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Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy

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I. INTRODUCTION

For the past thirty years, victims of human rights abuses abroad have been able to sue those responsible in U.S. courts under the Alien Tort Statute (ATS), which provides: “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.”¹ This line of cases began in 1980 with *Filartiga v. Pena-Irala*,² a suit by the father and sister of a young Paraguayan man whom a local police inspector had tortured to death. In 2004, the Supreme Court endorsed this line of cases in *Sosa v. Alvarez-Machain*.³ The Court noted that although the ATS was “strictly jurisdictional,”⁴ it was “enacted on the understanding that the common law would provide a cause of action,”⁵ at least for violation of safe conducts, infringement of the rights of ambassadors, and piracy. Translating the statute into modern terms, the Court held

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¹ 28 U.S.C. § 1350. The ATS was passed as part of the Judiciary Act of 1789. See An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) [hereinafter Judiciary Act]. The “law of nations” referred to unwritten international law – what we today call “customary international law.” See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 2 n.1 (2009).

² 630 F.2d 876 (2d Cir. 1980).

³ 542 U.S. 692 (2004).

⁴ *Id.* at 713.

⁵ *Id.* at 724.

that U.S. courts may hear “claims under federal common law”⁶ for violations of present-day human rights law so long as those claims “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁷

In a recent article, Professor Michael Ramsey argues that ATS suits against foreign defendants (especially investor-liability suits) violate international law limits on jurisdiction to prescribe—that is, limits on when a nation may make its substantive law applicable to a given actor’s conduct.⁸ When the defendant is foreign and the conduct takes place abroad, he reasons, the United States lacks jurisdiction to prescribe on traditional bases like territoriality, effects, or nationality.⁹ Therefore, the United States may regulate the foreign defendant’s conduct only if the human rights violation is subject to “universal jurisdiction.”¹⁰ Ramsey argues that indirect investor liability—aiding and abetting, for example—does not fall into this category.¹¹ Thus, he concludes “that international law permits U.S. courts to impose liability on non-U.S. investors for non-U.S. conduct only when the investor actually commits a universal jurisdiction offense, not when the investor has some indirect involvement in the offenses of a host government.”¹²

While Professor Ramsey argues that customary international law should limit the reach of the ATS, the administration of George W. Bush has made a broader argument that the ATS should never be applied to foreign conduct because of the presumption against extraterritoriality.¹³ Relying on language in *Sosa*, the government reasoned that “any cause of action recognized by a federal court is one devised as a

⁶ *Id.* at 732.

⁷ *Id.* at 725. The Court found that Alvarez-Machain’s claim, based on “a single illegal detention of less than a day,” failed this test. *Id.* at 738.

⁸ See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271 (2009).

⁹ See *id.* at 284–86; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT (THIRD)] (listing bases for jurisdiction to prescribe).

¹⁰ Universal jurisdiction is “jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.” RESTATEMENT (THIRD) § 404.

¹¹ See Ramsey, *supra* note 8, at 303–20.

¹² *Id.* at 304.

¹³ See Brief for the United States of America as Amicus Curiae at 5–8, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (on file with the author) [hereinafter U.S. Khulumani Brief]; see also *Equal Employment Opportunity Comm’n v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“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.’”) (quoting *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

matter of federal common law—*i.e.*, the law of the United States.”¹⁴ To apply the ATS to foreign conduct, therefore, would be “to give U.S. law an extraterritorial effect.”¹⁵

Neither of these arguments is new. Indeed, each of them was raised in *Sosa*. Ramsey’s argument about jurisdiction to prescribe was pressed by the European Commission¹⁶ and got only one vote.¹⁷ The Bush Administration urged the Justices to apply the presumption against extraterritoriality to the ATS,¹⁸ but no member of the Court adopted its position. This essay contends that the *Sosa* Court was right not to adopt these arguments and that lower courts should reject them as well.

