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Kiobel, Extraterritoriality, and the "Global War on Terror"

CRAIG MARTIN[†]

ABSTRACT

For the purpose of exploring the issues of extraterritoriality raised in Kiobel v. Royal Dutch Petroleum Co., *this project sought to examine how the federal courts have considered extraterritoriality in cases arising in the so-called "global war on terror" (GWOT). The inquiry leads to some new and arguably important observations about extraterritoriality in the GWOT policies and related jurisprudence.*

The plaintiffs in Kiobel *claimed, under the Alien Tort Statute (ATS), that the defendant corporations were liable for complicity in Nigeria's conduct of indefinite detention, torture, and extrajudicial killing. The U.S. Supreme Court departed from the issue of corporate liability under international law to question whether the ATS, when invoked in cases involving foreign litigants for conduct abroad (so-called "foreign-cubed" cases), was an extraterritorial exercise of jurisdiction, in violation of domestic presumptions or international law principles on jurisdiction. The move was surprising because the application of the ATS is arguably a permissible exercise of adjudicative jurisdiction, rather than an impermissible exercise of prescriptive or enforcement jurisdiction.*

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In exploring this move in Kiobel *this Article set out to examine how the federal courts have approached issues of extraterritoriality in claims of indefinite detention, torture, and extrajudicial killing arising in response to the GWOT. This inquiry suggests that the government conduct giving rise to these GWOT cases itself constituted the extraterritorial exercise of U.S. prescriptive and enforcement jurisdiction in foreign territory. Moreover, in many instances the conduct was arguably undertaken without clear congressionial approval or other legal authority, and was thus likely in violation of both the international law principles limiting the exercise of domestic jurisdiction abroad, and the domestic presumption against extraterritoriality.*

The second observation arising from the inquiry is that the courts, the relevant bar, and the academy have not acknowledged or sufficiently examined the extent to which this government conduct was an extraterritorial application of U.S. law and policy. Rather, all the focus, by both the courts and the academy, is on whether U.S. rights can apply extraterritorially to protect the foreign claimants in these cases. Strictly limiting the extraterritorial application of U.S. legal rights, the courts have not questioned the application of U.S. law and policy that gave rise to those rights claims in the first place.

There is also a stark contrast between the manner in which the courts apply standards, canons of statutory construction, and various doctrines, in legitimizing the government conduct and immunizing U.S. defendants from claims on the one hand, and in limiting the availability of U.S. legal rights, and operation of the ATS itself, on the other hand. Moreover, with respect to the key issue of nexus, which is core to the decision in Kiobel, *the courts seem to apply very different standards.*

The Article explores some of the arguments for why the U.S. conduct in these GWOT cases is not impermissibly extraterritorial, and thus why the courts ought not be concerned. But even if in the specifics of each case the doctrinal treatment is correct, given the contrast between the approach of the Court to extraterritoriality in Kiobel *to that of the courts in the GWOT cases, it is argued that the issues nonetheless deserve more analysis and debate. While* Kiobel *may have left the ATS dead to claimants in foreign-cubed cases, it may lead to renewed inquiry into the legitimacy of the extraterritorial exercise of U.S. jurisdiction in the GWOT.*

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I. INTRODUCTION

Kiobel v. Royal Dutch Petroleum Co.[1] generated a great deal of interest even before it was argued in the U.S. Supreme Court, and much more will be written about it in the wake of the Court's rather surprising judgment. Much of the analysis will focus on whether anything remains of the Alien Tort Statute (ATS),[2] what impact the case will have on international human rights, and the extent to which the opinions in the judgment, and particularly their discussion of extraterritoriality, are consistent with prior ATS jurisprudence. This Article, written for a symposium on the case held after oral argument at the Supreme Court but prior to the judgment,[3] began as an inquiry

1. 133 S. Ct. 1659 (2013).

2. 28 U.S.C. § 1350 (2006).

3. While this volume is being published after the judgment was rendered, and some revisions were permitted in light of the judgment, the symposium was held, and the bulk of the writing was done, before the case was decided.

into some of these questions, with a focus on the extraterritoriality issue. The Court's inquiry into that issue was surprising, because there are some good reasons to think that the ATS does not give rise to impermissibly extraterritorial exercises of U.S. jurisdiction. The research for this Article thus began by looking at how the federal courts have treated extraterritoriality in other cases involving the kinds of human rights violations raised in *Kiobel*, particularly in the context of the so-called "global war on terror" (GWOT). The idea was that such an examination might provide some insights into why and how the Court had focused on the issue of extraterritoriality in *Kiobel*. But in the end, the examination of those cases through the lens of the Court's treatment of extraterritoriality in *Kiobel* leads to some potentially new and important observations regarding how extraterritoriality is understood in the context of the GWOT.

In short, the first observation is that the U.S. conduct giving rise to the GWOT cases itself constitutes extraterritorial exercises of U.S. jurisdiction. In many cases this conduct lacks sufficiently clear congressionial or other relevant legal authority, which suggests that such conduct may violate domestic presumptions against extraterritoriality, and international law principles on jurisdiction. Yet, the courts, and the academy, have focused on whether U.S. legal rights and other protections can be applied extraterritorially to benefit such claimants, while apparently ignoring the fact that the policy against which they seek protection is itself an extraterritorial exercise of U.S. jurisdiction. Moreover, there is a stark contrast in how the courts have applied standards and relevant doctrine when considering the authority for U.S. conduct in the GWOT, as compared to the strict standards and doctrine applied in both *Kiobel* itself, and in the consideration of the rights claims of foreign claimants in the GWOT.

By way of background, *Kiobel* was an ATS class action in which the plaintiffs argued that the defendant corporations were liable for torture, crimes against humanity, extrajudicial killing, arbitrary detention, and other violations of international law committed by agents of the government of Nigeria.[4] The ATS provides federal courts with jurisdiction to adjudicate tort claims made by foreigners for the violation of a narrow range of well-established principles of international law.[5] While enacted as part of the Judiciary Act of 1789, the ATS was virtually unheard of until it was first employed to

4. *Kiobel*, 133 S. Ct. at 1662–63.

5. *See infra* text accompanying notes 41–45.

advance human rights claims in *Filártiga v. Peña-Irala*.[6] In *Filártiga*, the family of a Paraguayan national, who had been tortured to death in Paraguay, won redress against the responsible former government agent for the tort arising from the violation of the international law prohibition against torture.[7]

The narrow issue on appeal to the Supreme Court in *Kiobel* was whether corporations had sufficient legal personality under international law to be held liable for such violations.[8] But in the course of oral argument the Court deviated from that narrow issue to delve more deeply into fundamental questions about the scope of the ATS, and whether its operation is an impermissible extraterritorial application of U.S. law.[9] The Court ordered a briefing of these new issues and reargument of the case several months later.[10] In particular, the Court questioned whether ATS claims made by foreigners for the conduct of other foreigners, perpetrated within foreign territory (so-called "foreign-cubed" cases), constituted an extraterritorial application of U.S. law in violation of the domestic presumption against extraterritoriality and the international law principles governing jurisdiction.[11] Thus, the central issue of corporate liability under international law was shunted to one side, and extraterritoriality under international law and the legitimate scope of the ATS became the focus of the case.[12] In the course of argument and reargument it became clear that the continued validity of a whole line of ATS cases involving the conduct of foreign actors abroad, stretching back to the seminal case of *Filártiga* itself, might be in jeopardy.

In the final result, in which the plaintiffs' claims were dismissed,

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6. 630 F.2d 876 (2d Cir. 1980).

7. *Id.* at 878.

8. *Kiobel*, 133 S. Ct. at 1663.

9. *See* Transcript of Oral Argument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (argued February 28, 2012); Transcript of Oral Reargument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (argued October 1, 2012).

10. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.).

11. *See infra* Parts II.A–B.

12. There is a certain irony in this. The Court did much the same thing, deviating from the issue on appeal and ordering reargument, in *Citizens United v. FEC*, 558 U.S. 310 (2010), in which of course the Court held that corporations enjoyed some of the same constitutional rights as natural persons. There would have been further irony had the Court in *Kiobel* held that corporations do not, however, enjoy sufficient legal personality to be held liable for violations of international law.

the majority grounded its decision in the domestic law presumption against extraterritoriality,[13] while the concurring minority focused on the international law principles on jurisdiction.[14] The domestic law presumption against extraterritoriality was itself founded on a respect for international law principles on jurisdiction, and thus, while differing in focus, the overall judgment was grounded in the relationship between the ATS and the international legal system. This apparent concern about extraterritoriality seems somewhat strange, in part because the application of the ATS in *Kiobel* is, arguably, entirely consistent with the Court's own interpretation of the relationship between the statute and international law in its seminal ATS decision *Sosa v. Alvarez-Machain.*[15] Moreover, the interpretation of that relationship in *Sosa* is itself consistent with international law principles on jurisdiction.

Reasonable people can and do disagree on this. There will continue to be much debate over the technical arguments regarding extraterritoriality, and the international law principles governing jurisdiction as they relate to this case. But given that there are reasonable arguments that the application of the ATS in foreign-cubed cases, such as *Kiobel*, would be consistent with *Sosa* and international law principles, it was surprising for the Court to depart from the corporate liability issue in order to raise the issue of extraterritoriality. The Court's focus on extraterritoriality leads naturally to an inquiry into how the Supreme Court, and other federal courts, have treated issues of extraterritoriality and respect for international law principles on jurisdiction in other cases that involve claims similar to those raised in *Kiobel*—that is, claims arising from the violations of international law principles that form *jus cogens* norms, and which are recognized under *Sosa* as grounding ATS claims. Such an inquiry leads one to wonder how, for instance, the courts have considered extraterritoriality and compliance with the international law principles on jurisdiction in cases involving claims similar to those raised in *Kiobel*, but arising in response to U.S. conduct in the GWOT.

This Article set out to explore that line of inquiry. But what began as an inquiry aimed at providing insights into the Court's approach in *Kiobel*, developed into more of an examination of this

13. *Kiobel*, 133 S. Ct. at 1669.

14. *Id.* at 1673–74 (Breyer, J., concurring in the judgment).

15. 542 U.S. 692 (2004).

sample of GWOT cases through the lens of the Court's treatment of extraterritoriality in *Kiobel*. Rather than the GWOT cases shedding light on *Kiobel*, thinking about the approach towards extraterritoriality in *Kiobel* provided some insights into our understanding of GWOT jurisprudence. In particular, the inquiry revealed some important and surprising features regarding an apparent failure to address the issue of extraterritoriality in the context of the GWOT. The most important observation is that the actions of the government of the United States against suspected terrorists, specifically policies of indefinite detention, enhanced interrogation techniques, extraordinary rendition and torture, and even targeted killing, itself constituted an extraterritorial application of U.S. law. Moreover, at times such conduct was, arguably, undertaken without clear congressionial approval or other relevant legal authority. As will be explored below, it is arguably the case that in many of these instances none of the Authorization for Use of Military Force (AUMF)[16] enacted shortly after the 9/11 attacks, or any other U.S. legislation, or indeed the international law of armed conflict, can be said to clearly authorize the U.S. actions. This would suggest that in some cases at least, the conduct was an impermissibly extraterritorial exercise of jurisdiction.

A second and related observation, is that the federal courts (including the Supreme Court), the litigants themselves, and even the scholars writing on the GWOT jurisprudence, have not sufficiently recognized the extent to which the government action in relation to these claimants constitutes an extraterritorial exercise of U.S. jurisdiction. Given the Court's questions and analysis in *Kiobel*, one would have expected that some inquiry would have been required in several of these GWOT cases into whether the government conduct in detaining, interrogating, or targeting the claimants represented an impermissible exercise of U.S. jurisdiction abroad. Yet there was none. Indeed, when the federal courts have dealt with issues of extraterritoriality in the context of rights claims made in GWOT cases, the focus has been almost exclusively on whether rights under U.S. law can be extended abroad. Scholarship too has focused narrowly on this debate. Thus, while everyone is preoccupied with the possibility and extent of extraterritorial application of rights, there

16. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note (2006)).

has been no corresponding judicial concern or even inquiry into how those very rights claims, many of them advanced under the ATS, sought protection against the extraterritorial application of U.S. law. Indeed, neither the jurisprudence nor the related academic literature, nor even the lawyers for the claimants, seem to have recognized this somewhat paradoxical feature of several of these GWOT cases.

A third observation is that there is a rather stark contrast between the generous and expansive approach of the federal courts in accepting the legitimacy of the government conduct in the GWOT on the one hand, and on the other hand the strict and narrow approach taken by the courts in dealing with the rights claims of the plaintiffs in the GWOT cases, and indeed by the Court in its analysis of extraterritoriality in *Kiobel*. This contrast is reflected in the different approaches to statutory interpretation taken by the courts in assessing congressionial intent and legal authority for government conduct, in the manner in which doctrine is employed, and perhaps most markedly in how the concept of nexus is developed and applied. One of the central arguments that is advanced for the rejection of foreign-cubed ATS cases is that there is not a sufficient connection to the United States. It was indeed an element of the Court's judgment in *Kiobel*.[17] The suggestion of such arguments being that the courts would be, and indeed should be, more open to adjudicating cases involving torture and other violations of *jus cogens* norms if the defendants were U.S. nationals, or there was otherwise a strong connection to the United States. But in several GWOT cases, in which American actors were defendants accused of such violations of international law, the courts have invoked and creatively extended various doctrines to block precisely such claims against the U.S. defendants.[18] In contrast, the courts accept the most tenuous arguments of attenuated links to al-Qaeda, on scant and often dubious evidence, as grounds for detaining and interrogating claimants in the GWOT cases.[19]

This Article begins in Part II with an explanation of the international law principles on the exercise of extraterritorial jurisdiction, as well as the U.S. domestic law presumptions on extraterritoriality. It explores how the ATS operates, and explains why the ATS is arguably not an extraterritorial exercise of

17. *Kiobel*, 133 S. Ct. at 1669; *see also id.* at 1671, 1674 (Breyer, J., concurring in the judgment).

18. *See infra* Part III.C.

19. *See infra* Part III.B.

prescriptive jurisdiction. Given that the Court thought otherwise in *Kiobel*, this gives rise to the question of how the courts have treated extraterritoriality in the context of the GWOT cases. Part III turns to that inquiry, beginning with an examination of how the sole concern over extraterritoriality in the GWOT cases has focused on questions of whether, and the extent to which, U.S. legal rights may be extended to foreigners abroad. It then moves to examine the cases involving claims of arbitrary detention, interrogation and torture, and extrajudicial killing, exploring in each case how the U.S. conduct arguably constitutes an exercise of prescriptive jurisdiction in violation of both international law principles on jurisdiction, and the domestic law presumptions against extraterritoriality. Moreover, the examination highlights the contrast between standards and doctrines employed by the courts depending upon which party's rights and privileges are at issue. Finally, in Part IV, the Article takes up some of the likely objections to this line of argument. It examines in turn whether the U.S. conduct can be explained as being authorized by the international law of armed conflict; whether it fits within the exceptions to the international law principles on jurisdiction; and whether it was in any event explicitly authorized by Congress, or alternatively was an exercise of the president's Commander-in-Chief powers, such that the domestic presumptions against extraterritoriality are rebutted.

