majestic simplicity and generality and with great potential for

extraterritorial application, the ATS is ripe for subjection to the presumption against extraterritoriality. To give full effect to these aspects of the presumption against extraterritoriality, the ATS must be interpreted as having no extraterritorial application. And there is no clear expression of congressional intent to overcome that presumption.

Petitioners' attempt, see Petitioners' Supplemental Opening Brief, at 34, to carve out an exception to this presumption for jurisdictional statutes such as the ATS is unpersuasive. First of all, the Court's holding that the presumption applies to "all cases", *Morrison*, *supra*, 130 S.Ct. at 2881, forecloses this possibility. While there may be some ambiguity as to whether "all cases" refers to all cases relating to the statute at issue in *Morrison* only or to all cases generally, the latter seems better to jibe with the tenor of the subsequent phrase "preserving a stable background against which Congress can legislate with predictable effects", *ibid*.

In any event, there is no reason for the proposed exception. This proposal rests on the argument that no substantive law is being projected when applying extraterritorially a jurisdictional provision, thus making a distinction between jurisdiction to prescribe and jurisdiction to adjudicate. As Brownlie explained, "There is [ ] no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction,

on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other." Ian Brownlie, *Principles of Public International Law* 311 (7th ed. 2008). What is important is the connection between the forum state and the alleged violations. Furthermore, a United States court's recognition of a cause of action for violations occurring extraterritorially would project at least United States law on remedies to those violations. This obtains either when the cause of action is completely federal common law and not part of international law or when the cause of action is already resident in international law but has been incorporated, as argued *infra*, by the court into the United States legal system as federal common law. The act of incorporation would transform international law into United States law and it is the United States that gives effect to it. [2]

The application of the presumption against extraterritoriality in "all cases" would also foreclose the case-by-case approach advocated by the Solicitor

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[2] Finally, Petitioners' attempt to analogize the ATS to 28 U.S.C. § 1332 or § 1331, Petitioner's Supplemental Opening Brief, at 34, is more difficult to deal with, but it seems that both sections should have the same geographical scope of application as the substantive applicable law and therefore cannot be determined on the language of these provisions alone. The ATS (excluding the treaty component) is different because the law of nations is slightly different from an applicable United States law (including that of a federal State) in the sense that it does not originate from the United States.

General. See Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance filed on June 13, 2012. Furthermore, the fact that the United States Government itself has changed its position several times, as stated by the Solicitor General, proves the danger and unworkable nature of this approach and the importance of applying the presumption to all cases. Underlying a change in its positions may be only a change of personnel, or, as has been described by Justice Stewart, the "shifting winds" in the Executive Branch. *Zschernig v. Miller*, 389 U.S. 429 (1968), at 443 (Stewart, J., concurring).

In order to overcome the presumption against extraterritoriality, Petitioners attempt to present evidence that, they argue, indicates congressional intent to give the ATS extraterritorial application. The evidence presented includes the text, history and purpose of the ATS. Petitioners' Supplemental Opening Brief, at 34-36. None of these, however, fulfills the task assigned to it.

The text of the ATS, together with the context in the Judiciary Act of 1789, does not show clear congressional intent for the extraterritorial application of the ATS. The argument of the Petitioners seems to be quite complex and can be dissected into several tranches. First, the ATS uses "any action" (originally "all causes") and thus indicates no implied limitation on scope. Petitioners' Supplemental Opening Brief, at 22. However, terms

such as "any" or "all" are boilerplate terms that are considered ambiguous and may not deal with the issue at hand, and therefore cannot overcome the presumption against extraterritoriality. See *Aramco*, 499 U.S. 250-253.

Second, Petitioners seem to argue that since in other places of § 9 of the Judiciary Act of 1789 the First Congress did provide for geographical limitations, when the Congress did not specify one in the clause on alien torts, that clause has none. Petitioners' Supplemental Opening Brief, at 21-22. Such a reading would turn the default rule on geographical scope and the presumption against extraterritoriality upside down: for Petitioners, the default geographical scope is the whole world. However, the proper default geographical scope of application of a United States statute in the normal parlance as well as under the presumption against extraterritoriality is its own territory. Any further specification serves to delimit the particular geographical scope for a particular purpose, such as specifying venue, whether inside or outside the default territory. Indeed, when Congress wants to specify a geographical scope outside the United States to which a statute is to apply, it knows how to do that affirmatively, rather than letting silence do the job. For example, 18 U.S.C. § 2340A states that "Whoever *outside the United States* commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years …."