Both arguments rest on a common fallacy—the fallacy that U.S. courts hearing ATS claims are exercising prescriptive jurisdiction. Courts do not apply U.S. substantive law in ATS cases; they apply customary international law. Certainly, the United States contributes to the development of customary international law along with other nations.¹⁹ The United States also considers customary international law to be part of its law.²⁰ But neither of these facts makes the application of customary international law by U.S. courts an exercise of prescriptive jurisdiction. In international law terms, the kind of jurisdiction courts exercise in ATS cases is not jurisdiction to prescribe but jurisdiction to adjudicate.²¹ It is the same kind of jurisdiction that courts exercise in conflict-of-laws cases when they apply law that is not made by their own sovereign to parties over whom they have personal jurisdiction.

Part I of this essay argues that U.S. courts exercise jurisdiction to adjudicate not jurisdiction to prescribe when they hear claims under the ATS. It analogizes ATS cases to conflict-of-laws cases and shows how the history of the statute and its interpretation in *Sosa* support that analogy. It also explains that universal jurisdiction still makes sense as a basis for prescriptive jurisdiction, even if it is not implicated by a U.S. court’s exercise of adjudicatory jurisdiction under the ATS. Part II turns to the

¹⁴ U.S. Khulumani Brief, *supra* note 13, at 5.

¹⁵ *Id.*

¹⁶ See Brief of the European Commission in Support of Neither Party as Amicus Curiae at 12, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036 [hereinafter EU *Sosa* Brief].

¹⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring).

¹⁸ See Brief for the United States as Respondent Supporting Petitioner at 46-50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581 [hereinafter U.S. *Sosa* Brief].

¹⁹ See RESTATEMENT (THIRD) § 102(2) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

²⁰ See, e.g., *Sosa*, 542 U.S. at 730 (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

²¹ See RESTATEMENT (THIRD) § 401 (distinguishing jurisdiction to prescribe from jurisdiction to adjudicate).

presumption against extraterritoriality, arguing that the presumption does not apply to jurisdictional statutes like the ATS.

II. INTERNATIONAL LAW LIMITS ON JURISDICTION TO PRESCRIBE

Professor Ramsey's argument rests on the premise that U.S. courts exercise prescriptive jurisdiction when they hear ATS cases. If U.S. courts are not exercising such jurisdiction, then obviously international law limits on jurisdiction to prescribe do not apply. Jurisdiction to prescribe is the authority to make the substantive rules of law applicable to a given actor's conduct; it is different from jurisdiction over a particular defendant, which is known in international law as jurisdiction to adjudicate.²² International law recognizes a number of bases for jurisdiction to prescribe, including conduct within the territory of the regulating state, effects within the territory of the regulating state, and conduct by one of the regulating state's nationals.²³ Even in the absence of one of these bases, a state has universal jurisdiction to prescribe punishment for certain offenses "of universal concern."²⁴

Ramsey correctly notes that courts sometimes exercise prescriptive jurisdiction.²⁵ In a common law system, courts often make the substantive law they apply. Customary international law, however, is not made by courts but rather "results from a general and consistent practice of states followed by them from a sense of legal obligation."²⁶ To his credit, Ramsey does not argue that U.S. courts are creating rules of customary international law in ATS cases.²⁷ His claim is rather that because

²² Compare *id.* § 401(a) (defining jurisdiction to prescribe as jurisdiction "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court") with *id.* § 401(b) (defining jurisdiction to adjudicate as jurisdiction "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings"). Ramsey makes no claim that U.S. courts violate international law on jurisdiction to adjudicate when they hear ATS cases.

²³ *Id.* § 402. International law also recognizes protective jurisdiction over offenses directed against the security or integrity of the state, such as espionage and counterfeiting, *see id.* § 402 cmt. f, and possibly "passive personality" jurisdiction based on the nationality of the victim. *See id.* § 402 cmt. g; *see also* Ramsey, *supra* note 8, at 284–86.

²⁴ RESTATEMENT (THIRD) § 404; *see* Ramsey, *supra* note 8, at 286. For a listing of such offenses, *see supra* note 10.

²⁵ *See* Ramsey, *supra* note 8, at 295–97; *see also* RESTATEMENT (THIRD) § 401(a) ("... or by determination of a court").

²⁶ RESTATEMENT (THIRD) § 102(2).