In the end, this brief exploration of how the courts have considered extraterritoriality in the context of the GWOT cases suggests a troubling disregard for U.S. violations of international law principles prohibiting the extraterritorial exercise of jurisdiction (in addition, of course, to the violation of international human rights law, which is the focus of much GWOT scholarship), which the Court purports to be concerned about in *Kiobel*. The Article begins by raising questions as to whether the Court was wrong in its analysis of the ATS and extraterritoriality in *Kiobel*, but it does not try to use the GWOT cases to make that argument; rather, in examining the GWOT cases through the lens of *Kiobel*, it suggests that we need to look more closely at how extraterritoriality has been ignored in the GWOT context. I cannot, within the scope of this Article, establish conclusively the pattern of disregard that I begin to examine here—but this brief exploration of such patterns does raise questions about such disregard, which I argue is worth further consideration and analysis.

II. THE ATS AND EXTRATERRITORIALITY UNDER INTERNATIONAL LAW

One of the Court's primary issues during oral argument was whether the operation of the ATS in foreign-cubed cases violates the international law principles on jurisdiction, or was barred by the domestic presumption against extraterritoriality. I suggested above that the ATS, as it was interpreted by the Court in *Sosa v. Alvarez-Machain*,[20] is consistent with those principles, even when employed in foreign-cubed cases. Several other articles in this Volume provide a more detailed analysis of precisely why this is so, but to provide the basis for the discussion of the GWOT cases, I begin with a quick review of the foundation for this proposition.

A. International Law Principles on Jurisdiction

The principles of both public and private international law relating to jurisdiction reflect the desire to minimize conflicts between the laws of sovereign nations. Jurisdiction is a fundamental component of sovereignty, and to the extent it is exercised in relation to events or persons outside of the state's territory, there is a risk that it will infringe the sovereignty of another state. From the perspective of international law, the state's exercise of jurisdiction can be understood as having three aspects, namely: (1) prescriptive jurisdiction, which relates to the creation and operation of laws; (2) adjudicative jurisdiction which relates to the operation of judicial powers in interpreting and applying the law in resolution of disputes; and (3) enforcement jurisdiction, which relates to the conduct of the executive powers of the state in enforcing the laws and policies of the nation.[21] Much of the controversy over extraterritoriality relates to the exercise of prescriptive jurisdiction in relation to conduct abroad—the passage of laws that purport to govern conduct and persons outside of the territory of the state—and it is prescriptive jurisdiction that is at the heart of understanding the extraterritoriality issue in *Kiobel*.

The starting presumption is that jurisdiction is territorial (the territorial principle), in that a state is entitled to exercise all three forms of jurisdiction without question within its own territory, and that there will be no interference within its territory by the exercise of

20. 542 U.S. 692 (2004).

21. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW ch. 21 (8th ed. 2012) (explaining the international law principles relating to jurisdiction).

any other state's jurisdiction. In essence, international law may be said to generally limit the exercise of jurisdiction to the territory of the state, and to thus prohibit the exercise of prescriptive and enforcement jurisdiction in relation to conduct beyond the territory of the state, with some exceptions—some universally accepted, others controversial.[22] The most clearly established exception is that states may exercise jurisdiction, even in relation to conduct or events outside its territory, in respect of its own nationals (the nationality principle). A second relatively well-established, if narrow, exception is that international law recognizes the right to exercise jurisdiction in situations requiring a legislative response to protect the state from a grave national security threat to the institutions of the state (the protective principle).[23]

Less widely accepted but asserted in particular by the United States, is the right of states to exercise prescriptive jurisdiction to govern conduct abroad that is intended to have and does have significant effects within the territory of the state (the effects doctrine or objective territoriality principle).[24] Even less well accepted, and more controversial, is the exercise of jurisdiction to address situations abroad in which the state's nationals are victims of crime (the passive

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22. In a number of amicus briefs filed in *Kiobel* this proposition was challenged on the basis of the judgment in S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), in which the Permanent Court of International Justice held that international law permits any exercise of jurisdiction within its territory in respect of conduct abroad that is not explicitly prohibited. The central holding of the case has been widely criticized, and contradicted in such later I.C.J. opinions as Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 78 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, & Buergenthal) and Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, at 169 (Feb. 14) (dissenting opinion of Judge Van den Wyngaert). *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 301–03 (4th ed. 1990). *But see* CRAWFORD, *supra* note 21, at 458.

23. BROWNLIE, *supra* note 22, at 304; CRAWFORD, *supra* note 21, at 462; *see also* Research in International Law, Harvard Law School, *Jurisdiction with Respect to Crime: Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 439 (Supp. 1935) [hereinafter *Harvard Draft Convention*]; Christopher W. Robbins, *Finding Terrorists' Intent: Aligning Civil Antiterrorism Law with National Security*, 83 ST. JOHN'S L. REV. 1201, 1213–30 (2009).

24. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987)*; see also* Robbins, *supra* note 23; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L. L.J. 121, 128 (2007); Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 709 n. 252 (2003).

personality principle).[25]

Finally, there is the conceptually distinct exception provided for in the principle of universal jurisdiction, which was also central to arguments advanced in *Kiobel*. This exception is well-established, but its scope and application remain in dispute.[26] In essence, it provides that states may exercise jurisdiction in respect of violations of certain principles of international law, typically *jus cogens* norms of customary international law such as the prohibitions against torture, war crimes, crimes against humanity, piracy, and trading in slaves.[27] Universal jurisdiction with respect to some violations is conferred by treaty, as with the Convention Against Torture,[28] while jurisdiction over other violations is understood to exist as a matter of customary international law. Interestingly, U.S. courts have not accepted that terrorism is an international crime for which states may exercise universal jurisdiction.[29]

I will return to the substance and scope of some of these principles later, when I examine possible justifications for the extraterritorial exercises of jurisdiction that give rise to the GWOT

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25. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987); *see also* MARY ELLEN O'CONNELL, INTERNATIONAL LAW 828–29 (2d ed. 1970); Geoffrey Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 14–30 (1993); Joshua Robinson, *United States Practice Penalizing International Terrorists Needlessly Undercuts Its Opposition to the Passive Personality Principle*, 16 B.U. INT'L L.J. 487 (1998).

26. Aside from open disputes as to when and for what offenses it may be available, there are some subtly different interpretations or understandings of the precise meaning of universal jurisdiction. Some argue that it constitutes the exercise of adjudicative jurisdiction by states in relation to violations of international law. *See, e.g.*, Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149 (2006). Others, such as Brownlie, suggest that it is more accurately the application of domestic (municipal) law to proscribe and punish acts that are also unlawful under international law, and in respect of which international law confers a liberty upon states to exercise prescriptive jurisdiction. BROWNLIE, *supra* note 22, at 304–06.

27. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

28. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85; *see also* R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.) 198–201 (Browne-Wilkinson, L.J.), 204–05 (Millett, L.J.).

29. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 105–06 (2d Cir. 2003). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (defining "Universal Jurisdiction to Define and Punish Certain Offenses" to include "perhaps certain acts of terrorism"). *See generally* Leila Sadat, *Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241 (2001); Colangelo, *supra* note 24.

cases.[30]

B. The Domestic Presumptions

Separate from the operation of the international law principles, but relevant to the question of whether the ATS constitutes an impermissibly extraterritorial application of U.S. law, are two presumptions in U.S. domestic law. The first is the presumption against extraterritoriality, which is traced back to Justice Oliver Wendell Holmes in *American Banana Co. v. United Fruit Co*.[31] in 1909. According to this doctrine, Congress is presumed not to intend statutes to apply extraterritorially, and thus courts will interpret legislation as having no extraterritorial application, unless Congress has explicitly expressed in the statute the intention that it apply outside U.S. territory.[32] The corollary to this is that if Congress explicitly provides that some statutory provision is to have extraterritorial application, then the courts will interpret it accordingly, regardless of whether doing so would be inconsistent with international law principles on jurisdiction. In other words, the presumption is only triggered when the government purports to apply a statute to conduct or persons overseas, and that statute is silent or ambiguous on the issue of extraterritorial effect. Such is the theory, but of course it is not quite so clear-cut in practice. The courts have often found an implicit congressionial intention to have the law applied extraterritorially, if such application is thought necessary to fully achieve the objectives of the law.[33]

The second presumption is referred to by the name of the nineteenth-century case in which it was established, *Murray v. Schooner Charming Betsy*.[34] According to the *Charming Betsy* doctrine, an act of Congress is not to be construed in a manner inconsistent with international law, so long as any other interpretation is possible.[35] As with the presumption against extraterritoriality, a law will be construed in a manner that would put the United States in

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30. *Infra* Part IV.B.

31. 213 U.S. 347, 357 (1909).

32. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

33. *See, e.g.*, United States v. Bowman, 260 U.S. 94 (1922); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994); *see infra* note 220 and accompanying text.

34. 6 U.S. (2 Cranch) 64 (1804).

35. *Id.* at 118.

violation of international law if Congress has explicitly expressed the intent that the statute operate notwithstanding any inconsistency with international law. Put simply, under either presumption, the courts will give effect to statutes that violate the obligations of the United States under international law if it is clearly the intent of Congress to do so; but both presumptions were developed on the judicial understanding that generally Congress is presumed to respect, and to comply with, the principles of international law.

The majority opinion in *Kiobel* held that the presumption against extraterritoriality applied to the ATS, and that there was insufficient evidence to support the notion that Congress had intended the ATS to apply to the conduct of foreigners occurring in foreign territory.[36] The concurring opinion of Justice Breyer, on the other hand, focused its attention on the international law principles regarding jurisdiction, and only agreed in the result based on the notion that there had to be a sufficient nexus to the interests of the U.S. to justify the exercise of jurisdiction.[37] In considering the operation of the ATS, and the nature of the extraterritorial exercise of jurisdiction in the GWOT cases, I will consider both domestic and international law principles, though the emphasis will be on the international law principles.

C. The Jurisdictional Operation of the ATS

The question raised by the Court in *Kiobel* was whether the ATS, at least when applied in so-called foreign-cubed cases, would constitute an extraterritorial exercise of prescriptive jurisdiction, either in violation of the domestic law presumptions, or the principles of international law regarding jurisdiction. The ATS provides 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."[38] It was argued by the defendants, and the governments of several states that filed amicus briefs,[39] that the ATS constitutes the application of U.S. substantive

36. 133 S. Ct. 1659, 1669 (2013).

37. *Id.* at 1671, 1673–78 (Breyer, J., concurring in the judgment).

38. 28 U.S.C. § 1350 (2006).

39. *See, e.g.*, Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Brief of the European Commission on Behalf of the European Union Supporting Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

and remedial law to conduct in another country, and to nationals of foreign states,[40] which is an exercise of prescriptive jurisdiction that cannot be justified by any of the principles of jurisdiction discussed above. But that position is arguably not consistent with the Court's own interpretation of the ATS in *Sosa*, nor with a line of lower court judgments stretching back to *Filártiga*.

Sosa is most noted for the narrow limits it placed on the kind of international law violations that could ground a claim, but it also addressed the jurisdiction courts would exercise in adjudicating those claims. Beginning with the limits, the Court established that the ATS provided the district courts with jurisdiction to adjudicate cases involving violations of a very narrow sub-set of principles of customary international law (leaving aside the issue of treaties of the United States).[41] That is, claims could only be made in respect of violations of those customary norms that are as well-established, clearly defined, and widely accepted today, as the specific crimes against the law of nations that had been in the contemplation of Congress in 1789, when the statute was enacted.[42] Moreover, the better reading of *Sosa* suggests that the Court was also limiting the scope of the ATS to those principles of customary international law which are understood to give rise to individual liability or culpability in international law.[43] The range of international law principles that the Court identified as falling within the scope of the ATS maps nicely onto the short list of customary international law norms that are most universally accepted as comprising *jus cogens* norms, namely: torture, piracy, a sub-set of war crimes, crimes against humanity, genocide, trading in slaves, and perhaps the crime of aggression.[44]

The Court in *Sosa* also clarified the jurisdictional nature of the

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40. *See* Transcript of Oral Reargument, *supra* note 9, at 34–35; Supplemental Brief of the United States as Amicus Curiae in Partial Support of Affirmance at 2, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

41. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

42. *Id.*

43. This inference flows in part from the cases discussed by Justice Souter, which refer to violations that are "heinous actions" that violate universal norms and that are "actionable." *Sosa*, 542 U.S. at 732.

44. *See, e.g.*, BROWNLIE, *supra* note 22, at 512–15; Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006); Jarvis, *supra* note 24, at 693 (discussing *jus cogens* norms).

ATS. It rejected arguments advanced by the plaintiff in *Sosa*, which are echoed by arguments again raised in *Kiobel*, that the ATS is substantive law creating new grounds for claims. In doing so, the Court held that the ATS is purely jurisdictional in nature, giving the district courts "cognizance" of certain causes of action for violations of international law, rather than providing authority for the creation of new causes of action, or itself providing a statutory cause of action.[45] In other words, the ATS confers upon the district courts jurisdiction to adjudicate, and provide a civil remedy for, violations of a narrow range of customary international law principles that give rise to individual liability. It does so only through the incorporation by reference of the law of nations, rather than through any attempt to implement those principles within domestic law.

This point can be better understood by contrasting the ATS with the much more recent Torture Victim Protection Act (TVPA).[46] The TVPA creates a cause of action for damages in *domestic law* against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects an individual to torture and extrajudicial killing, among other things.[47] Rather than merely referring to the definition of torture in the Convention Against Torture, the TVPA provides its own definition, which is drawn directly from the convention. In so doing it makes the definition, and the cause of action, an integral part of U.S. domestic law. The TVPA is an example of the *implementation through statute* of certain international law principles, in contrast to the ATS, which is an example of the *incorporation by reference* of certain international law principles.[48] This results in significant differences in how the two statutes operate, and in whether they should be understood as constituting an exercise of prescriptive jurisdiction in addition to authorizing the exercise of adjudicative jurisdiction.

The legislation that implements international law principles will evolve over time within the domestic legal system, independent of how those principles may develop in the international system. In contrast, the incorporation by reference of international law norms, with the grant of jurisdiction to courts to directly adjudicate the

45. *Sosa*, 542 U.S. at 713.

46. Pub. L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

47. *Id.*

48. *See* Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640 (2010) (comparing the ATS and the TVPA).

violations of those principles, will be much less likely to lead to such divergence over time.[49] When courts are called upon to adjudicate cases concerning those principles, they will be required to consider how the principles have evolved and been interpreted within international law, in a way that they would not be required to do when the principles are directly implemented through statute. Thus, the ATS, which the Court in *Sosa* recognized as merely incorporating by reference "the law of nations,"[50] will continue to confer jurisdiction to adjudicate violations of a class of customary international law principles, as that class has developed and evolved over time. In doing so, courts will naturally apply the then-current interpretations of those international law principles.[51]

The U.S. federal courts will of course be exercising adjudicative jurisdiction in cases arising under both the ATS and the TVPA. But flowing from the difference between the statutes explained above, we should understand that under the TVPA the courts will be applying U.S. law to foreign conduct. This application of the law will reflect an exercise of prescriptive jurisdiction in respect of conduct abroad. In contrast, in the case of the ATS, the courts will be adjudicating, and fashioning a civil remedy for, violations of international law itself. While the remedy is a creation of U.S. law, the substance of the law being adjudicated and enforced is not—the substantive law remains the relevant principles of international law.

It will be argued by some that even if this is true, the statutory fashioning of the remedy, and indeed the rather unique imposition of

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49. *See* Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOK. L. REV. 611, 709–11 (2011) (discussing the difference between implementation and incorporation of international law into domestic law in the context of internalizing norms on the use of force).

50. *Sosa*, 542 U.S. at 721.