(emphasis added). And the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73 (28 U.S.C. 1350 note) expressly names as a possible defendant an individual acting under the authority or color of law "of any foreign nation". Thus, using the territory of the United States as the default scope is a better position and is in no way in conflict with other clauses in § 9 of the Judiciary Act of 1789, where the geographical limitations were used to specify venue for the district courts.

Thirdly, Petitioners also resort to the historical context and purpose of the ATS as well as the 1795 Bradford opinion, 1 Op. Att'y Gen. 57 (1795). The absence of any drafting history and uncertain historical context provide no assistance. Petitioners claim that the ATS was plainly addressed to the new Nation's role in the international community and to international concerns that did not stop at our shores. Petitioners' Supplemental Opening Brief, at 36. One surely agrees that the ATS was addressed to the role of the new Nation and to international concerns, but there is no clear evidence that would show the ATS was addressed to concerns beyond the borders of the new Nation. Indeed, the new Nation, still weak from its war for independence, would not have wanted to apply a statute to matters outside its borders, knowing that it could lead to international frictions. See Supplemental Brief for the United States, *supra* at 15. The Bradford opinion is also susceptible to various interpretations, one of which would ground

that opinion on the United States nationality of the potential defendants involved.

Finally, Petitioners seek help from *Sosa* v. *Alvarez-Machain*, 507 U.S. 349 (1993), by arguing that since "*Sosa* identified piracy as one of the paradigmatic torts actionable under the ATS", Petitioners' Supplemental Opening Brief, at 25, and since the presumption against extraterritoriality does not make a distinction between conduct occurring on the high seas and conduct occurring within the territory of foreign sovereigns, *ibid.* at 35, applying the presumption to the ATS would do violence to *Sosa*. This is apparently the argument. This position however is problematic. First of all, it jumps to the conclusion that *Sosa* has concluded that piracy is one of the paradigmatic torts actionable under the ATS. Properly read, *Sosa* did not so hold; piracy was not at issue in that case, and it was used only as an example of a norm that is of definite content and acceptance by the civilized nations. That is no reason, however, to conclude immediately that the Court has recognized a cause of action for piracy under the ATS. One should not read too much into the Court's decision in that case. Finally, piracy probably is better placed within admiralty jurisdiction under § 9 of the Judiciary Act of 1789. This would allow all issues relating to piracy to be litigated under one head of jurisdiction, eliminating any potential inconvenience.

In any event, even if one were to agree that the inference proposed by Petitioners is a possible one, it would not be sufficient to overcome the presumption against extraterritoriality. As the Court held in *Morrison*, "possible interpretations of statutory language do not override the presumption against extraterritoriality". 130 S.Ct. at 2883. As the Court taught in *Aramco*, "If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." 499 U.S. at 253.

II. If the ATS applies extraterritorially to a violation occurring within the territory of a foreign sovereign, it should be interpreted as having incorporated the entire bundle of international law norms with respect to that particular violation, substantive, remedial and jurisdictional and the recognition of a cause of action under the ATS must meet the requirements from that bundle of norms

Held in *Sosa* as a jurisdictional grant, the ATS in simple language states that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. A natural reading of this language would treat the law of nations, which is taken to be international law for the purpose of this case, or the treaty as the rules of decision. As a result, the ATS must be read as having incorporated the entire bundle of international law norms with respect to that particular violation, substantive (i.e., primary conduct rule), remedial as well as jurisdictional and the recognition of a cause of action must meet the requirements from that bundle of norms. Only when this bundle does not provide adequate rules for application should federal common law be applied to fashion appropriate

solutions, with due regard to the relevant international situation.

One wonders why one cannot apply a sort of dépeçage so as to allow courts to apply only the substantive norm from international law, not other parts of the international law norm bundle relating to the violation. Such a dépeçage approach would seem to go against the language of the provision. This is made clear by asking whether, if the applicable treaty provides for a bundle of rules regarding the violation, that treaty norm bundle must be applied by the courts. The answer is clearly positive. Comparable treatment of the two components in the same place of the provision would demand that courts apply the entire international law norm bundle relating to the violation, too.

Secondly, an international law norm bundle often embodies the result of a sophisticated assessment of the international situation, difficult policy choices as well as delicate international compromises. A dépeçage approach would disturb such assessment, choices and compromises. Sometimes international law promulgates a substantive norm, but decides not to provide any remedies for its violation. A certain amount of ambivalence toward enforcement of international law norms is deliberate and advantageous in international law. See Oscar Schachter, *International Law in Theory and Practice*, 227-229 (1991). Sometimes international law expressly calls

for amnesty for certain violations. For example, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, provides in Article 6(5) that, "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." This probably reflects customary international law at present. Sometimes international law may provide for multilateral mechanism remedies, such as those from the regional human rights courts or the treaty bodies. Sometimes international law leaves it to the territorial state to provide for remedies for any violation of international law. Creative approaches to remedying past violations have been crafted by states. The efforts of South Africa to promote reconciliation after apartheid ended are a prime example. With malice to none and with charity to all, so to speak, post-trauma states manage to move ahead and recover from their troubled past. Any dépeçage approach to the application of the international law norm bundle would disturb such arrangements and make impossible societal, large-scale reconciliation and recovery.