²⁷ He acknowledges that "[t]he core conception of customary international law is that its rules arise from the common practices of nations, done out of a sense of legal obligation." Ramsey, *supra* note 8, at 313. Indeed, he criticizes reliance on the decisions of international courts in ATS cases on the ground that international courts do not make international law. *See id.* at 306 ("because customary international law in its classic form arises from the practices of nations, decisions of international tribunals do not create customary international law.").

customary international law does not require any particular means of redress, the decision by the United States to “allow individuals to make claims in court, as opposed to offering some other kind of remedy” constitutes an exercise of jurisdiction to prescribe.²⁸ Summarizing his position, Ramsey writes: “the creation of individual criminal or civil liability is a national regulatory act.”²⁹

It is difficult to see how this differs from what U.S. courts do in ordinary conflict-of-laws cases when they apply foreign substantive law. Ramsey acknowledges that since U.S. courts apply customary international law as the rule of decision, “ATS suits might be analogous to cases enforcing foreign law in U.S. courts, which are routinely subject only to the limits of adjudicatory (not prescriptive) jurisdiction.”³⁰ He tries to distinguish conflicts cases from ATS suits on the ground that foreign laws “create liability and a right to sue” while customary international law does not,³¹ but his argument misunderstands how conflicts rules work. Foreign law does not apply of its own force in U.S. courts any more than customary international law does. When a litigant makes a claim based on foreign substantive law in a U.S. court, it is American law that determines both whether the action may be brought³² and what form it may take (*e.g.* law or equity, contract or tort).³³ Conflicts rules allowing claims based on foreign law have never been considered an exercise of jurisdiction to prescribe, and there is no reason to reach a different conclusion with respect to the ATS, which allows claims based on international law.³⁴

The original understanding of the ATS supports this conflict-of-laws analogy.³⁵ Jurists in the eighteenth century distinguished between local and transitory actions. Crimes were local and had to be tried where they occurred.³⁶ Tort suits for

²⁸ Ramsey, *supra* note 8, at 298.

²⁹ *Id.* at 299.

³⁰ *Id.* at 297.

³¹ *Id.* at 298.

³² See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 123 (1971) (“The local law of the forum determines which of its courts, if any, may entertain an action on a claim involving foreign elements.”); *id.* § 123, cmt. b (“The state of the forum may fail to provide a court in which action on a particular claim can be brought.”).

³³ See *id.* § 124 (“The local law of the forum determines the form in which a proceeding may be instituted on a claim involving foreign elements.”).

³⁴ Of course, the exercise of personal and subject matter jurisdiction under the ATS does involve the application of some U.S. domestic rules—the Federal Rules of Civil Procedure and the Federal Rules of Evidence, for example. In conflicts cases, no one thinks these are illegitimate exercises of jurisdiction to prescribe, see *id.* §§ 122, 138, and the same should be true under the ATS.

³⁵ On the history of the ATS, see William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT’L & COMP. L. REV. 221 (1996). Professor Ramsey often begins his analysis of an issue with original intent, see, *e.g.*, MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007), but does not discuss the history of the ATS in this article.

³⁶ See *Rafael v. Verelst*, 96 Eng. Rep. 621, 622 (C.P. 1776) (De Grey, C.J.) (“Crimes are in their nature local, and the jurisdiction of crimes is local.”). Rights in real property were also

personal injuries, on the other hand, were transitory and could be brought wherever the defendant was found.³⁷ Indeed, Blackstone maintained that “[a]ll over the world, actions transitory follow the person of the defendant.”³⁸ This distinction between local and transitory actions is reflected in the text of the 1789 Judiciary Act. Section 9 of that Act limited the jurisdiction of the district courts to crimes “cognizable under the authority of the United States, committed within their respective districts or on the high seas.”³⁹ A few lines later, it granted jurisdiction over “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States” without any geographical limitation.⁴⁰ When Attorney General Bradford was called upon to construe these provisions in 1795, he also had the local-transitory distinction in mind. Bradford was asked what actions might be taken against certain Americans who had violated the law of nations on neutrality by aiding the French in attacking a British colony at Sierra Leone. With respect to criminal liability, Bradford opined that “[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States,” though he noted that “crimes committed on the high seas *are* within the jurisdiction of the district and circuit courts of the United States.”⁴¹ But the same geographic limitations did not apply to tort actions, and Bradford expressed:

no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.⁴²

considered local, including actions for trespass. *See id.*; *Doulson v. Matthews*, 100 Eng. Rep. 1143, 1145 (K.B. 1792) (Buller, J.) (noting that “an action quare clausum fregit is local.”).