51. On this point I should clarify a position I have taken in the past. In *Taking War Seriously*, in the process of discussing the ATS in the context of comparing methods and ramifications of domestic incorporation and implementation of international law, I wrote that the ATS did not "incorporate the international law norms per se, but as the Supreme Court held in *Sosa v. Alvarez-Machain*, the statute confers subject matter jurisdiction and creates a cause of action for the violation of the 'law of nations,' which is a reference to customary international law." Martin, *supra* note 49, at 710. Upon reflection, this was too fine a distinction. By incorporating the "law of nations" by reference, and given that the "law of nations" has been interpreted to mean a narrow range of customary international law principles, it is fair to say that the ATS does incorporate by reference that subset of customary international law principles.

a civil remedy in tort for violations of international law norms that are for the most part criminal in nature, is an exercise of prescriptive jurisdiction—and that this by itself is an impermissible interference in the sovereignty of other states. There are, however, two responses to this argument. First, under the concept of universal jurisdiction the state that has personal jurisdiction over the perpetrator of the crime in question has some discretion in terms of developing and applying a sanction.[52] Second, this domestic development of a sanction for a violation of a foreign or international law is entirely consistent with private international law principles: choice of law and law of the forum may operate such that the law of one jurisdiction provides for the prohibition and the basis for liability, while the law of the forum provides the remedy. In other words, as applied to the circumstances of the ATS, international law provides for the "conduct regulating" rule, while the law of the forum provides the "loss-allocating" rule.[53]

III. EXTRATERRITORIALITY IN THE "GLOBAL WAR ON TERROR"

The foregoing analysis suggests that there is good reason to believe that the ATS is not an extraterritorial exercise of prescriptive jurisdiction, inconsistent with international law principles, even when applied in foreign-cubed cases. This raises the question of why the *Kiobel* Court professed such concern over the possibility, particularly when that was not the issue presented to the Court. In considering why the Court might have raised the issue, a natural line of inquiry is to examine how the Court, and federal courts generally, have dealt with issues of extraterritoriality in other contexts. Have the courts been as concerned with the possible extraterritorial application of other laws? Much has been written on the extraterritorial reach of U.S. law and how the federal courts have treated such extraterritoriality.[54] The extent to which the United States

52. CRAWFORD, *supra* note 21, at 467–68.

53. Anthony J. Colangelo, *The ATS and Extraterritoriality, Part II: Universal Civil Jurisdiction and Choice of Law*, OPINIO JURIS (Mar. 27, 2012, 10:30 AM), http://opiniojuris.org/2012/03/27/universal-civil-jurisdiction-and-choice-of-law; *see* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1086 (2011); *see also* Hannah Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 255, 268, 298 (2006).

54. *See Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226 (2011); *see also* 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 (2012); Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 77 AM. SOC'Y INT'L L. PROC. 370 (1983); William S. Dodge, *The Presumption Against Extraterritoriality After* Morrison, 105 AM. SOC'Y INT'L L. PROC. 396 (2011); Michelle K. Fiechter, *Extraterritorial*

increasingly sought to apply its antitrust law extraterritorially in the latter half of the twentieth century, for instance, is notorious.[55] But less studied, and more directly relevant for assessing the Court's stance in *Kiobel*, is how the courts have treated the extraterritorial application of U.S. law in cases relating to the so-called "global war on terror," in which many of the issues in play, such as arbitrary detention, interrogation and torture, and extrajudicial killing, are similar to those that were raised in *Kiobel*, and are at the center of many ATS claims. How have the courts considered extraterritoriality in these cases?

There is a growing and complex jurisprudence relating to the GWOT, and a similarly robust scholarly analysis of the jurisprudence.[56] This short Article cannot review the entire landscape. But it examines a few examples, in order to explore the extent to

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Application of the Alien Tort Statute: The Effect of Morrison v. National Australia Bank, Ltd. *on Future Litigation*, 97 IOWA L. REV. 959 (2012); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1986); Jordan J. Paust, Kiobel, *Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT'L L. 18 (2012).

55. It was precisely in this area that the courts developed the "effects doctrine" (the "objective territorial principle") to justify the extension of U.S. jurisdiction to govern conduct abroad that would allegedly impact U.S. markets. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). In doing so, they searched for implicit Congressionial intent to apply antitrust law abroad to mitigate such effects, all in order to overcome the presumption against extraterritoriality and the strictures of the *Charming Betsy* doctrine. The effects doctrine was explicitly adopted by Congress for application in the realm of antitrust in the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2006). *See generally* Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11 (2003); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999); Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191 (1999); Jay Lawrence Westbrook, *Review Essay: Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71 (1990).

56. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004). *See generally* Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L. L. REV. 105 (2005); Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 WAYNE L. REV. 1131 (2008); Thomas M. Pohl, *From Blackbeard to Bin Laden: The Re-Emergence of the Alien Tort Claims Act of 1789 and Its Potential Impact on the Global War on Terrorism*, 34 J. LEGIS. 77 (2008).

which they reveal whether the claims made in those cases were in response to government conduct that constituted the extraterritorial exercise of U.S. prescriptive and enforcement jurisdiction, potentially violating international law principles on jurisdiction, and without explicit congressionial intent—and how the courts have treated such extraterritorial application of U.S. law.

A. Extraterritorial Application of Rights – A Misdirected Focus

The majority of cases arising from the GWOT relate to the detention of foreigners in Guantánamo Bay in Cuba, Bagram Air Force Base in Afghanistan, and elsewhere. In those cases, and in the academic literature about this line of cases, there has been extensive discussion of extraterritoriality—but it relates specifically and narrowly to the question of whether certain rights under U.S. law operate extraterritorially and so protect these detainees.[57] This focus overlooks entirely the extraterritorial application of U.S. law that has given rise to the claims for such rights and protection. Before turning to that other aspect of these cases, however, it is worth making some observations about this judicial and scholarly analysis of the extension of rights. The high-water mark of extraterritorial application of rights came in *Boumediene v. Bush*,[58] in which the Court held that the constitutional right to the writ of habeas corpus[59] did indeed extend to foreigners being detained in the leased territory in Guantánamo Bay, and it struck down as unconstitutional the provisions of the Military Commissions Act of 2006 (MCA),[60] which purported to exclude the application of the suspension clause to such detainees.[61] In this sense, *Boumediene* is viewed as a victory for rights-protection generally, an expansion of extraterritorial application of constitutional rights in particular, and a check on the

57. *See, e.g.*, *Developments in the Law*, *supra* note 54, at 1126, 1158; Apostolova, *supra* note 48; Jamie A. Baron Rodriguez, *Torture on Trial: How the Alien Tort Statute May Expose the United States Government's Illegal 'Extraordinary Rendition' Program Through Its Use of a Private Contractor*, 14 ILSA J. INT'L & COMP. L. 189 (2007); Ku, *supra* note 56; Pohl, *supra* note 56.

58. 553 U.S. 723 (2008).

59. U.S. CONST. art. 1, § 9, cl. 2.

60. Military Commissions Act of 2006, 109 Pub. L. 366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C. (2006)).

61. For a discussion of the constitutional problems associated with such jurisdiction stripping, see Alex Glashausser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225 (2012); Martin J. Katz, *Guantánamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377 (2009).

expanding power of the Executive in the GWOT.[62]

This holding in *Boumediene*, however, has been very narrowly construed by the lower courts in subsequent cases, and the Court has chosen not to grant certiorari in any of these cases. For example, the D.C. Circuit purported to apply the *Boumediene* standard in *Al Maqaleh v. Gates*,[63] holding that the writ of habeas corpus did not extend to persons detained at Bagram.[64] The primary distinguishing features, according to the court, were that the United States did not exercise the kind of de facto sovereign control over Bagram that it did over Guantánamo Bay[65] (a feature that had been emphasized by Justice Kennedy in *Boumediene*[66]), and that Bagram was located in a theatre of war, thus creating practical obstacles to extending constitutional rights to detainees there.[67] So, notwithstanding *Boumediene*, the extraterritorial application of rights under U.S. law, including constitutional rights, to those who are arguably under the complete jurisdiction and control of the U.S. government, has actually been very limited.[68]

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62. For analysis of *Boumediene*, see, e.g., Ryan Firestone, *The* Boumediene *Illusion: The Unsettled Role of Habeas Corpus Abroad in the War on Terror*, 84 TEMP. L. REV. 555 (2012); Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of* Boumediene, 57 WAYNE L. REV. 99 (2011); Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221 (2011); Lobel, *supra* note 56; Nathaniel H. Nesbitt, *Meeting* Boumediene*'s Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244 (2010).

63. 605 F.3d 84 (D.C. Cir. 2010).

64. *Id.* at 98.

65. *Id.* at 97.

66. 553 U.S. 723, 755 (2008).

67. *Al Maqaleh*, 605 F.3d at 97.

68. *See, e.g.*, JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41156, JUDICIAL ACTIVITY CONCERNING ENEMY COMBATANT DETAINEES: MAJOR COURT RULINGS (2012) (reviewing detention cases); *see also* N.Y. STATE BAR ASS'N COMM. ON CIVIL RIGHTS, REPORT ON EXECUTIVE DETENTION, HABEAS CORPUS AND THE MILITARY COMMISSIONS ACT OF 2006 (2008); Lobel, *supra* note 56; Joshua Geltzer, *Decisions Detained: The Courts' Embrace of Complexity in Guantánamo-Related Litigation*, 29 BERKLEY J. INT'L L. 94 (2011); Alexandra Link, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT'L L. 439 (2013). Parenthetically, this very limited extension of rights to persons under U.S. control can be contrasted with how the European Court of Human Rights has analyzed the extension of rights under the European Convention of Human Rights to detainees and others killed by the armed forces of member states. *See, e.g.*, Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011).

The focus in U.S. legal discourse on the extent and validity of the extraterritorial application of rights in the context of the GWOT may highlight the significant limits placed on the protections available to detainees and others subject to U.S. jurisdiction. But it tends to obscure the extent to which U.S. law is being applied extraterritorially in a manner that violates the principles of international law on jurisdiction. Indeed, the exclusive focus on the extension of rights in the context of discussing extraterritoriality may be viewed as being somewhat bizarre, particularly in light of the arguments made in *Kiobel*, for two reasons. First, the extension of constitutional rights for the purpose of providing protections to foreigners located in the territory of another state, in their relationship with the government of the United States, is not the kind of extraterritorial application of law that is likely to offend the sovereignty of that other state.[69] It is not an exercise of jurisdiction in which U.S. law prescribes, limits, or otherwise governs the conduct of a foreign national in foreign territory. Rather, it only provides protections to a foreigner in his or her interaction with the U.S. government, in a manner that tends to be of little relevance to the laws of the territory in which the person happens to be located.[70]

Second, and more important, this preoccupation with whether U.S. legal rights can apply extraterritorially to protect foreign plaintiffs entirely fails to question whether the government conduct against which those plaintiffs seek protection is itself an impermissible extraterritorial application of U.S. law. The judicial and academic focus on rights, while ignoring the government's actions giving rise to those rights claims, seems almost paradoxical. Because upon some reflection, it would appear that the laws and policies that are the cause of the rights claims in these GWOT cases constitute a much more problematic exercise of either prescriptive or enforcement jurisdiction within the territory of another state than any extension of rights would be, and they are arguably in violation of the international law principles on jurisdiction.[71] It is to that

69. *See generally* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, B.U. L. REV. (forthcoming 2013); Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2011); Stigall, *supra* note 54.

70. However, courts have argued that extending rights could interfere with the foreign relations of the United States with the government of Afghanistan. *See, e.g.*, Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 (D.C. Cir. 2010).

71. As explained, the primary argument is that these laws do constitute an exercise of jurisdiction, arguably in violation of international law principles and the domestic presumptions. The first implication of this is that U.S. jurisdiction should not be so applied. But alternatively, these observations should also bolster the argument that the Constitution

extraterritorial application of U.S. law that I now turn.

B. Indefinite Detention

To explore this second point in more detail, I begin by considering the circumstances surrounding the early detention cases. It will be recalled that from the beginning of 2002, shortly after the invasion of Afghanistan, the United States began transporting suspected members of al-Qaeda, the Taliban, and other persons suspected of being or supporting terrorists, to a detention facility at Guantánamo Bay. Rising to over 700 persons, these detainees were specifically not afforded the status of prisoners of war under the Geneva Conventions, nor were they charged with any criminal offense.[72] The detainees were said to be detained pursuant to the authority of the AUMF,[73] which was a joint resolution of Congress authorizing the President to:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[74]

In addition, authority flowed from the Presidential Military Order of November 13, 2001, titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (Presidential MO).[75]

The majority of the detainees in Guantánamo had been captured

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ought to follow the flag. Those who will defend the legitimacy of these extraterritorial applications of U.S. law should have a difficult time also maintaining, on a principled basis, that rights should not also be extended to those affected by such laws.

72. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 13, 2001); *see also* COMM. ON MILITARY AFFAIRS & JUSTICE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, *INTER ARMA SILENT LEGES*: IN TIMES OF ARMED CONFLICT, SHOULD THE LAWS BE SILENT? (2001), *available at* http://www.nycbar.org/pdf/report/should_the_laws.pdf.

73. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note (2006)).

74. *Id.* § 2(a).

75. *See supra* note 72.

in Afghanistan, which was a theater of war in the international armed conflict in which the United States was a belligerent (the international armed conflict became a non-international armed conflict in 2002, but the United States remained a belligerent assisting the government against an insurgency). Many, however, had been detained in other countries in which there was no armed conflict. They were, moreover, nationals of countries not involved in the conflict in Afghanistan. Many of them also argued that they had no affiliation with either al-Qaeda or the Taliban. A plurality of the Supreme Court had held in *Hamdi v. Rumsfeld*,[76] the first in the line of Supreme Court detention cases, that the government's authority to detain persons captured fighting in Afghanistan was a necessary incident to the authority conferred by the AUMF,[77] but that left open the question of whether the AUMF could provide authority to detain those persons captured elsewhere.

Several of these detainees challenged in the federal courts the validity of their detention, and some of them grounded their claims in part under the ATS itself. The issue reached the Supreme Court in the amalgamated case of *Rasul v. Bush*,[78] the second in the line of detention cases decided by the Supreme Court, handed down in 2004. The petitioners were Australian and Kuwaiti nationals.[79] One of the Australians, Mamdouh Habib, was a dual Egyptian and Australian national, who had been captured in Pakistan, was held and interrogated there by the CIA, and then "rendered" to Egypt, where he was again interrogated and allegedly tortured for five months, after which he was transferred to Guantánamo.[80]

The primary issue before the Court in *Rasul* was whether federal

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76. 542 U.S. 507, 518 (2004) ("We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

77. *Id*. at 517. Hamdi was also a U.S. citizen, and much of the case turned on the question of the authority to detain an American determined to be an "enemy combatant." *Id*. at 509.

78. 542 U.S. 466 (2004).

79. *Id.* at 470.