If the entire international law norm bundle is not considered to have been incorporated under the

ATS, that bundle would still set the limits for the exercise of jurisdiction under the ATS, yielding the same result. As Schachter found, *supra*, at 250, "There is no dissent from the general proposition that public international law sets limits on the authority of States to legislate, adjudicate and enforce its domestic law". As Brownlie pointed out in his *Principles of Public International Law* 300 (7th ed. 2008), "Excessive and abusive assertion of civil jurisdiction could lead to international responsibility or protests at *ultra vires* acts." The *Charming Betsy* doctrine, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), demands that the ATS be given an interpretation that would not violate international law, and its scope be delimited by the applicable international law bundle. In this context, the application of the *Charming Betsy* doctrine has the effect, similar to the application of the presumption against extraterritoriality, of forcing Congress to make a more deliberative decision and to express that decision in a clearer way when it intends to affect international relations, thus ultimately promoting better sovereign decision-making in foreign affairs.

Applying these considerations, a court should first look to international law for answers when faced with the question as to whether a cause of action should be recognized, and should consider the entire bundle of norms applicable to the alleged violations. The Court's approach in *Sosa* appears

to be somewhat different but is broadly consistent with the approach proposed here. It is true that the Court did not apply the entire bundle in that case, but that's because the Court could dispose of the claim already on one part of the analysis—the quality of the alleged substantive norm violated, and need not proceed any further. And the Court made clear that it was addressing only one of the criteria, not all, for the recognition of a cause of action by prefacing its holding with "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350". 542 U.S. at 732.

The Court's analysis regarding the substantive norm is broadly consistent with the argument made here, although it is not so straightforward and is difficult to characterize. The Court first announced the standard that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted", *ibid.* It then proceeded to identify the alleged norm by applying a framework of international law sources it has previously adopted[3] and found that the plaintiff did not prove any definite binding international law norm. *Ibid.*, 736-738. It then concluded that "It is enough to hold that a single illegal detention of less than a day,

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[3] *The Paquete Habana*, 175 U.S. 677, 686 (1900).

followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy". *Ibid.*, 738. It is thus clear that international law is the first port of call in this analysis, which is broadly consistent with the argument made here. It is also fair to say that the Court's standard betrays some doubt on international law, and applies a more stringent content standard on that body of law as a basis for fashioning a federal remedy. To this extent, the *Sosa* standard is more defendant friendly than is international law. The analysis shows however that at least in that case international law itself already presented an insurmountable hurdle to the plaintiff and thus the more stringent content standard is unnecessary.

The *Sosa* case did not have to go further, but if the Court found that the international law norm met the stringent content requirement, it should not rest just at that and at once recognize a cause of action. It should continue to consider whether such a cause of action is available under international law and whether any jurisdictional requirements under international law can be met.

A. No cause of action shall be recognized for corporate liability because international law does not recognize corporate liability for torts for violations of customary international law and because any such alleged international law norm does not meet the *Sosa* clear definition requirement

At present, customary international law does not recognize corporate liability for torts for violations of customary international law. This has been made clear by the fifth and last Special Rapporteur for the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, in another case before this Honorable Court, see Brief of *Amicus Curiae* Professor James Crawford in Support of Conditional Cross-Petitioner, in *Presbyterian Church of Sudan v. Talisman Energy*, No. 09-1418, filed June 23, 2010, and by the first round of briefing and oral arguments in this case.

Specifically with respect to human rights instruments, John Ruggie stated in an important report that "it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations." Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational

Corporations and Other Business Enterprises, U.N. Doc. A/HRC/4/035, para. 44 (Feb. 9, 2007).

Furthermore, the fact that in all national legal systems there exists corporate liability does not necessarily lead to the conclusion corporate liability can therefore be applied as a "general principle", a species of international law within the ambit of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ). Not all generally applied national legal principles constitute general principles within the meaning of the term under that article. Only those principles that are "internationalizable" in terms of scope of application do. As Judge Sir Arnold McNair stated in his Separate Opinion in *International Status of South West Africa*, *Advisory Opinion*, 1950 I.C.J. 128, 148 (1950):

> Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply .... (c) the general principles of law recognized by civilized nations". The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the

> duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.