³⁷ *See Rafael*, 96 Eng. Rep. at 623 (“But personal injuries are of a transitory nature, and sequuntur forum rei.”); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (Mansfield, C.J.) (holding that action for assault and false imprisonment in Minorca was transitory and could be tried in England); *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) (“Right of action [for false imprisonment] against an administrator is transitory, and the action may be brought wherever he is found.”). Contract actions were also transitory. *See Mostyn*, 98 Eng. Rep. at 1031 (noting that “contracts . . . follow the person”); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 384 (1765-69) (“I may sue a Frenchman here for a debt contracted abroad.”).

³⁸ 3 BLACKSTONE, *supra* note 37, at 384.

³⁹ Judiciary Act, ch. 20, § 9, 1 Stat. at 76–77 (emphasis added).

⁴⁰ *Id.*, 1 Stat. at 77.

⁴¹ 1 Op. Att’y Gen. 57, 58 (1795). In addition to Section 9’s geographic limitation of the district courts’ subject matter jurisdiction, the various provisions of the neutrality statute were limited to acts “within the territory or jurisdiction of the United States.” An Act in addition to the act for the punishment of certain crimes against the United States, ch. 51 § 5, 1 Stat. 381, 384 (1794).

⁴² 1 Op. Att’y Gen. at 59. The fact that the prospective defendants were Americans was important to establish a violation of the law of nations—had the defendants been French,

Unlike criminal liability, tort actions were transitory.

The substantive law to be applied in transitory actions was generally foreign law. Writing in *The Federalist No. 82*, Alexander Hamilton noted:

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.⁴³

This was undoubtedly true of contract cases,⁴⁴ and it also seems to have been true of torts. Addressing the applicable law in one of the leading transitory tort cases, *Mostyn v. Fabrigas*, Lord Mansfield stated that “whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried.”⁴⁵ Then, as now, foreign law did not apply in U.S. courts of its own force, but was given effect by the forum state’s extension of “comity.”⁴⁶

Even if the choice between the *lex fori* and the *lex locus delicti* had been controversial in ordinary tort cases, it would have presented no problem in ATS suits. A U.S. court hearing the ATS claims of those aliens injured in the French attack on Sierra Leone would not have had to choose between its own law and that of the place where the attack occurred because the law of nations on neutrality would have bound

there would have been no breach of neutrality. But otherwise, Bradford’s opinion does not treat the nationality of the defendants as significant to establishing jurisdiction under the ATS.

⁴³ THE FEDERALIST NO. 82 (Alexander Hamilton).

⁴⁴ See, e.g., *Robinson v. Bland*, 96 Eng. Rep. 141, 141 (K.B. 1760) (Mansfield, C.J.) (“the general rule established ex comitate et jure gentium is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract”); *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C. Va. 1799) (Washington, J.) (“the effect of a contract, made in one place, will be allowed according to the laws of that country, if no inconvenience results therefrom to the citizens of the country where those laws are sought to be enforced”).

⁴⁵ *Mostyn*, 98 Eng. Rep. at 1029; see also Peter Handford, *Edward John Eyre and the Conflict of Laws*, 32 MELB. U. L. REV. 822, 848–52 (2008) (discussing cases). In the nineteenth century, alternatives to *lex locus delicti* developed for tort conflicts, including the *lex fori* approach favored by Savigny and the double actionability rule of *Phillips v. Eyre*. See *id.* at 849, 852–55.