80. For a compilation of court documents relating to Habib's litigation, see Declaration of Teresa A. McPalmer, Habib v. Bush, No. 02-CV-1130 (D.D.C. Oct. 1, 2004), *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-defense-department/csrts/csrt_isn_661.pdf. For accounts of his ordeal, see *Profile: Hamdouh Habib*, BBCNEWS (Dec. 7, 2005), http://news.bbc.co.uk/2/hi/asia-pacific/4214747.stm; JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 125–26 (2008).

courts had jurisdiction under 28 U.S.C. § 2241 to hear the habeas corpus claims of such detainees.[81] Or, to put it another way, whether the statutory right to habeas corpus had extraterritorial application to persons detained at Guantánamo Bay. The government argued that the statutory right to habeas corpus could not be extended to Guantánamo precisely because it would constitute an impermissible extraterritorial application of law, in violation of the presumption against extraterritoriality in U.S. law.[82] The majority held that the presumption could not apply to the operation of the habeas statute with respect to persons detained in Guantánamo, because of the extent to which the United States exercised jurisdiction over Guantánamo Bay and the government agents implementing the detention.[83] Thus, in essence, the application of the statute at Guantánamo would not be extraterritorial at all. Having found that the federal courts had jurisdiction for that purpose, the majority proceeded to find that the courts also had jurisdiction to hear ATS claims, which the lower courts had denied on the grounds that the detainees lacked "litigation privilege" in the United States.[84]

This account of the case thus far is typical of the discussion regarding the extent to which habeas corpus and constitutional rights should be applied extraterritorially. In that sense it was a victory for the detainees. But let us pause to consider the extraterritorial operation of U.S. law that deprived these applicants of their freedom. Individuals who were citizens of countries on friendly terms with the United States were seized and detained in countries that were not engaged in any armed conflict and in which the United States was certainly not a belligerent, on the direction of U.S. agents. The captured individuals were then subjected to interrogation by agents of the U.S. government (and other governments, in cooperation with U.S. agents) and indefinitely detained without charge by the U.S. government.[85] Leaving aside the extent to which these actions were

81. *Rasul*, 542 U.S. at 475.

82. *Id.* at 480.

83. *Id.*

84. *Id.* at 484.

85. It should be noted that one of the petitioners in *Rasul* was David Hicks, the Australian who was ultimately charged and later convicted under a plea agreement for providing material support to terrorists in the Military Commissions in Guantánamo. He remains one of only a handful of persons charged and convicted under the military commissions system. Mamdouh Habib was released in 2005.

violations of U.S. obligations under international law in other respects (namely, under international human rights law and the international law of diplomatic relations), they were arguably extraterritorial applications of U.S. law in apparent violation of the principles of jurisdiction under international law.[86]

The seizure, interrogation, and detention constituted an exercise of U.S. jurisdiction that began in foreign territory and in respect of foreign nationals, for alleged conduct that had occurred in foreign territory. The Supreme Court in *Rasul* partially grounded its decision regarding jurisdiction on the fact that the detainees were currently in a territory that was effectively under U.S. jurisdiction, and on the basis that the U.S. agents implementing such detention were certainly under the jurisdiction of the federal courts.[87] That was so for purposes of the operation of the habeas statute and the ATS. But left unexamined is the fact that the circumstances leading to the detention of these foreigners reflected an extraterritorial application of U.S. law and that the continued detention of foreigners for alleged conduct in third countries constituted an ongoing extraterritorial exercise of jurisdiction. These actions were not only the exercise of prescriptive jurisdiction, but, more importantly, of enforcement jurisdiction. Enforcement jurisdiction is treated with the most suspicion under international law because it is most likely to offend the sovereignty of other states when exercised extraterritorially.[88]

I discuss below whether such exercise of jurisdiction may be justified under one of the exceptions to the international law prohibitions against extraterritorial exercise of jurisdiction, and whether these detentions were undertaken pursuant to explicit and intentional congressionial direction so as to defeat the domestic presumptions. But I will argue that it cannot be so justified, and if that is right, then this was a violation of both the international law principles and the domestic presumptions that the Court was so concerned about in *Kiobel*. While I will examine these issues in more detail below, I pause here to consider some aspects relating to the apparent legal authority for these detentions, which should be a fundamental line of inquiry in any habeas litigation. As noted above, the Supreme Court held in *Hamdi v. Rumsfeld*[89] that the government

86. Whether such conduct falls within the scope of the exceptions discussed earlier, will be addressed in Part IV.B.

87. *Rasul*, 542 U.S. at 478–79.

88. CRAWFORD, *supra* note 21, at 478–82.

89. 542 U.S. 507 (2004) (plurality opinion).

is authorized under the AUMF to detain persons captured while fighting U.S. forces in Afghanistan.[90] But a significant number of detainees being held in Guantánamo and elsewhere were not captured in Afghanistan, are not members of al-Qaeda, and so do not readily fit within the scope of the AUMF. Thus, the legal authority for their detention is not clear, which should trigger questions of extraterritoriality under the domestic presumptions.

Consider the case of *Al Maqaleh v. Gates*,[91] in which habeas claims were brought by three individuals who were being detained at Bagram.[92] One was a Yemeni citizen who was originally captured in Thailand, another was a Tunisian who was captured in Pakistan, and the third was a Yemeni citizen whose place of capture was disputed.[93] All three were citizens of countries with which the United States was not in armed conflict, and two alleged that they were captured in countries that were not theaters of armed conflict.[94] Their detention in Afghanistan had no relation to the armed conflict in Afghanistan,[95] and they were initially detained at sites in other countries, the location of which has not been disclosed.[96] It is not clear, nor did the D.C. Circuit engage in any detailed analysis to clarify, how these individuals came within the scope of the language of the AUMF, which only authorized the use of force against those organizations or persons who had been responsible for the 9/11 attacks and those who had harbored such persons after the fact.[97]

Moreover, the process by which the detainees were determined to come within the scope of the detention power was itself highly suspect. Their status as "enemy combatants" was established in a process conducted before an "Unlawful Enemy Combatant Review Board" (UECRB).[98] The district court and D.C. Circuit both held that the UECRB afforded detainees with even fewer procedural rights

90. *Id.* at 518.

91. 605 F.3d 84 (D.C. Cir. 2010).

92. *Id.* at 88.

93. *Id.* at 87.

94. Joint Brief for Petitioners-Appellees at 2–3, *Al Maqaleh*, 605 F.3d 84 (Nos. 09-5265, 09-5266, 09-5277).

95. *Id.* at 1–2.

96. *Id.* at 2–3.

97. Authorization for Use of Military Force, § 2, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note (2006)).

98. *Al Maqaleh*, 605 F.3d at 96.

than the Combat Status Review Tribunals (CSRT) that were established after the decision in *Rasul v. Bush*.[99] Consequently, because of the irregularity of the process by which status was determined, the D.C. Circuit held that "while the important adequacy of process factor [in the *Boumediene* test] strongly supported the extension of the Suspension Clause and habeas rights in *Boumediene*, it even more strongly favors petitioners here."[100] Nonetheless, the court denied the petition for habeas corpus on the grounds that the United States did not exercise de facto sovereignty over Bagram, and it was, in any event, in a theater of war.[101]

What is significant, however, is the absence of any apparent inquiry into the justification for the extraterritorial exercise of U.S. jurisdiction. The determination of the detainees' status as "unlawful enemy combatants" was through the application of a U.S. legal framework within the territory of Afghanistan. The UECRB was not established pursuant to any federal legislation, and indeed the precise policy and procedure of the UECRB was extremely unclear at the time.[102] Whether these individuals could be legitimately detained under the putative authority of the AUMF, therefore, remains a highly debatable point.

Nonetheless, the detention constituted an exercise of prescriptive jurisdiction, and one much more likely to conflict with the laws and sovereign rights of Afghanistan than any extension of U.S. legal rights could. Indeed, significant friction between the United States and Afghanistan over U.S. detentions at Bagram and elsewhere has continued up to the time of this writing.[103] What is more, the resulting detention of these individuals within Afghanistan reflects not only an exercise of prescriptive jurisdiction, but also enforcement jurisdiction within the territory of another sovereign state, against which the international law principles on jurisdiction are the most restrictive. As

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99. 542 U.S. 466 (2008).

100. *Al Maqaleh*, 605 F.3d at 96.

101. *Id.* at 97.

102. *See* Memorandum from Deputy Sec'y of Def. for Sec'ys of the Military Dep'ts, Policy Guidance on Review Procedures and Transfer and Release Auth. at Bagram Theater Internment Facility, Afg. (July 2, 2009), *available at* http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf; Reply to Petitioner's Opposition to Respondents' Motion to Dismiss, *Al Maqaleh*, 605 F.3d 84 (Nos. 09-5265, 09-5266, 09-5267).

103. *See, e.g.*, Rod Nordland, *Karzai Orders Afghan Forces to Take Control of American-Built Prison*, N.Y. TIMES, Nov. 20, 2013, at A4; Rod Nordland, *U.S. Cancels Transfer of Bagram Prison to Afghans*, N.Y. TIMES, Mar. 9, 2013, http://www.nytimes.com/2013/03/09/world/asia/us-cancels-transfer-of-bagram-prison-to-afghans.html?r=0.

will be discussed below, this exercise of jurisdiction arguably did not fall within the exceptions on the exercise of prescriptive jurisdiction, nor was it a direct application of the law of armed conflict.[104] There is no exploration in the court's judgment of whether this exercise of jurisdiction met the international law exceptions, no inquiry into the precise legal authority for it, and whether such authority reflected explicit congressionial intent to violate international law. Yet, while preoccupied with the question of whether the rights of habeas corpus could extend extraterritorially to apply to detainees in Bagram, the D.C. Circuit never even considered the question of whether the application of U.S. law in detaining those individuals in Bagram was itself a permissible extraterritorial exercise of jurisdiction. The courts are untroubled by the question: if habeas rights cannot be extended, how can the laws that are depriving the habeas applicant of his liberty be so extended? And if the extraterritorial application of law depriving him of his liberty is legitimate, how can it be that the related habeas rights do not equally so apply?

C. Torture and U.S. Defendants

In addition to the burgeoning number of detention and habeas claims arising from the GWOT, there are a disturbing number of cases that involve allegations of torture conducted by agents of the U.S. government, or in some cases by foreign agents at the behest of the U.S. government. Several of these cases included claims advanced under the ATS. The manner in which the courts have dealt with these cases is relevant to my discussion here for a number of reasons.

First, torture was one of the claims advanced in *Kiobel*,[105] and there can be no question that the prohibition against torture is, pursuant to the *Sosa* standard, one of the *jus cogens* norms that falls within the narrow range of principles that can ground an ATS claim. The claim in *Filártiga*, it will be recalled, was based on a violation of the prohibition against torture.[106] Like piracy, torture is one of those international wrongs over which all countries have jurisdiction to adjudicate and provide remedies. Indeed, the Convention Against Torture not only authorizes the exercise of universal jurisdiction, but

104. *See infra* Part IV.B.
105. 133 S. Ct. 1659, 1663 (2013).
106. Filártiga v. Peña-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

it imposes obligations on states to prosecute or extradite those accused of torture.[107]

Second, it is particularly instructive to examine how the courts have considered torture claims advanced under the ATS where the defendants are U.S. nationals. One of the arguments against ATS claims in foreign-cubed cases is that they are impermissible precisely because there is no essential connection to the United States.[108] Such arguments suggest that while it might make sense for U.S. courts to adjudicate the claims of foreigners when the defendant is a U.S. national, or there is some other substantial connection to the United States, it is not reasonable for them to do so when both parties are foreigners and the offending conduct occurred abroad.[109] These arguments make frequent reference to the original incidents that are said to have motivated the enactment of the ATS, such as attacks on foreign ambassadors within the territory of the United States. The clear implication is that ATS claims by foreigners against U.S. defendants, for the violation of *jus cogens* norms (or other principles of customary international law falling within the *Sosa* standard), would be valid (subject to other defenses) and indeed fulfill the original intent of the statute.

The reality reflected by the torture cases arising from the GWOT, however, suggests that such arguments are hollow. While they are raised against the adjudication of foreign-cubed ATS cases, they are nowhere to be found when a U.S. defendant is actually before a court. For instance, in *Rasul v. Myers*,[110] the D.C. Circuit considered the claims of four British detainees against then Secretary of Defense Donald Rumsfeld and others for having unlawfully detained the petitioners at Guantánamo Bay, and for the torture that

107. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4–8, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85.

108. This was, indeed, one of the central arguments of Justice Breyer in his concurrence in *Kiobel*. *See* 133 S. Ct. at 1677–78 (Breyer, J., concurring in the judgment).

109. *See, e.g.*, Transcript of Oral Reargument, *supra* note 9, at 45 (oral argument of Solicitor General Donald Verrilli); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *supra* note 39, at 15.

110. 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008). The case, often referred to as *Rasul I*, is complicated by the fact that the decision was vacated and remanded by the Supreme Court on the basis that the decision in *Boumediene* cast aspects of it in doubt. But in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1091 (2009), often referred to as *Rasul II*, the D.C. Circuit reinstated its decision in *Rasul I*, and the Supreme Court denied the application for certiorari. So ultimately, the decision in *Rasul I* on the ATS stands, and the Supreme Court denied certriorari on that issue.

they alleged they had suffered while detained. They advanced these claims on a number of grounds, including the Fifth and Eighth Amendments of the Constitution, the ATS, and certain provisions of the Geneva Conventions.[111]

The D.C. Circuit dismissed the claims in part based on arguments that the constitutional rights in question did not extend extraterritorially to detainees in Guantánamo Bay—once again focusing on the limited reach of the Constitution.[112] But the court also dismissed the ATS claims of the petitioners, holding that the "detention and interrogation of suspected enemy combatants" by the defendants was "incidental to [their] legitimate employment duties."[113] Therefore, because the defendants "had acted within the scope of their employment" the ATS claims were "restyled" as claims against the United States governed by the Federal Tort Claims Act (FTCA),[114] and the court then dismissed those claims for failure to exhaust administrative remedies as the FTCA requires.[115] The FTCA allows suits against the government for personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting in the scope of his office or employment.[116] It also, however, bars such claims where the wrong occurred in a foreign country.[117] Moreover, the FTCA was amended by the Westfall Act,[118] such that where the government employee was acting within the scope of his office or employment, the suit can only be brought against the government, and not against any individual.[119] The Supreme Court denied certiorari in respect to these ATS claims in *Rasul v. Myers*,[120] apparently seeing no reason to disturb this rejection of ATS claims against U.S. defendants for torture.

Two years later, in *Ali v. Rumsfeld*,[121] the D.C. Circuit

111. *Rasul I*, 512 F.3d at 649.
112. *Id.* at 664–65 .
113. *Id.* at 658–59.
114. 28 U.S.C. § 1346(b) (2006).
115. *Rasul I*, 512 F.3d at 660–61.
116. 28 U.S.C. § 1346(b)(1).
117. 28 U.S.C. § 2680(k) (2006).
118. 28 U.S.C. § 2679 (2006).
119. *Id.* § 2679(b)(1).
120. 555 U.S. 1083 (2008). For details of the case history, see *supra* note 110.
121. 649 F.3d 762 (D.C. Cir. 2011).

considered the claims of a number of individuals who had been detained in Afghanistan and Iraq. The plaintiffs alleged, among other things, that they had suffered abuse that would qualify as torture and cruel, inhuman, and degrading treatment, in violation of international law.[122] The claims were made against government agents, again including former Secretary of Defense Rumsfeld. Relying on its holding in *Rasul v. Myers*, the court again found that the defendants had been acting within the scope of their employment in engaging in the alleged torture[123]—and again found that the Westfall Act applied, such that the claims had to be properly brought against the United States rather than the individual defendants.[124] As such, administrative remedies had to have been exhausted, and as they were not, the claims were dismissed.[125] Interestingly, the Westfall Act does not immunize federal employees in circumstances in which the tort involves the violation of a federal statute, and in *Ali v. Rumsfeld* petitioners argued that the defendants had violated the ATS itself, and thus could not come within the scope of the Westfall Act. The court, in rejecting this argument, reaffirmed its understanding of *Sosa*, in that the ATS was a strictly jurisdictional statute, and that it created no substantive cause of action. The violations of law that the petitioners alleged constituted violations of customary international law, which the ATS empowered the federal courts to adjudicate, but did not constitute violations of the ATS itself.[126]

There are, of course, a number of other cases involving claims for remedies to address injury caused by torture perpetrated either by agents of the U.S. government, or those of other states acting in cooperation with the U.S. government. And there is also now a significant degree of evidence that the U.S. government under the Bush administration engaged in systematic torture, approved at the

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122. *Id.* at 765.