How "internationalizable" principles can be identified and transposed to the international field may be a herculean task; fortunately the fact that the international community has such a hard time accepting corporate liability as principle of international law or of human rights law shows that community has decided that corporate liability is not such a principle.

In light of this, even if corporate liability can arguably be considered a principle of international law, it can never meet the "clear definition" requirement under *Sosa*. No doubt such an alleged norm of corporate liability under international law has a "less definite content and acceptance among civilized nations than the historical paradigm familiar when § 1350 was enacted". 542 U.S., at 732.

B. No cause of action shall be recognized for violations with which the United States has no direct and substantial connection because ATS jurisdiction cannot be exercised over them

As argued above, the recognition of a cause of action for a violation of international law must meet the jurisdictional requirements under international law. State practice and scholarly opinion have all demonstrated that a nation may exercise jurisdiction over a matter only if that nation has a direct and substantial connection with that matter. Sometimes this relationship is put as a reasonable relationship. Restatement of the Law, Third, Foreign Relations Law of the United States, §421 and Reporters' Note 1 (presenting state practice including treaty practice). Obviously if a nation cannot exercise jurisdiction over a violation, no cause of action shall be recognized for it.

There may be controversy on what constitutes a direct and substantial connection or a reasonable relationship. It may be a difficult exercise for one to ascertain such a connection or relationship. Since the alleged violations in this case clearly have no connection with the United States, there is no need for the Court to undergo this exercise in detail.

C. ATS Jurisdiction cannot be built upon universal jurisdiction since international law recognizes neither universal criminal jurisdiction except over piracy nor universal civil jurisdiction

In order to overcome the jurisdictional requirement hurdle, Petitioners essentially assert that there exists universal jurisdiction over a variety of crimes and as a result there is ATS jurisdiction over them. Petitioners' Supplemental Opening Brief, at 48-52. The term "universal jurisdiction" is used generally to denote "universal criminal jurisdiction". Often this broad assertion confuses universal jurisdiction with extraterritorial jurisdiction flowing from a treaty. True universal jurisdiction is jurisdiction based solely on the universal concern over the crime. Jurisdiction results from universal concern plus another factor such as the presence of the suspect or an obligation to assert jurisdiction under a treaty is normally not true universal jurisdiction. [4] That is to say, there is a certain amount of looseness in the use by many of the term "universal jurisdiction". See Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion in the *Arrest Warrant* of *11 April 2000* (D.R. Congo v. Belgium) case, 2002 I.C.J. 63, 76, para. 45.

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[4] See Sienho Yee, Universal Jurisdiction: Concept, Logic, and Reality, 11 Chinese Journal of International Law 503-530 (2011).

Furthermore, this broad assertion is not based on a solid law-making assessment of the various norms according to the framework as formulated in Article 38 of the Statute of the ICJ. Such an assessment reveals that there is at this moment no universal jurisdiction over any crime other than piracy. After a rigorous analysis of treaties and state practice, Judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion in the *Arrest Warrant*, *ibid.,* para. 45, and President Guillaume, in his Separate Opinion, *ibid.*, at 35, all concluded, more or less that there was no universal jurisdiction other than over piracy. Of course, if this Court were to search for a universal jurisdiction norm, it must conduct the same kind of rigorous exercise under the international law sources framework.

It is true that Judges Higgins, Kooijmans and Buergenthal found some trending up in state practice in asserting universal jurisdiction over crimes against humanity, but that trend has not ripened into a rule of customary international law. Joint Separate Opinion, *ibid.* at 76, para.52.

If there was such a trend, which did not constitute customary international law, at the time of the *Arrest Warrant* case, state practice asserting universal jurisdiction has been trending down since that time. Belgium[5] and Spain,[6] the only two nations

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[5] 5 August 2003 Act on Grave Breaches of International

that clearly asserted pure universal jurisdiction over certain crimes, have all abandoned pure universal jurisdiction by repealing or modifying their statutes and by conditioning the exercise of jurisdiction on some links with the forum. As has been observed, "the universal jurisdiction movement appears to be a moving train without its locomotive".[7] This trending-down may have been due to the cautious and perhaps ingenious judgment of the International Court of Justice in *Arrest Warrant*, as well as to the efforts of the United States officials in this regard.[8]

The rarity of the actual prosecutions based on universal jurisdiction and the unrepresentative

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Humanitarian Law (Belgium).