⁴⁶ See, e.g., *Banks*, 2 F. Cas. at 757 (noting that foreign laws “have no effect directly with the people of any other government, but, by the courtesy of nations, to be inferred from their tacit consent, the laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to the rights of such other government or its citizens”). These principles had been articulated by the Dutch jurist Ulrich Huber. See Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, translated in SELECTED ARTICLES ON THE CONFLICT OF LAWS 162, 164 (Ernest G. Lorenzen ed., 1947). Huber’s ideas made their way into American law through the influence of Lord Mansfield. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 14–19 (1991).

the American defendants in both places. Following Blackstone, Americans considered the law of nations to be part of their common law,⁴⁷ but that did not make it an American creation. As Blackstone explained, “[t]he law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”⁴⁸ In sum, there is no evidence that the ATS was originally understood as an exercise of prescriptive jurisdiction, and plenty of evidence that torts in violation of the law of nation were considered a subset of transitory torts.

Professor Ramsey claims that his view is supported by the Supreme Court’s decision in *Sosa*,⁴⁹ but in fact the opposite is true. *Sosa* expressly rejected the argument that the ATS created a new cause of action, holding that the statute was “strictly jurisdictional.”⁵⁰ “As enacted in 1789, the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, *not power to mold substantive law*.”⁵¹ Adopting the view of an amicus brief, the Court reasoned that no express cause of action was necessary “because torts in violation of the law of nations would have been recognized within the common law of the time.”⁵²

It was only in Part IV of its opinion, when it came to define and apply a standard for claims based on the present-day law of nations, that the Court began to speak of “considering a new cause of action,”⁵³ “recogniz[ing] private claims under federal common law,”⁵⁴ and “[c]reating a private cause of action.”⁵⁵ It is this language to which Ramsey refers when he argues that federal courts creating “a federal common law cause of action” after *Sosa* are exercising jurisdiction to prescribe.⁵⁶ But the context of the Court’s discussion makes clear that Ramsey has drawn the wrong conclusion from its language. In the first instance, the language the Court used in Part IV of its opinion is explained by the need to translate the ATS from an eighteenth century world of general common law (including the law of nations), which courts “discovered” and applied to any case falling within their jurisdiction, to a modern world that distinguishes between state and federal common law, views common law as “made” rather than “discovered,” and generally requires legislative causes of

⁴⁷ See 4 BLACKSTONE, *supra* note 37, at 67 (“the law of nations . . . is here adopted in it’s [*sic*] full extent by the common law, and is held to be a part of the law of the land”); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784) (“the law of Nations . . . , in its full extent, is part of the law of this State”); 1 Op. Att’y Gen. 26, 27 (1792) (“The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.”).

⁴⁸ 4 BLACKSTONE, *supra* note 37, at 66.

⁴⁹ See Ramsey, *supra* note 8, at 298.

⁵⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

⁵¹ *Id.* (emphasis added).

⁵² *Id.* at 714. I should disclose that I authored the *amicus* brief in question. See Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 419425.

⁵³ *Sosa*, 542 U.S. at 725.

⁵⁴ *Id.* at 732.

⁵⁵ *Id.* at 738.

⁵⁶ Ramsey, *supra* note 8, at 298.

action.⁵⁷ To the extent that Part IV of *Sosa* does more than just translate the ATS into modern terms, it certainly does not expand the federal courts' authority to regulate. Rather, it "restrain[s]" their "discretion" by permitting a cause of action only for certain international law norms.⁵⁸ Simply put, *Sosa's* language about creating federal common law causes of action describes not a new exercise of prescriptive jurisdiction but a new limit on adjudicatory jurisdiction.

Professor Ramsey also argues that understanding the direct application of customary international law in domestic courts to be an exercise of jurisdiction to prescribe "is the only way that the idea of universal jurisdiction as a whole makes sense."⁵⁹ If national courts were free to apply all the rules of customary international law directly, the argument goes, no special rule authorizing the prescription of a subcategory of those rules would be necessary. But not every legal system in the world allows the direct application of customary international law.⁶⁰ At one time the United States permitted criminal prosecutions directly under the law of nations,⁶¹ but the Supreme Court outlawed this practice in 1816.⁶² Since then, pirates, slave traders, and terrorists have been prosecuted not directly under international law but under federal statutes passed to enforce that law.⁶³ Universal jurisdiction authorizes the application of such statutes to defendants having no connection to the United States.⁶⁴

When a court applies customary international law directly, rather than a statute incorporating that law, no basis for jurisdiction to prescribe is necessary. That is not to say that there are no limits on the direct application of customary international law. A court must have personal jurisdiction over the defendant—what international law calls jurisdiction to adjudicate.⁶⁵ Customary international law authorizes adjudicatory jurisdiction on a number of bases commonly used in ATS cases, including the defendant's presence within the territory of a state and regularly carrying on business within a state.⁶⁶ Nothing in international law requires that the United States have jurisdiction to prescribe as a precondition to exercising jurisdiction

⁵⁷ See *Sosa*, 542 U.S. at 725–27.