123. The torture claims were, of course, assumed to be true for the purposes of the motion. *Id.* at 769.

124. *Id.* at 775.

125. *Id.*

126. *Id*. at 775–76. The D.C. Circuit's interpretation of *Sosa*, and of the ATS as a purely jurisdictional grant to adjudicate violations of international law, was of course consistent with the position that I have taken here on the operation of the ATS. But it is not at all clear that such an interpretation necessitates the holding that the ATS cannot thereby be violated within the meaning of the immunity exception in the Westfall Act. Judge Edwards, in a powerful dissent in *Ali*, argued that where a court determines for the purposes of an ATS claim that a state official has engaged in torture, in violation of a principle of international law that falls within the *Sosa* standard, such a violation constitutes a violation of the ATS for the purposes of triggering the exception in the Westfall Act. *Id.* at 778–93 (Edwards, J., dissenting).

highest levels of government.[127] In *Al-Zahrani v. Rodriguez*,[128] the families of detainees who were alleged to have died as a result of torture in Guantánamo Bay brought claims against a number of individual defendants, including the Director of the Joint Intelligence Group, under the ATS and other grounds.[129] On appeal, the D.C. Circuit affirmed the dismissal of the claims, holding that the court lacked jurisdiction to consider the issues because of the jurisdiction stripping provisions of the Military Commissions Act of 2006 (MCA).[130] Yet while it was quite true that the Military Commissions Act had stripped jurisdiction to consider claims of "an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant,"[131] there was no apparent inquiry into whether these deceased claimants had been "determined by the United States to have been properly detained as an enemy combatant." It has been well known for some time that many of the detainees held in Guantánamo Bay were not "enemy combatants" as defined by the United States, and that the determination process that resulted in many being classified as "enemy combatants" was deeply flawed.[132]

Stepping back again to consider the underlying circumstances of these cases, there is at once an unmistakable asymmetry in how the court thinks about extraterritoriality, as well as a continued pattern of the rights claims being denied on technical doctrinal grounds. Moreover, the narrow technical reasoning in the denial of these claims stands in marked contrast to the broad and sweeping fashion in which the court establishes or accepts U.S. authority to detain and

127. THE CONSTITUTION PROJECT, REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 3–7 (2013), *available at* http://detaineetaskforce.org/pdf/Full-Report.pdf.

128. 669 F.3d 315 (D.C. Cir. 2012).

129. *Id.* at 316–17.

130. *Id.* at 317; 28 U.S.C. § 2241(e)(2) (2006) ("Except as provided in [§§ 1005(e)(2) and (e)(3) of the Detainee Treatment Act of 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

131. 28 U.S.C. § 2241(e)(2).

132. *See, e.g.*, Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* (Seton Hall Law Pub. Law & Legal Research Paper Series, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245.

otherwise exercise jurisdiction over claimants. Thus, the D.C. Circuit in both decisions in *Rasul v. Myers* rejected the argument that substantive constitutional rights other than the narrow right to habeas corpus could be extended extraterritorially to benefit the detainees in Guantánamo Bay.[133] The court held that Guantánamo Bay was foreign territory over which the United States did not have sovereignty for constitutional purposes.[134] At the same time, it did not seem to consider at all the question of whether the conduct of the defendants, in detaining and interrogating these foreign individuals at Guantánamo Bay, was an extraterritorial exercise of prescriptive and enforcement jurisdiction in violation of the principles of jurisdiction in international law.

Quite apart from the authority to detain, considered above, what was the authority of the agents to interrogate and indeed to torture these claimants? For the purpose of triggering the application of the Westfall Act and the FTCA, the court was prepared to assume that the American defendants were acting in the normal course of their duties as agents of the U.S. government, but did not consider whether their conduct was actually authorized by statute, and whether such legislation provided clear congressionial intent to apply extraterritorially, or indeed whether it conferred authority to detain and interrogate individuals of a class that included these specific claimants. As discussed above, the process by which detainees were determined to fall within the scope of the supposedly authorizing legislation—namely the CSRT and UECRB procedures—was itself only an administrative policy, and it was deeply flawed.[135]

Then there are the contrasting ways in which the courts have considered the issue of "nexus." The concept of nexus has been important on the one hand to establish legal authority to detain persons captured beyond the battlefields of Afghanistan or Iraq, but on the other hand to deny the legal claims of such detainees. Beginning with the authority to detain, in a series of cases the D.C. Circuit has held that persons may be detained even if the nexus to al-Qaeda or associated forces is highly attenuated, or even replaced by other criteria altogether.[136] Such nexus may be established through a

133. Rasul v. Myers (*Rasul I*), 512 F.3d 644, 666 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008); Rasul v. Myers (*Rasul II*), 563 F.3d 527, 531 (D.C. Cir. 2009).

134. *Rasul I*, 512 F.3d at 666–67; *Rasul II*, 563 F.3d at 531.

135. Denbeaux & Denbeaux, *supra* note 132, at 2–3, 38–39; *see also supra* text accompanying notes 99–100.

136. *See* Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), *petition for reh'g en banc*

"functional approach," rather than requiring any evidence of actual membership or other formal connection.[137] The evidentiary burden for establishing such nexus is merely a "preponderance of the evidence" standard.[138] Perhaps most astonishing, the government records used to establish such a nexus, including mere summaries of intelligence reports, are entitled to a "presumption of regularity" and thus can be relied upon as such by the courts.[139]

In *Al-Bihani v. Obama*, the court held that the AUMF provided authority for the detention of persons who "purposefully and materially support such forces in hostilities against U.S. coalition partners."[140] It did so by relying not only on the AUMF, but the definition of who could be tried by military commission in the MCA—a statute that, of course, did not itself provide any authority to detain anyone.[141] It went on to specifically reject the relevance of the international law of armed conflict in any such determination.[142] This was later affirmed in *Almerfedi v. Obama*,[143] in which the court held that the government may detain "any individual engaged in hostilities . . . against the United States, who purposefully and materially supported hostilities against the United States or its coalition partners, or who is part of the Taliban, al Qaeda, or associated forces."[144] This interpretation of the AUMF, as authorizing detention separate and apart from any necessary nexus to "al Qaeda and associated forces," and entirely unrelated to the 9/11 attacks, vastly broadens the scope of who can be detained and is not supported by the text of the legislation. It is, moreover, inconsistent with the Supreme Court's holding in *Hamdi*,[145] yet the Supreme Court refused to grant

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denied, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); *see also* Almerfedi v. Obama, 654 F.3d 1, 4 n.2 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012).

137. *See* Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010).

138. Al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010), *cert denied*, 131 S. Ct. 1812 (2011).

139. Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011), *cert denied*, 132 S. Ct. 2741 (2012). For a review of all these cases, see ELSEA & GARCIA, *supra* note 68.

140. *Al-Bihani*, 590 F.3d at 872.

141. *Id.*

142. *Id.* at 871.

143. *Almerfedi*, 654 F.3d at 4 n.2.

144. *Id.* (internal quotation marks omitted).

145. *Cf.* ELSEA & GARCIA, *supra* note 68, at 8–9; Ryan Goodman & Derek Jinks, *Replies to Congressionial Authorization: International Law, U.S. War Powers, and the Global War*

certiorari in *Al-Bihani*.[146]

In contrast to this, as discussed above, courts strictly construed nexus requirements for the purpose of denying liability in rights claims. One of the key issues raised by the Court in *Kiobel* itself was whether there was sufficient nexus between the defendant corporations and the United States.[147] The majority held that there was not, writing that, "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[148]

The decision in *Arar v. Ashcroft*,[149] a case involving (among other things) a claim brought under the TVPA, similarly reflected a strict interpretation of nexus requirements. The notorious *Arar* case arose from the detention of Maher Arar, a Canadian-Syrian dual national while in transit through New York, and his rendition to Syria, where he was interrogated and tortured over the course of a year in detention.[150] The Second Circuit held that in order to ground a claim against U.S. defendants under the TVPA for torture committed by Syrian agents allegedly at the bidding of and in cooperation with the U.S. defendants, the statute required that the U.S. defendants had acted "under color of foreign law, or under its authority."[151] The court construed this very strictly and literally in denying the claim, holding that while the defendants may have "encouraged or solicited certain conduct by foreign officials . . . . Such conduct is insufficient to establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may be otherwise

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on Terrorism, 118 HARV. L. REV. 2653 (2005) (discussing the relevance of the law of armed conflict to the interpretation of the AUMF). It should be noted that in a denial of a petition for an en banc rehearing of the *Al-Bihani* case, a concurring opinion by the majority of the court suggested that the part of the decision on the relevance of the law of armed conflict to the AUMF was non-binding *obiter dicta*. Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring).

146. 131 S. Ct. 1814 (2011) (mem.).

147. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013); *id.* at 1677–78 (Breyer, J., concurring in the judgment).

148. *Id.* at 1669 (majority opinion).

149. 585 F.3d 559 (2d Cir. 2009).

150. *See* COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS (2006), *available at* http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf (detailing a full account of the circumstances of Arar's detention and torture); *see also* DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (2008), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_08-18_Mar08.pdf.

151. *Arar*, 585 F.3d at 568.

attributable to Syria."[152] Writing in dissent, Judge Pooler, joined by Judges Calabresi, Sack, and Parker, noted that this interpretation of the nexus requirement for purposes of the TVPA was strained and inconsistent with other jurisprudence employing a "color of law" test.[153] She argued that when looked at through the prism of agency law, the distinction drawn by the majority, between facilitating and directing torture and actually engaging in the acts of torture was unprincipled, adding that "[i]f we carry the majority's logic to its extreme, federal agents could never be responsible for torture inflicted under color of foreign law, even if they were in the room with the foreign torturers orchestrating the techniques."[154]

Similarly, as discussed above, the court in *Ali v. Rumsfeld* employed a very strict interpretation of the relevant statutes, holding that proof of torture as part of an ATS claim, while clearly a violation of the relevant international law prohibitions, could not constitute a violation of the ATS itself for purposes of the sovereign immunity exception in the Westfall Act and the FTCA.[155] In dissent, Judge Edwards argued that this interpretation was incorrect for a number of reasons, and he concluded, "It is ironic that, under the majority's approach, *United States officials* who torture a foreign national in a foreign country are not subject to suit in an action brought under [the ATS], whereas *foreign officials* who commit official torture in a foreign country may be sued under [the ATS]."[156] Of course, the current reality is that virtually no one can be sued for torture under the ATS, whether a U.S. or foreign citizen, no matter where the torture takes place. The suggestion that a sufficient U.S. connection will ground ATS claims is just a chimera. Moreover, the United States has detained, interrogated, and has indeed tortured people, on the basis of a nexus to terrorist organizations that is very loosely defined, established on weak evidence through a flawed process, on the basis of legal authority that is very broadly interpreted. At the same time, we deny the claims, rights, and remedies of the same people due to strictly defined nexus requirements and narrowly construed interpretations of governing statutes.

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152. *Id.*
153. *Id.* at 629 (Pooler, J., dissenting).
154. *Id.*
155. Ali v. Rumsfeld, 649 F.3d 762, 755–76 (D.C. Cir. 2011).
156. *Id.* at 779 (Edwards, J., dissenting).

D. Extrajudicial Killing

The final issue I will explore is extrajudicial killing. It was one of the specific issues raised in the ATS claims of the plaintiffs in *Kiobel*. It was also an issue brought before the federal courts in the case of *Al-Aulaqi v. Obama*.[157] The case involved the now-famous Anwar Al-Aulaqi,[158] the dual U.S.-Yemeni national who was a propagandist for al-Qaeda in the Arabian Peninsula (AQAP) until he was killed along with another dual-U.S. citizen and several other people in a CIA drone strike in Yemen on September 30, 2011.[159] The lawsuit was commenced after it was reported in early 2010 that Al-Aulaqi had been placed on a kill-list authorizing his targeting in the U.S. drone-based targeted killing program.[160] His father, Nasser, brought an application in federal court, on behalf of both his son and himself, for an injunction to prevent the government from killing Al-Aulaqi.[161] Of interest for the purposes of this Article, one of the claims was brought under the ATS, based on the argument that the killing of Al-Aulaqi outside of the context of armed conflict, and outside of circumstances in which he posed a concrete, specific and imminent threat to life or physical safety, would constitute an extrajudicial killing in violation of both treaty and customary international law principles.[162]

The claim of Al-Aulaqi's father was dismissed on several grounds, including standing and the application of the political question doctrine.[163] But among the grounds for dismissing the claim, Judge Bates of the U.S. District Court for the District of Columbia held that there was no cognizable claim under the ATS, and that in any event the United States had not waived sovereign immunity with respect to any claim under the ATS.[164] It is this aspect of the decision that will be examined here. Significantly, the court began by

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157. 727 F. Supp. 2d 1 (D.D.C. 2010).

158. His name is typically spelled al-Awlaki in major newspapers, but for consistency I use the spelling used in the judgment.

159. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1. Also killed were Samir Khan, an American-Pakistani dual national who published an English language online magazine called "Inspire" for al-Qaeda. *Id.*

160. *See, e.g.*, Tom Leonard, *Barack Obama Orders Killing of US Cleric Anwar al-Awlaki*, THE TELEGRAPH, Apr. 7, 2010.

161. *Al-Aulaqi*, 727 F. Supp. 2d at 8.

162. *Id.* at 12.

163. *Id.* at 35, 52.

164. *Id.* at 35, 37, 40.

recognizing that extrajudicial killing does constitute a violation of the kind of well-established and widely accepted principle of customary international law that is required by *Sosa* to ground a claim under the ATS, and it noted that this proposition had been accepted in several other cases.[165] In this sense, then, the claim advanced was entirely "cognizable" in ATS terms.

Judge Bates went on to decide, however, that while the extrajudicial killing might itself be actionable under the ATS, *the threat* of such a killing did not constitute a violation of customary international law, and so no relief could be had under the ATS.[166] This conclusion seems absurd. The application was for an injunction to prevent the commission of an act that the court acknowledged to be a violation of law that is cognizable and actionable under the legal system in question. The injunction was to prevent that act, not the threat of such, and so it is the act that grounds the claim.

In addition to this argument, however, the court also held that Nasser Al-Aulaqi could not bring the claim under the ATS on behalf of his son Anwar, since Anwar Al-Aulaqi was a U.S. citizen in addition to being Yemeni, and the ATS is limited to claims by aliens.[167] This argument ignored the fact that Anwar Al-Aulaqi was also a Yemeni national, and his legitimate claim to foreign nationality could, arguably, have satisfied the "alien" requirement of the ATS. But that aside, there is some irony here: for in *Kiobel* it was said that the parties have an *insufficient connection* with the United States to ground a claim under the ATS,[168] while here in *Al-Aulaqi* the court in part dismissed the case on the argument that the petitioner had *too great a connection* to the United States.[169]

In the final result, of course, the claim was dismissed, no injunction was issued, and Nasser Al-Aulaqi's son was killed, as feared, some ten months later (Anwar Al-Aulaqi's sixteen-year-old son was similarly killed in a separate drone attack in Yemen a couple

165. *Id*. at 36 (citing Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1178–79 (C.D. Cal. 2005); Kadic v. Karadžić, 70 F.3d 232, 241–45 (2d Cir. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987)).