6 Ley Orgánica 1/2009, de 3 de noviembre complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (http://noticias.juridicas.com/base_datos/Admin/lo1-2009.html) (Spain). The essence of this new law, as stated by representative of Spain in the UNGA, A/C.6/65/SR.11 (13 Oct. 2010), 4, para.21, is: "judges could only prosecute perpetrators of serious crimes committed anywhere in the world when no other international or third-country court had initiated proceedings against them and when they were present in Spanish territory or when the victim was a Spanish national".

7 Sienho Yee, supra n. 4, 11 Chinese Journal of International Law, at 530.

8 Donald Rumsfeld, Known and Unknown: A Memoir (2011), 596-598. Rumsfeld reported a "frank and full exchange" with Mr. Andre Flabaut, Belgium's minister of defense and that "Within two months of that conversation, the Belgian government repealed their law." Ibid., 598.

nature of the rare cases[9] prove that there may not have been any real trend at all. The great confusion and diversity of views over the concept and principle of universal jurisdiction expressed during the recent debates [10] at the Sixth (Legal) Committee of the United Nations Generally Assembly confirms that the universal jurisdiction idea is shrouded in so much controversy as to prevent it from securing the general acceptance of the international community to make it a customary international law norm, except with respect to piracy. For example, the statement made on behalf the African Group of States before the 6th Committee in October 2010 said:

> There was as yet no generally accepted definition of universal jurisdiction and no agreement on which crimes, other than piracy and slavery, it should cover or on the conditions under which it would apply. If few States had responded with information about their practice on universal jurisdiction, it

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9 Luc Reydams, The Rise and Fall of Universal Jurisdiction, Leuven Centre for Global Governance Studies, Working Paper No. 37 (http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp31-40/wp37.pdf, January 2010), p. 22.

10 For documents on the debates, see UN Websites, http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml; http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml; http://www.un.org/en/ga/sixth/64/UnivJur.shtml.

> was because the principle hardly existed in most domestic jurisdictions.[11]

The civil branch of universal jurisdiction, sometimes called universal civil jurisdiction, does not fare well, either, on a test of status under the law-making framework of international law. In fact, its customary international law status is on even shakier ground. Back in 2002 in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal, noted in their Joint Separate Opinion that "the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas" and that "While 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." 2002 I.C.J. 63, 77, para. 48.

Nothing has happened in state practice since then to cause one to give a better assessment of the status of universal civil jurisdiction. Rather, its prospects may be getting dimmer. For example, it has been recently stated that "No other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.

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[11] A/C.6/65/SR.10 (13 October 2010) (http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/C.6/65/SR.10&Lang=E), para.60.

And many respected authorities throughout the international legal system—authorities deeply committed to human rights—view ATS litigation to be contrary to international law." Brief of Chevron Corporation, et al., as *Amici Curiae* in Support of Respondents, in *Kiobel*, filed Feb. 3, 2012, at 6. Impressive data on state practice and scholarly opinion have been marshaled to support this position, *ibid.*, at 6-10 and need not be repeated here.

One of the reasons why universal civil jurisdiction has even less attraction than universal criminal jurisdiction is that the exercise of the former can be triggered by only a private person while the exercise of the latter is usually under the control of the political authorities. See *Sosa*, 542 U.S. at 277. When international relations are at stake, giving such power to a private person is anathema to the idea of sovereign authority. Such private exercise of power has been vividly described sometimes as "Plaintiff's Diplomacy". If the judicial branch feels the need to defer in foreign affairs to the Congress and the Executive Branch, one wonders whether it could have confidence in a private plaintiff's handling of diplomacy.

In light of the non-customary international law status of universal jurisdiction and universal civil jurisdiction, any attempt to tag ATS jurisdiction to universal jurisdiction (whether criminal or civil) would necessarily fail.

D. ATS jurisdiction cannot be built upon the transitory tort doctrine because it is a peculiarly special doctrine having no general applicability and is contrary to international law

Nor can ATS jurisdiction be built on the traditional transitory tort doctrine. That doctrine is a peculiarly special doctrine; it has no general applicability and has never been a rule of international law. At present it is generally considered contrary to international law. Thus, Article 3 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Economic Community of 1968, as amended in 1978, 18 Int'l Leg.Mat. 21 (1978), expressly excludes the application of this doctrine in Ireland and the United Kingdom against domiciliaries of other contracting states. The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007, 2007 O.J. (L 339) 3, contains a similar provision. This exclusion obviously shows the non-use of the transitory tort doctrine in other parts of that Community. High authorities in the United States thus concluded that "Jurisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to

that state." Restatement of the Law, Third, Foreign Relations Law of the United States, §421, Reporters' Note 5.

CONCLUSION

For all the above reasons, the Judgment of the Court of Appeals should be affirmed.

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