⁵⁸ *Id.* at 725. In particular, norms that are well accepted and specifically defined. See *supra* note 7 and accompanying text.

⁵⁹ Ramsey, *supra* note 8, at 298.

⁶⁰ See generally Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201 (2008).

⁶¹ See, e.g., *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Henfield's Case*, 11 F. Cas. 1099 (C.C. D. Pa. 1793).

⁶² See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). See generally INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, ch. 1 (David L. Sloss, Michael D. Ramsey, and William S. Dodge eds., forthcoming 2010).

⁶³ See, e.g., Antiterrorism Act, 18 U.S.C. §§ 2331–2339.

⁶⁴ See RESTATEMENT (THIRD) § 404.

⁶⁵ See *id.* §§ 421–23. Thus, Professor Ramsey's statement that, unless rules on prescriptive jurisdiction apply, "any nation could allow anyone to enforce any international law rule against any defendant," Ramsey, *supra* note 8, at 298, is plainly overbroad.

⁶⁶ See RESTATEMENT (THIRD) §§ 421(2)(a) & (2)(h).

to adjudicate.⁶⁷ More particularly, nothing limits the exercise of jurisdiction to adjudicate cases involving foreign parties and foreign conduct to cases of universal jurisdiction.⁶⁸ Jurisdiction to prescribe and jurisdiction to adjudicate are different categories, and the best way to make sense of universal jurisdiction is to keep those categories separate.

Finally, it is worth noting that the *Sosa* Court declined to apply international law limits on prescriptive jurisdiction to the ATS. The European Commission argued in its amicus brief that the Court “should construe the Alien Tort Statute to define the subject matter addressed by the statute to extend only so far as the United States’s jurisdiction to prescribe under international law.”⁶⁹ But only Justice Breyer bought this argument.⁷⁰ The Court was right to reject the idea that the ATS involves an exercise of prescriptive jurisdiction, for that notion is contrary to both its construction of the statute as strictly jurisdictional and to the original understanding of the statute.

III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The United States argued in *Sosa* that the ATS should not be applied to foreign conduct because of the presumption against extraterritoriality.⁷¹ This argument fared even worse than the European Commission’s, attracting the assent of not a single Justice. The Court’s failure to apply the presumption against extraterritoriality in *Sosa* is particularly notable in light of the Court’s parallel holding that the plaintiff could not proceed against the United States under the FTCA because the tort had occurred in a foreign country.⁷² Undeterred, the Bush Administration repeated the same argument after *Sosa*, pointing to the same language on which Professor Ramsey relies. Since “any cause of action recognized by a federal court is one devised as a matter of federal common law—*i.e.*, the law of the United States,” the government argued, to apply such law to foreign conduct would be “to give U.S. law an extraterritorial effect.”⁷³

⁶⁷ See *id.* § 421, cmt. a (“The fact that an exercise of jurisdiction to adjudicate in given circumstances is reasonable does not mean that the forum state has jurisdiction to prescribe in respect to the subject matter of the action.”).

⁶⁸ Section 423 provides that “[a] state may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes or other non-territorial offenses within the state’s jurisdiction to prescribe.” *Id.* § 423. But this supplements rather than limits the bases for jurisdiction under Section 421. For a discussion of universal jurisdiction in civil cases, see Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142 (2006).

⁶⁹ EU *Sosa* Brief, *supra* note 16, at 12.

⁷⁰ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring). The Court’s silence is telling, given its discussion of another argument raised by the European Commission—that a foreign plaintiff must exhaust local remedies before bringing an ATS claim. See *id.* at 733 n. 21; EU *Sosa* Brief, *supra* note 16, at 23–25.