166. *Al-Aulaqi*, 727 F. Supp. 2d at 36.

167. *Id.* at 39.

168. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

169. *Al-Aulaqi*, 727 F. Supp. 2d at 39.

of weeks thereafter.)[170] In the introduction to his opinion, Judge Bates noted that the case raised a number of what he called "stark and perplexing questions," among which he included the question of whether "the Executive [can] order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization?" and "how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principles) under the [AUMF]?"[171] He concluded, however, that none of these questions could be addressed given that the case had to be dismissed on grounds of non-justiciability.[172]

As a lower court bound by the technical doctrines on standing, that may have been entirely correct. But the questions remain, and they relate to my broader consideration of the extraterritorial application of U.S. law. The killing of a person within the territory of another state, as an act both implementing and said to be authorized by one's own domestic law, is certainly an extreme example of the exercise of both prescriptive and enforcement jurisdiction. Some will say that it was an act of war authorized by international law, but I will address below why a court would have good reason to question that proposition. Similarly, some instances of targeted killing are said to have been consented to by the host government—the administration claims this to have been the case with the killing of Al-Aulaqi. Consent of the government affects the self-defense and *jus ad bellum* claims, but in the context of an armed conflict, in which the law of armed conflict applies, such consent does not affect the law of armed conflict analysis of whether it is lawful to kill a person.[173] Regardless of consent, there must be an armed conflict in existence for there to be any justification for the killing under the law of armed conflict, and the killing must comply with the law of armed conflict. And in a non-armed conflict situation, consent is only meaningful if the consenting government could have itself lawfully killed the person, in similar fashion, under its own domestic laws and

170. Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16-Year-Old American*, THE ATLANTIC (Oct. 24, 2012), http://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028/.

171. *Al-Aulaqi*, 727 F. Supp. 2d at 9.

172. *Id.*

173. *Cf.* Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the* Jus ad Bellum *Regime*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 223, 233–34 (Claire Finkelstein et al. eds., 2012) (discussing the issue of consent as it applies to *jus ad bellum*).

under international human rights law. Moreover, there is no question that the governments of Pakistan, Yemen, and Somalia have objected to many of the targeted killing strikes within their territory.[174] As such, there can be little question that this constitutes an extraterritorial exercise of jurisdiction, and it is difficult to imagine an exercise of jurisdiction more likely to cause friction and conflict than this. Why, then, was the question of extraterritoriality not even raised in the *Al-Aulaqi* case? Of course, there will be some that will argue that there are good reasons why the courts would not need to consider such issues. It is to those arguments that I turn next.

IV. QUALIFICATIONS AND OBJECTIONS

A number of objections could be raised to the argument that these GWOT cases illustrate the exercise of extraterritorial jurisdiction, and that the courts, if they are indeed concerned about extraterritoriality, should have examined this issue more closely in these cases. As discussed earlier, there are three primary reasons that courts would have no cause to inquire into whether an exercise of jurisdiction is an impermissibly extraterritorial application of law: first, that the action is not an exercise of U.S. jurisdiction at all, since it is really an implementation of international law; second, that the conduct falls within one of the exceptions to the international law prohibition on the extraterritorial exercise of jurisdiction; or third, Congress explicitly intended that the law be implemented extraterritorially, and thus the presumptions against extraterritoriality, and the *Charming Betsy* doctrine, do not apply or are overcome. A variant on the third argument, specific to the GWOT cases, might be that the Executive is permitted to engage in the impugned conduct under the Commander-in-Chief power under the Constitution, and thus no congressionial authority is required and the presumptions do not apply. These arguments form the basis for the three most likely objections to the suggestion that we should be more concerned about

174. *See* David E. Sanger & Eric Schmitt, *As Rift Deepens, Kerry has a Warning for Pakistan*, N.Y. TIMES, May 15, 2011, at A16; Greg Bruno, *U.S. Drone Activities in Pakistan*, COUNCIL ON FOREIGN RELATIONS (July 19, 2010), http://www.cfr.org/pakistan/us-drone-activities-pakistan/p22659#p6. Similarly, there are questions regarding Yemen's consent to strikes. *See* Mark Mazzetti, *U.S. Is Intensifying a Secret Campaign of Yemen Airstrikes*, N.Y. TIMES, June 9, 2011, at A6. Strikes in Somalia have occurred when there has been insufficient central authority to provide meaningful consent. *See* Mark Mazzetti & Eric Schmitt, *U.S. Expands its Drone War Into Somalia*, N.Y. TIMES, July 2, 2011, at A1.

the extraterritorial application of U.S. law that is reflected in the GWOT cases. In this section I will briefly explore the contours of these objections and the possible responses to them.

A. International, Not Domestic Law

I begin with the first likely objection, that some of the impugned conduct by the United States is authorized by the international law of armed conflict, and thus constitutes an enforcement of international law rather than the extraterritorial application of U.S. law. First, it bears noting that this argument would be rather ironic in the context of our discussion of *Kiobel*. Recall the argument that I made earlier, based on the analysis of several experts on the issue, that the operation of the ATS is itself an enforcement of international law principles and thus should not be understood as an exercise of prescriptive jurisdiction.[175] That argument is far truer of the ATS than it is for the exercises of jurisdiction considered above in the GWOT cases. But, of course, the *Kiobel* Court rejected that argument as it relates to the ATS.[176] If the standards applied in *Kiobel* were employed here, this argument should surely fail.

Leaving that irony aside, however, there is a strong argument that the conduct giving rise to the GWOT cases here under consideration cannot be justified by international law, or be understood as an implementation of international law. Beginning with torture, the prohibition on torture is a *jus cogens* or peremptory norm of international law, meaning that it cannot be derogated from under any circumstances.[177] So, while the U.S. courts may have found that such torture was within the "scope of legitimate employment" of government agents for purposes of the FTCA,[178] it could never be consistent with international law, far less be understood as implementing it. But aside from torture, some argue that the detention of "enemy combatants" at Guantánamo Bay, Bagram, and elsewhere, as well as the targeted killing of "enemy combatants" with missiles fired from drones within the territory of countries such as Yemen, Pakistan, and Somalia, is justified by and conducted in accordance with the international law of armed conflict. This argument suffers a number of serious problems, which I briefly

175. *See supra* Part II.C.

176. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664–66 (2013).

177. *See supra* note 44.

178. Rasul v. Myers (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008); *see also supra* text accompanying notes 115–117.

review.

I begin by looking in more detail at the government's legal justification for the targeted killing program, as this rationale is more fully developed, but it would apply similarly to the authority for detaining those captured outside the hot battlefields of Afghanistan and Iraq. The justification was developed in several legal memoranda from the Office of Legal Counsel in the Department of Justice. These have yet to be publicly disclosed, and the Obama Administration continues to resist disclosure of the memos, both in court[179] and in its relations with Congress.[180] Our best information comes from a leaked Department of Justice White Paper summarizing the legal arguments.[181] It argues that the legal justification rests on two foundations. First, that the United States is in a transnational armed conflict with al-Qaeda and "associated forces," as authorized under domestic law by the AUMF, and that the United States is therefore permitted to kill members of those armed organizations as combatants under the international law of armed conflict. Second, and in any event, the United States may kill such persons as an exercise of the right of self-defense as provided for in Article 51 of the UN Charter.[182]

I will focus on the "armed conflict" argument, as the self-defense claim implicates the *jus ad bellum* regime, which governs the use of force against states. While this self-defense justification also suffers deep flaws, that argument is less relevant to the inquiry here.[183] It only relates to the targeted killing program, not the detention cases, but even in the case of targeted killing, even if the use of force is so justified, the specific targeting is still governed by the law of armed conflict. Thus, the more relevant justification, for both the targeted killing program and the detention cases, is that the

179. *See* N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

180. Scott Shane & Mark Mazzetti, *White House Tactic for C.I.A. Bid Holds Back Drone Memos*, N.Y. TIMES, Feb. 21, 2013, at A1.

181. U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011) [hereinafter DOJ WHITE PAPER], *available at* http://www.fas.org/irp/eprint/doj-lethal.pdf.

182. *Id*. at 1–2.

183. *See* Martin, *supra* note 173 (containing my own analysis of the extent to which the targeted killing program cannot be justified under the doctrine of self-defense and thus frequently leads to the use of force in violation of the *jus ad bellum* regime).

United States is in an armed conflict, and that these actions are thus authorized by and are consistent with the international law of armed conflict. But the question of whether a state can be in a "transnational" non-international armed conflict with non-state actors such as al-Qaeda and AQAP is an issue that must be determined in accordance with the criteria provided for within in the international law of armed conflict itself.[184] Many international law scholars, organizations, and institutions relevant to the law of armed conflict, have rejected the claim that the United States can be in an armed conflict with non-state actors such as AQAP, in a battlefield that extends to wherever in the world that its members happen to be, and in particular, to the territory of states in which the United States is not otherwise involved as a belligerent in an armed conflict.[185]

In short, the argument is that the interaction with these amorphous terrorist groups, which are typically characterized by an atomized and anonymized cell structure, does not satisfy the essential criteria for determining the existence of an armed conflict, namely: (1) that the armed groups have a sufficient level of organization and structure; (2) that the conflict between such organized armed groups and the state is characterized by protracted military hostilities of sufficient intensity and duration; and (3) that such hostilities have some geographical or spatial limitation.[186] The United States simply cannot be in a global armed conflict with whichever group it defines as hostile, wherever members of such groups happen to be. The ramifications of this objection are clear. If a killing or detention is undertaken in a situation that does not constitute an armed conflict, then the law of armed conflict does not apply, and the conduct cannot

184. Those criteria are captured in what is known as the *Tadić* test. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see also* Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32–35 (Elizabeth Wilmshurst ed., 2012). *See generally* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT (2002); ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW (2010).

185. *See, e.g.*, Jakob Kellenberger, President of the Int'l Comm. of the Red Cross, *Confronting Complexity Through Law: The Case for Reason, Vision and Humanity*, Grotius Lecture at the American Society of International Law (Mar. 28, 2012), *available at* http://intercrossblog.icrc.org/blog/kellenberger-grotius-lecture-asil-case-reason-vision-and-humanity; Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law* (Harvard Univ. Program on Humanitarian Policy & Conflict Research Occasional Paper Series, 2006), *available at* http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

186. These are the three criteria of the Tadić test. *Tadić*, Case No. IT-94-1-I, ¶ 70.

be justified as being authorized by, or being an implementation of, the law of armed conflict.

The problems do not end there for the argument that the GWOT cases arise from conduct that is authorized by international law, as opposed to being an exercise of U.S. jurisdiction. Suppose for the sake of argument that there is such an armed conflict with al-Qaeda and associated forces, or conversely that there is a non-international armed conflict in Yemen or Pakistan, in which the United States is providing assistance to the government, or indeed that the United States is using force against such states in self-defense. Even in that situation, individuals such as Anwar Al-Aulaqi could still not be classified as "combatants," who could thus be killed at any time on the basis of such status. First, the concept of "combatant," as defined in the Geneva Conventions, is limited to international armed conflict.[187] In an international armed conflict, only combatants as defined may be targeted on the basis of status alone. And regardless of the type of armed conflict, persons not coming within the definition of combatant under the Geneva Conventions,[188] even if they are clearly members of a terrorist organization, would be considered civilians who can only be targeted "for such time as they are taking direct part in hostilities."[189] That is, they can only be targeted on the basis of their conduct, not on the basis of their status. The Israeli Supreme Court, in considering a challenge to Israel's own targeted killing program, confirmed this proposition and rejected arguments that Hamas terrorists could be targeted at will on the basis of some new status of "unlawful enemy combatants."[190]

These objections, of course, echo the question raised by Judge Bates in *Al Maqaleh* as to whether a person could be killed merely on

187. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* GARY SOLIS, THE LAW OF ARMED CONFLICT 187–91 (2010). It should be noted that while the United States is not a party to the Additional Protocols, and it continues to object to certain specific provisions, it has accepted that most of the provisions of the treaty, including Article 51(3), constitute customary international law.

188. Third Geneva Convention, *supra* note 187, art. 4.

189. Additional Protocol I, *supra* note 187, art. 51(3).

190. HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel 57(6) IsrSC 285 [2005] (Isr.).

the bare assertion of membership in a group.[191] It is true that, in contrast to the contested status of the detainees in *Rasul v. Bush*,[192] Anwar Al-Aulaqi was a self-professed member of AQAP and was at minimum a propagandist for that organization, in which role he helped to inspire radical opposition to the United States.[193] But what is not known is to what extent he was involved in operational aspects of terrorist attacks, or to what extent he was directly participating in such attacks, and moreover, whether he was engaging in such activity so as to truly pose a direct and imminent threat at the time he was killed.[194]

A final point to be made with respect to the targeted killing program is that Al-Aulaqi was killed by a CIA drone strike, as are many if not most of the "insurgents" and "militants" killed in strikes in both Yemen and Pakistan.[195] But members of the CIA are not themselves "combatants" privileged with the authority to kill under the law of armed conflict. They are themselves civilians rather than combatants as the term is defined in the Geneva Conventions.[196] Even if one accepts that the armed forces of the United States were authorized to kill Al-Aulaqi and others under the law of armed conflict, the CIA was certainly not.[197] Thus, even here the conduct

191.727 F. Supp. 2d 1, 9 (D.D.C. 2010); *see supra* text accompanying note 171.

192. 542 U.S. 466 (2004).

193. *See, e.g.*, Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES, Mar. 10, 2013, at A1.

194. The word "imminent" here is used in the sense that it is normally understood in the law of armed conflict and *jus ad bellum* doctrine of self-defense, not in the highly unconventional and elastic meaning that is imposed upon it in the DOJ WHITE PAPER, *supra* note 181, at 7–8. Imminence is traditionally related to the right of self-defense. *See, e.g.*, YORUM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 182–87, 209–10 (2005); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 160–65 (2008); NILS MELTZER, TARGETED KILLING IN INTERNATIONAL LAW 346–53 (2008).

195. There is a division of responsibility between the CIA and the Department of Defense. *See* Micha Zenko, *Transferring CIA Drone Strikes to the Pentagon*, COUNCIL ON FOREIGN RELATIONS (Apr. 2013), http://www.cfr.org/defensehomeland-security/transferring-cia-drone-strikes-pentagon/p30434.

196. CIA operations are understood to be affected by a number of international legal norms. *See* Third Geneva Convention, *supra* note 187, art. 4; Additional Protocol I, *supra* note 187, art. 51(3); *see also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27–33 (2004); SOLIS, *supra* note 187, at 220–27.

197. This point was highlighted when Harold Koh, then legal counsel to the State Department, argued that the plan to indict and try Omar Khadr, the Canadian detainee at Guantánamo Bay, for the "crime" of engaging in hostilities in Afghanistan and killing an American medic while not a privileged combatant, would mean that he was being prosecuted for the very same thing that the CIA was currently engaging in. *See* Scott Horton, *The Khadr Boomerang*, HARPER'S (May 25, 2010, 1:26 PM), http://harpers.org/blog/2010/05/the-khadr-boomerang/.

cannot be said to constitute an implementation of international law, or to be authorized by international law.

Similar arguments apply to many of the detention cases discussed above. A number of detainees, such as those that brought claims in *Rasul v. Bush*,[198] and in *Al Maqaleh v. Gates*,[199] were nationals of countries that had friendly relations with the United States, and they were captured in countries other than Afghanistan and Iraq, with which the United States was not engaged in armed conflict. The justification for their capture, rendition, interrogation and indefinite detention without charge is that they are members or supporters of Al- Qaeda or "associated forces" with which the United States is in a transnational armed conflict. As discussed above, if that proposition is unfounded as a matter of international law, then of course the justification for capturing and detaining them is similarly flawed. Moreover, as discussed with respect to Al-Aulaqi, even if one accepts that there can be such a global "transnational" non-international armed conflict with al-Qaeda and "associated forces," the capture and detention of persons in neutral states on the basis of "material support" of "co-belligerent" non-state actors, or on the basis of vaguely understood notions of "links" to such groups, cannot be supported by the law of armed conflict. Even the D.C. Circuit has begun to recognize that "material support for terrorism" is not an offense under the international law of armed conflict.[200] If the detention is said to be authorized exclusively by international law, as opposed to domestic law (and hence comprising an exercise of domestic jurisdiction), one would expect some deeper inquiry in these cases to determine whether the detention in each specific case was consistent with the provisions of the Geneva Conventions.

Let me pause here to put this discussion into context for the purposes of my examination of the extraterritorial application of U.S. law. I am here addressing the potential objection that the government conduct in the GWOT cases I have discussed was in fact undertaken pursuant to international law rather than being an exercise of domestic jurisdiction. The upshot of the foregoing analysis, however, is that if the international law critics are correct, in that the United

198. 542 U.S. 466 (2004).

199. 605 F.3d 84 (D.C. Cir. 2010).

200. *See* Hamdan v. United States, 696 F.3d 1238, 1251 (D.C. Cir. 2012) (stating that material support for terrorism is not a war crime under international law).

States lacks a basis in the law of armed conflict to engage in this type of targeted killing or detention of individuals captured outside of theaters of traditional armed conflict, on the basis of their alleged membership in al-Qaeda or "associated forces," then such conduct is a violation of international law in a number of respects, not least of which being that the targeted killing violates the customary international law prohibition on extrajudicial killing.[201] But the extrajudicial killing, as well as the capture, interrogation, and indefinite detention of individuals, if not authorized by international law, would thus constitute an extraordinary exercise of executive enforcement jurisdiction extraterritorially. The killing of foreign nationals, within the territory of a foreign state, for activity that is undertaken in a foreign state, is an extreme exercise of jurisdiction abroad, and would violate the international law principles on jurisdiction.

Within the scope of this Article, I cannot resolve these arguments relating to the validity of the claim of a transnational armed conflict with al-Qaeda and "associated forces," or whether the targeted killing program and the detention of those captured outside of Afghanistan might be otherwise legal under international law. But it is indisputable that the claims are highly controversial. If these claims were the sole legal basis for detentions, targeted killing, and the other conduct discussed here, and thus the basis for arguing that such conduct was not an impermissible exercise of U.S. jurisdiction, then one would expect that those arguments would have at least been subjected to some inquiry and consideration by the courts. But the courts have not taken up this issue. To the extent the issue of whether the laws of armed conflict apply, the Supreme Court in *Hamdan v. Rumsfeld*[202] did find that there was a non-international armed conflict in existence in Afghanistan, where Hamdan had been captured.[203] And in *Hamdan v. United States*,[204] a later case involving the same detainee, the D.C. Circuit found that material support for terrorism is not a war crime under international law.[205] But in both *Hamdan* and *Hamdi v. Rumsfeld*,[206] the Supreme Court was quite careful in limiting its discussion to the actual armed conflict that was

201. This has been acknowledged by U.S. courts. *See supra* note 165 and accompanying text.

202. 548 U.S. 557 (2006).

203. *Id.* at 566–68.

204. 696 F.3d 1238 (D.C. Cir. 2012).

205. *Id.* at 1251.

206. 542 U.S. 507 (2004).

indisputably in process in Afghanistan. There has been little other inquiry into the validity of claims that international law grounds the actions undertaken elsewhere. Indeed, in *Al-Bihani v. Obama*,[207] the D.C. Circuit rejected the notion that the international law of armed conflict should inform in any way the interpretation of the AUMF, implying that the AUMF was the sole authority for government action.[208]

B. Exceptions to International Law Principles on Jurisdiction

The second possible objection to the suggestion that the detention and other treatment of foreigners captured abroad is an impermissible exercise of jurisdiction, is that such conduct falls within the exceptions to the international law prohibition on the extraterritorial application of domestic law. The exceptions relevant here are the objective territorial principle (effects doctrine), the passive personality principle, and the protective principle. It will be recalled from the discussion in Part II that the validity and scope of both the objective territoriality principle (which permits the exercise of jurisdiction over conduct outside of the territory of the state that will have substantial effects within its territory), and the passive personality principle (which permits the exercise of jurisdiction outside of the territory of the state for the protection of nationals abroad) are somewhat controversial. The third exception, the protective principle, is far narrower in scope than is typically understood. I explore their application here briefly.

The 1935 Harvard Research Draft Convention[209] was an early attempt to develop an international consensus on the limits on the exercise of domestic jurisdiction under international law. It never advanced to form the basis of a treaty, but it continues to be referred to as being important in defining and articulating the scope of a number of the core concepts developed therein. The passive personality principle was one of the principles articulated in the Draft Convention. Nevertheless, a significant segment of the international community historically has rejected the passive personality

207. 590 F.3d 866 (D.C. Cir. 2010), *petition for reh'g en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

208. *See id.* at 871.

209. *Harvard Draft Convention*, *supra* note 23.

principle.[210] It may be argued that regardless of claims by certain countries, it does not constitute an accepted principle of international law, though James Crawford notes that "such objections have not, however, prevented the development of something approaching a consensus on the use of passive personality in certain cases, often linked to international terrorism."[211] That assertion notwithstanding, it is a principle that the United States itself traditionally has opposed and rejected in areas not related to terrorism, and its own attempts to employ the passive personality in certain kinds of terrorism cases has met with criticism both at home and abroad.[212]

In any event, even if the principle is accepted as being recognized, the narrow range of cases in which the exercise of jurisdiction may be permissible under the passive personality principle would be limited to those involving criminal prosecution or civil actions in regular courts for deliberate terrorist attacks aimed at the state's nationals abroad. These would involve judicial proceedings in the kinds of cases that are least likely to provoke the objection of the other sovereign states implicated.[213] The acceptance of this narrow exercise of jurisdiction relies not only on the universal condemnation of the kind of terrorist act in question, but also the improbability that such exercise of jurisdiction would lead to unlimited or unexpected criminal liability.[214] As discussed above, one of the recurring problems in the GWOT cases is the considerable uncertainty regarding the process by which individuals have been identified for detention, targeting, or otherwise been made subject to the exercise of U.S. jurisdiction, together with the very limited degree of judicial oversight to determine whether the initial identification was justified.[215] Moreover, almost invariably they arise from suspicion of involvement with certain groups, rather than prosecution

210. Robbins, *supra* note 23, at 10–11.

211. CRAWFORD, *supra* note 21, at 461; *see* O'CONNELL, *supra* note 25, at 828–29; ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS 243 (7th ed. 2012); Watson, *supra* note 25, at 14–15, 30.

212. Robinson, *supra* note 25, at 487–89, 496; Robbins, *supra* note 23, at 10–11.

213. For instance, the line of foreign sovereign immunity cases against Iran for damages arising from its vicarious liability for the terrorist activities of groups such as Hezbollah. *See, e.g.*, Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8 (D.C. Cir. 2009). Another example can be found in the prosecutions for hijackings, which have drawn support from the universal condemnation reflected in the anti-hijacking conventions. *See, e.g.*, United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

214. *Yunis*, 681 F. Supp. at 902.

215. Denbeaux & Denbeaux, *supra* note 132, at 2–3, 38–39; *see also supra* text accompanying notes 99–100.

for terrorist attacks already conducted. Finally, they do not involve adjudication in regular courts, but rather detention without charge, torture, and extrajudicial killing.

The objective territoriality principle has been embraced by the United States to justify, among other things, the extraterritorial application of antitrust law.[216] But this principle too is not widely accepted in international law, and to the extent that it is accepted, it tends to be narrowly construed. Even under the more recent U.S. formulations of the principle, the effect of the conduct within the United States must be substantial and direct.[217] While it might be permissible to extend jurisdiction under this test to those members of al-Qaeda who had been involved in the 9/11 attacks, the same cannot be said for the seizure and detention of persons on scant evidence that they have some level of affiliation with, or are providing some level of "material support" to, terrorist groups said to be associated with al-Qaeda.[218] This is all the more so for members of groups like al-Shabaab, which most acknowledge are locally focused, and pose no direct threat to the United States.[219]

Turning to the protective principle, it contemplates the legitimate extraterritorial exercise of jurisdiction in respect of conduct by foreigners abroad that pose a direct and substantial threat to the national security of the state. Once again, U.S. courts have at times construed this principle in the broadest possible terms, to justify such conduct as the criminal prosecution of foreigners for murder committed abroad in the course of international narcotics trading.[220]

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216. *See supra* note 55.

217. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403 (1987); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2889–90 (2010). In *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), the Second Circuit relied upon the principle to support the prosecution of foreign terrorists plotting to destroy foreign aircraft with no American passengers, flying between third states, though the primary ground was that Congress intended the statute in question to have extraterritorial effect.

218. On the problems with the determination process, and the deference courts have shown the evidentiary standards, see *supra* Part III.B–C.

219. *See, e.g.*, Jonathan Masters, *Al-Shabaab*, COUNCIL ON FOREIGN RELATIONS (Feb. 5, 2013), http://www.cfr.org/somalia/al-shabaab/p18650. *But see Al Shabaab: Recruitment and Radicalization within the Muslim American Community and the Threat to the Homeland: Hearing Before the H. Comm. on Homeland Security*, 112th Cong. 204 (2011) (statement of Chairman Peter T. King).

220. *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994), is a prime example of this. The case involved the prosecution of Mexican nationals for the torture and murder of

But it is important to emphasize that from its first articulation in the Harvard Research Draft Convention in 1935,[221] the international law perspective on the protective principle was that it permits the exercise of prescriptive jurisdiction (and of course adjudicative jurisdiction) with respect to crimes committed by a foreigner against the security, territorial integrity, or political independence of the state.[222] This formulation is construed narrowly to mean that the crime triggering the right to exercise jurisdiction must be directed at, and threaten the integrity of, government functions and the institutions of the state, rather than purely civilian targets.[223]

Perhaps ironically, it has been the U.S. and U.K. legal systems that were traditionally viewed as maintaining the most restrictive view of the protective principle.[224] Moreover, this exception for the exercise of jurisdiction is fundamentally understood to be for the purpose of criminal prosecution for crimes already committed. This emphasis is reflected in the Harvard Draft Convention, which contains limitations relating to double jeopardy, trials in absentia, and guarantees of fair and impartial trials of the accused by regularly constituted courts, as well as protection against cruel, unusual or inhuman punishments thereafter.[225] Thus, again, the prosecution in federal courts of the perpetrators of the 9/11 attacks on the Pentagon, being an institution of the state, would clearly fall within the scope of the exception. But the exercise of prescriptive and enforcement jurisdiction in the indefinite detention, interrogation, prosecution in military commissions, and extrajudicial killing of individuals who are suspected of involvement in terrorist attacks on civilians would clearly not come within the established scope of the principle. That

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two Americans in Mexico under the mistaken belief that they were DEA agents. The Ninth Circuit sought to support its extraterritorial application of the relevant criminal statute by relying in part on the protective principle, characterizing it as permitting the extraterritorial application of U.S. law to conduct that "may impinge on the territorial integrity, security, or political independence of the United States." *Id.* at 840. That is not an accurate statement of the principle, nor could it justify the exercise of jurisdiction to prosecute the murder of nationals abroad. Even had the victims been DEA officials, their murder would not have constituted a threat to the security of the United States sufficient to trigger the protective principle.

221. *Harvard Draft Convention*, *supra* note 23.

222. *See id.* at 543.

223. *See id*. at 557; *see also* Robbins, *supra* note 23, at 10; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmt. f (1987). *But see* CRAWFORD, *supra* note 21, at 462.

224. *See Harvard Draft Convention*, *supra* note 23; Robbins, *supra* note 23, at 1223–25.

225. *Harvard Draft Convention*, *supra* note 23, at 596–601 (containing Article 12 of the Draft Convention, describing the prosecution and punishment of aliens).

may strike many as being bizarre, and a good reason for thinking that the international law principles on jurisdiction are out of date and in need of adjustment. But these are the principles that the Court purported to be concerned with in the oral argument in *Kiobel*, and indeed to which Justice Breyer referred in his concurring opinion.[226]

What is more, unless one fully accepts the international law of armed conflict justifications for the targeted killing and indefinite detention of those captured beyond any theater of armed conflict, such acts of extrajudicial killing and arbitrary detention without charge constitute a most extreme form of enforcement jurisdiction in apparent violation of long-established principles at the foundation of the rule of law. This would militate against any justifications grounded in any of these three principles of jurisdiction. One cannot imagine for a moment that the United States would accept such arguments were the Chinese to take to launching operations within the territory of neighboring countries to kill Uighur "militants" said to be plotting attacks against China from safe-houses abroad, or detaining nationals of third states captured abroad for "material support" for the Uighurs. Consider the international reaction to the suspected Israeli killing of the Hamas leader Mahmoud al-Mabhouh in Dubai in 2010,[227] or the poisoning of former Russian FSB/KGB agent Alexander Litvinenko in London in 2006, thought to be conducted by agents of the Kremlin.[228] There was no talk then of such actions being justifiable exercises of jurisdiction under the protective or objective territorial principles.

C. Congressionial Authority and the Presumptions

The third objection is that the conduct in question in these cases was explicitly authorized by Congress, and thus the twin presumptions—that is, the presumption against extraterritoriality, and

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226. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring in the judgment). Though it is submitted that his assertion that the United States could exercise jurisdiction in the event that U.S. interests were sufficiently implicated, this is not consistent with the international law principles to which he refers.

227. *See, e.g.*, Ian Black & Rory McCarthy, *Mystery over Dubai Killing of Hamas Official Deepens*, THE GUARDIAN, Feb. 24, 2010, http://www.guardian.co.uk/world/2010 /feb/24/mos sad-hamas-dubai-passports.

228. *See, e.g.*, Esther Addley, *Alexander Litvinenko: Coroner Urges Public Inquiry into Death*, THE GUARDIAN, June 5, 2013, http://www.guardian.co.uk/world/2013/jun/05/alex ander-litvinenko-coroner-public-inquiry1.

the *Charming Betsy* doctrine, which essentially presumes that Congress does not intend to violate international law—have quite simply been overcome by clear congressionial intent. In other words, the conduct may indeed constitute the extraterritorial application of U.S. law, and the resulting exercise of prescriptive and enforcement jurisdiction may be in violation of the international law principles of jurisdiction, and indeed violate other substantive principles of international law; but the courts need not consider such issues if Congress has explicitly authorized the conduct with clear intent that it apply in precisely that way, in respect of foreign persons for conduct undertaken in foreign territory.