⁷¹ U.S. *Sosa* Brief, *supra* note 18, at 46–50.

⁷² See *Sosa*, 542 U.S. at 699–711.

⁷³ U.S. Khulumani Brief, *supra* note 13, at 5.

Like the argument discussed in Part I, the notion that the presumption against extraterritoriality should apply to the ATS rests on the fallacy that U.S. courts hearing ATS claims are exercising prescriptive jurisdiction. Many of the points made above apply with equal force here. Courts do not apply U.S. substantive law in ATS cases; they apply customary international law. Customary international law is not made by the United States alone and cannot be applied “extraterritorially,” since it is, by definition, binding in all countries. *Sosa*’s language about creating federal common law causes of action does not change this. As we have already seen, that language describes not a new exercise of prescriptive jurisdiction but a new limit on adjudicatory jurisdiction.⁷⁴

Sosa tells us that the ATS is “strictly jurisdictional,”⁷⁵ and the presumption against extraterritoriality has never been applied to jurisdictional statutes. Federal courts routinely exercise jurisdiction under the federal diversity statute⁷⁶ over tort suits that arise abroad.⁷⁷ If the presumption against extraterritoriality does not bar these suits—and no one thinks that it does—it is not clear why it should bar ATS suits, which are simply a subset of transitory torts.⁷⁸

As a historical matter, it is quite clear that the presumption against extraterritoriality was not understood to apply to the ATS. At the time the ATS was passed, that presumption was stronger than it is today, because it rested not on notions of comity and domestic concern but on rules of international law.⁷⁹ Yet Attorney General Bradford’s 1795 opinion expressed “no doubt” that alien plaintiffs could bring suit under the ATS for torts in violation of the law of nations that occurred in Sierra Leone.⁸⁰

Nor would the purposes of the presumption against extraterritoriality be served by applying it to the ATS today. The presumption is generally thought to have two modern justifications: (1) that it protects “against unintended clashes between our laws and those of other nations which could result in international discord” and (2) that Congress “is primarily concerned with domestic conditions.”⁸¹ The first is inapplicable when the United States applies not its own law but rules of customary

⁷⁴ See *supra* notes 53–58 and accompanying text.

⁷⁵ *Sosa*, 542 U.S. at 713.

⁷⁶ 28 U.S.C. § 1332.

⁷⁷ See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (Posner, J.) (applying Mexican law on negligence to tort that occurred in Acapulco).

⁷⁸ See *supra* notes 35–48 and accompanying text.

⁷⁹ See *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories”); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (“It is conceded that the legislation of every country is territorial”); *Huber*, *supra* note 46, at 164 (“The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.”). See generally INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 62, ch. 1.

⁸⁰ See *supra* notes 41–42 and accompanying text.

⁸¹ *Equal Employment Opportunity Comm’n v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). See generally William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998).

international law binding on all nations. The second is rebutted by the very subject matter of the ATS.

It should come as no surprise, then, that the presumption against extraterritoriality argument has not fared well since *Sosa*. On remand from the Second Circuit in *In re South African Apartheid Litigation*, the District Court expressly rejected it on the ground that the ATS does not involve an exercise of jurisdiction to prescribe.⁸² The statute, the court noted, “does not by its own terms regulate conduct; rather it applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives.”⁸³

IV. CONCLUSION

The United States should not make rules for the rest of the world. Both the presumption against extraterritoriality and customary international law rules on jurisdiction to prescribe constrain the application of U.S. substantive law to cases that it may legitimately regulate. But neither applies to ATS cases, in which U.S. courts apply not U.S. substantive law but customary international law. That law is not prescribed by the United States alone but “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁸⁴ It is not applied extraterritorially because it is binding throughout the globe. Both of these arguments for limiting the ATS were raised in *Sosa*, and neither was adopted by the Court. The lower courts could continue to reject the prescriptive jurisdiction fallacy, the urgings of the Bush Administration and Professor Ramsey notwithstanding.

⁸² *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 246-47 (S.D.N.Y. 2009).

⁸³ *Id.* at 247.

⁸⁴ RESTATEMENT (THIRD) § 102(2).