There are a number of responses to this objection. It is useful to begin by recalling that both presumptions flow from a respect for both international law and the sovereign autonomy of foreign legal systems, and an understanding that the United States would typically avoid engaging in conduct that either violated international law or was likely to impinge on the sovereignty of another state or cause conflicts with foreign laws. The presumptions are in fact interrelated, since even without an explicit presumption against extraterritoriality, the *Charming Betsy* doctrine militates against the interpretation of a statute so as to apply extraterritorially in violation of the international law principles on jurisdiction.

The corollary to the presumptions, of course, is that where Congress clearly intends a law to apply extraterritorially, or where the statute cannot be construed in a manner that is consistent with principles of international law,[229] then the legislation will be given effect regardless of extraterritorial application or inconsistency with international law.[230] But one of the problems that has dogged this doctrine is the uneven standards that the courts have applied in

229. This overly simplifies the issue of course. If the principle is in a treaty to which the United States is a party, which is more recent in time than the statute, and the principle is found in a provision that is construed to be self-executing, then of course the treaty provision may be held to defeat the statutory provision. *See* U.S. CONST. art. VII; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(2) (1987). *See generally* LORI DAMROSCH ET AL., PUBLIC INTERNATIONAL LAW 685 (2009).

230. *See* United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) ("[W]hile customary international law may inform the judgment of our courts in an appropriate case, it cannot alter or constrain the making of law by the political branches of government . . . ."); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.").

assessing the "clear congressionial intent." This, of course, turns out to be one of the core issues in the Court's majority decision in *Kiobel* itself. Thus, as already briefly discussed, the Court has in the past searched for "implicit intent" in extending the reach of antitrust law and other statutes to conduct overseas. It has done so by adopting functional and instrumentalist approaches; thus in *United States v. Bowman*,[231] a pre-World War II case, the Court held that a statute criminalizing conspiracy to defraud a U.S.-owned corporation must apply to conduct undertaken on the high seas, since to find otherwise would vastly limit the utility of the statute and create "a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."[232]

We now know that the Court in *Kiobel* rejected any such functional or instrumentalist approach to the inquiry into whether there was congressionial intent that the ATS apply extraterritorially. Of course, as Chief Justice Roberts himself noted, the Court in *Kiobel* was, strictly speaking, not even assessing whether the ATS ought to apply extraterritorially, but whether Congress intended courts to exercise the jurisdiction granted under the ATS in a manner that would have extraterritorial effect.[233] But in any event, in conducting that inquiry, the Court applied a very strict rule of interpretation, holding that "to rebut the presumption, the ATS would need to evince a 'clear indication of extraterritoriality.'"[234] It went on to find that the ATS "covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach."[235] The Court brushed aside the fact that the Congress of 1789 clearly intended the ATS to apply to piracy,[236] which as Justice Breyer convincingly demonstrated in the minority concurring opinion, is quite clearly extraterritorial.[237] It similarly dismissed historical evidence regarding congressionial intent, stating that Attorney General Bradford's 1795 opinion regarding ATS claims arising from U.S. involvement in a French raid

231. 260 U.S. 94 (1922).

232. *Id*. at 98.

233. Chief Justice Roberts notes this in his majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

234. *Id*. at 1665.

235. *Id.*

236. *Id*. at 1671 (Breyer, J., concurring in the judgment).

237. *Id*. at 1672–74.

on the British fort at Sierra Leone defied a "definitive reading."[238]

Such strict standards for assessing whether there was explicit congressionial authority to implement a law extraterritorially, or in a manner inconsistent with international law, stands in stark contrast to the manner in which the courts have considered such issues in the GWOT cases that I have considered here. As I have discussed, the courts have seldom even adverted to the question of whether the conduct constitutes an extraterritorial application of U.S. law. Now, to be sure, it is obvious that the AUMF itself is intended to apply beyond the territory of the United States. Its primary purpose is to authorize the use of force abroad. So it might be argued that courts have naturally not adverted to the extraterritorial aspect of conduct said to be authorized by the AUMF. But as I have argued, it is not at all clear that much of the conduct that gave rise to the cases considered here was in fact authorized by the AUMF. And given that lack of clarity, combined with the fact that the conduct was an extraterritorial exercise of jurisdiction, and potentially inconsistent with principles of international law, one would have expected the courts to have probed the question more deeply, and to have applied the kind of standards that the Court did in *Kiobel*—if, indeed, the courts are really concerned with adherence to principles of international law and avoiding conflicts with other legal systems.

The reasons why the conduct here under consideration may not have been explicitly authorized by the AUMF or any other legislation have been addressed above. On a purely textual reading of the statute, it cannot extend to the capture, interrogation, and detention of persons who were seized in Thailand, or the killing of persons in Yemen, Somalia, or Pakistan, who were not members of al-Qaeda or some organization that planned, authorized, committed, or aided the 9/11 terrorist attacks.[239] Moreover, the process by which persons have been determined to be "enemy combatants" in the detention context is flawed, while in the targeted killing context it remains entirely unknown. In the end, the courts have not applied the kind of strict interpretation seen in the Court's construction of the ATS in *Kiobel*, in assessing the explicit statutory authority to engage in this conduct within the GWOT.

238. *Id.* at 1668 (majority opinion).

239. At least not before the enactment of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), which is understood to have expanded the scope of the authority to use force beyond that provided in the AUMF.

One final point needs to be addressed regarding the issue of domestic authority. Some might argue that even if this impugned conduct is not explicitly authorized by Congress, it comes within the Commander-in-Chief authority of the President, pursuant to Article II, Section 2 of the Constitution.[240] This of course implicates an old and very contentious debate over the war powers under the Constitution of the United States, and the exact contours of executive and legislative control over decisions to use military force.[241] Without delving into the particulars of that debate, I would suggest that the better view is that the President has authority to decide how and where to employ military force within an armed conflict, but cannot initiate armed conflict or use force against another state without congressionial approval.[242] In the context of my arguments above, the first point to be made is that the courts in none of these GWOT cases even look to Commander-in-Chief authority. But in any event, within the context of the detention, torture, and targeted killing debate, once again we come back to the question of whether such conduct was legitimately part of an armed conflict or not. If it is not, then of course one could argue that the Commander-in-Chief power does not authorize detaining or killing someone in a foreign country, though the more hawkish advocates of executive power would disagree. But in any event, even the strongest advocates of more aggressive positions on war powers and the Commander-in-Chief authority acknowledge that there is deep disagreement, and no settled position on the issue.[243] Thus, precisely because the issues surrounding war powers remain contentious and are unsettled, one would expect the courts to make some inquiry into whether the conduct in question might have nonetheless required congressionial authorization, and if

240. U.S. CONST. art. 11, § 2, cl. 1.

241. *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004); THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR (Gary M. Stern & Morton H. Halperin eds., 1994); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 242–52 (1996); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

242. I have previously written about war powers under the U.S. Constitution. *See* Martin, *supra* note 49, at 36–38, 58–61.

243. *See* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006). *But see* FISHER, *supra* note 241, at 15 (arguing that Yoo, as the most aggressive advocate of executive war powers, is virtually alone in his interpretation of the intent of the drafters of the war powers clause of the Constitution).

so, whether Congress had provided authority that unambiguously applied to the circumstances in the particular case.

V. CONCLUSIONS – *KIOBEL* AND THE "GLOBAL WAR ON TERROR"

This examination of extraterritoriality in a small sample of GWOT cases is all too brief and admittedly incomplete. But let us recall the reason for the exploration. The primary purpose for this study of GWOT cases was to examine how the federal courts have considered issues of extraterritoriality in other cases involving claims regarding violations of *jus cogens* norms in international law. In other words, it began as an inquiry aimed at providing some insight into the Court's reasons for delving into the issues of extraterritoriality in *Kiobel*. In so doing, however, the inquiry, brief and incomplete as it may be, has raised some significant questions about the approach of the federal courts in the GWOT cases. In essence, the inquiry began with the thought that GWOT cases might shed light on *Kiobel*, but in the end, the inquiry through the lens of the *Kiobel* judgment may shed some light on our approach to the GWOT, and may contribute to beginning a fruitful discussion on some under-evaluated aspects of the GWOT policies and jurisprudence.

Why this inquiry to begin with? How and why would the GWOT cases shed any light on the Court's approach to *Kiobel*? The starting point was that the Court's diversion into the issue of extraterritoriality was odd. There is good reason to believe that the ATS does not constitute an extraterritorial application of U.S. law, or to be more precise, an exercise of prescriptive jurisdiction in violation of the international law principles on jurisdiction, or domestic presumptions against extraterritoriality. The Court's own interpretation of the ATS in *Sosa* supports the view that the ATS is purely a grant of jurisdiction to federal courts to recognize and adjudicate causes of action in tort for violations of international law. Such exercise of adjudicative jurisdiction, particularly in relation to violations of *jus cogens* norms in respect of which international law recognizes universal jurisdiction in any event, is entirely consistent with international law principles on jurisdiction. The fact that there is little or no connection to the United States in so-called foreign-cubed cases does not significantly alter this analysis.

The next step was to consider how the Court, and the federal courts generally, have treated extraterritoriality in relation to other cases involving claims arising from violations of the same *jus cogens* norms that were at issue in *Kiobel*, but in which there is a greater

U.S. connection. The government's conduct in the so-called GWOT has given rise to a number of cases in which there were precisely such claims regarding the violation of international law prohibitions on indefinite and arbitrary detention, torture, and extrajudicial killing, and in which there was a much stronger U.S. connection. Several of these cases involved claims under the ATS itself. The examination of these cases, however, ended up revealing some surprising and important features about the government's conduct in the GWOT, and about how the federal courts have treated such conduct, and even how the relevant bar and the academy have understood the policy and resulting jurisprudence. These observations are significant in their own right, quite apart from *Kiobel*, and they can be reduced to a few key points.

First, the conduct of the U.S. government that gave rise to the claims in these cases—that is the capture of foreigners in foreign lands and then subjecting them to indefinite detention, the interrogation and torture of several of such detainees, and the extrajudicial killing of persons in foreign territory in which the United States is not involved in armed conflict—itself constitutes the extraterritorial application of U.S. law. Or, to put it more precisely, it constitutes the exercise of U.S. prescriptive and enforcement jurisdiction with respect to foreigners in foreign territory. Moreover, in several of these instances, this extraterritorial exercise of jurisdiction is arguably in violation of the international law principles on jurisdiction; the conduct cannot be said to constitute the implementation of, or be authorized by, the international law of armed conflict; and the congressionial authority for such conduct has been less than certain, meaning that the domestic presumptions apply and have not been rebutted.

Second, the courts, including the Supreme Court, in considering these cases, have not analyzed the question of whether such conduct represents an impermissibly extraterritorial application of U.S. law. Indeed, the question is virtually never raised. Rather, to the extent that extraterritoriality is raised as an issue in these cases, all the focus is on whether various rights under U.S. law can be applied extraterritorially to protect foreigners who are made subject to the exercise of U.S. jurisdiction in foreign territory. In light of this inquiry, I find this feature in particular to be strange: that courts should be so concerned with the question of extraterritorial

application of rights, and go so far as to express apprehension over the possibility that extending rights to foreigners in the grips of U.S. power in foreign territory might cause friction in foreign relations or infringe international law principles on jurisdiction; while at the same time being so entirely oblivious of the fact that the government's conduct in detaining, torturing, and killing those foreigners in foreign lands should itself constitute egregious exercises of U.S. jurisdiction in violation of not only principles of jurisdiction, but also fundamental human rights principles under international law. Moreover, it is interesting to note that the academic literature on the GWOT jurisprudence has similarly focused on the extraterritorial application of rights, while apparently ignoring the question of whether the conduct giving rise to the claims is itself an impermissible exercise of extraterritorial jurisdiction.

The third observation is in relation to the contrasting standards that are applied in the various contexts. The courts have applied broad statutory interpretations and generous standards in finding legal authority (and, by implication, explicit congressionial intent that the law operate abroad) for the government exercise of jurisdiction in the GWOT. In some cases, the courts have extended the authority of the AUMF far beyond what the language can support. In contrast with that, the Court applied strict and narrow interpretations of the ATS and employed high standards for establishing congressionial intent in *Kiobel* itself. Similarly, the courts employed strict standards of statutory interpretation and mobilized various doctrines to limit the extraterritorial reach of habeas corpus and other U.S. legal rights to claimants under U.S. jurisdiction abroad, as well as for the purpose of insulating and immunizing U.S. defendants from the claims of such plaintiffs in the GWOT cases. The manner in which the courts employed the concept of nexus perhaps reflects the most obvious disparity. On the one hand, the courts have required a substantial connection to the United States to ground ATS claims (except in the case of Al-Aulaqi, in which too great a connection was one basis for rejecting his claim), have held that the link between the U.S. and Syrian agents acting on its behalf in torturing a rendered subject was insufficient to trigger liability, and have required claimants to be clearly within U.S. territorial jurisdiction in order to avail themselves of U.S. legal rights. Yet the courts at the same time have accepted the most tenuous nexus to al-Qaeda, often on the basis of weak and often dubious evidence, and have even extended the AUMF to persons unrelated to al-Qaeda and captured in non-conflict countries years after 9/11 for providing "material support" to amorphous associated

forces, as the basis for legitimating U.S. government action in detaining and interrogating claimants.

There are, of course, counter-arguments to my proposition that U.S. conduct constitutes the exercise of prescriptive jurisdiction, in likely violation of both U.S. domestic presumptions and international law principles on jurisdiction. But I have tried to argue that those objections too can be answered. Some readers may not find my responses to the "likely objections" persuasive. In other words, it may be argued that the courts in these cases were entirely right not to consider extraterritoriality issues, precisely because the conduct was clearly authorized by Congress in legislation that was explicitly intended to apply extraterritorially, and in any event it was consistent with and authorized by the international law of armed conflict, and came within the exceptions to the international law prohibition on extraterritorial exercise of jurisdiction. In short, the courts were doctrinally correct, and there was no issue to explore or express concern over.

Others may think that these cases in fact reflect the kind of "grey holes" that are created when courts are excessively deferential to executive power in times of armed conflict or national emergency, which reflects an unfortunate but inevitable erosion of the thick rule of law.[244] But no matter what one may think on the technical merits of these decisions, I want to argue that we should nonetheless step back and consider the broader pattern that this exploration provides. That is, that U.S. law is being applied extraterritorially in the GWOT in ways that, quite aside from possibly violating substantive principles of human rights and humanitarian law, are violating the international law principles on jurisdiction—the very issue that purportedly caused the Court such concern in oral argument in *Kiobel*. If we care about international law principles on jurisdiction and are concerned about the extraterritorial application of domestic law, we should recognize and study further this aspect of the GWOT. Moreover, it is not only an issue of how the courts have treated this issue. We should be asking why Congress has not addressed the

244. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (suggesting that such grey holes are inevitable in times of crisis); David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?* 27 CARDOZO L. REV. 2005 (2006) (arguing that such gray holes are not inevitable and are to be resisted in defense of the rule of law).

question. It may decide to entirely support the conduct here in question—though in so doing it should consider carefully whether the conduct complies with U.S. obligations under international law—but if Congress supports the conduct, it should pass legislation to provide an explicit legal foundation for it.

In the end, the judgment in *Kiobel* has left the ATS all but dead to claimants seeking to enforce rights against foreign defendants, and many human rights advocates will profoundly regret the decision for this reason. But the issue of extraterritoriality remains very much alive, and perhaps the Court's judgment in *Kiobel* will contribute to a renewed inquiry into the nature and legitimacy of the extraterritorial exercise of U.S. jurisdiction in the so-called "global war on terror."