

# Universal Jurisdiction and U.S. Law

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The conventional wisdom among international law scholars is that customary international law—that is, the law that results from the customary practices and beliefs of nations—places limitations on the authority of nations to apply their laws extraterritorially.<sup>1</sup> Unless a nation's extraterritorial law falls within one of five categories<sup>2</sup>—territoriality, nationality, protective principle, passive personality, or universality—it is said, the nation violates international law rules governing “prescriptive jurisdiction.”<sup>3</sup> All but one of these categories require a nexus between the regulating nation and the conduct, offender, or victim. Under the territorial category, a nation may regulate conduct within its territory as well as foreign conduct that has substantial effects or intended effects in its territory. Under the nationality category, a nation has broad authority to regulate the conduct of its nationals anywhere in the world. Under the protective principle, a nation may regulate certain foreign conduct that threatens its national security or government operations. Under the passive personality category, a nation may regulate certain foreign conduct that harms or is intended to harm its nationals.<sup>4</sup> These four categories

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<sup>1</sup> See, for example, Restatement (Third) of Foreign Relations Law §§ 402–04 (1987); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in M. Cherif Bassiouni, ed., *International Criminal Law* 36–41 (Transnational 2d ed 1999); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *Tex L Rev* 785, 785–88 (1988).

<sup>2</sup> An early discussion of these five categories can be found in a 1935 Harvard Research Project that purported to summarize principles of customary international law. See Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 *Am J Intl L* 435 (Supp 1935).

<sup>3</sup> Prescriptive jurisdiction is “the authority of a state to make its law applicable to persons or activities.” Restatement (Third) of Foreign Relations Law at 231 (1987).

<sup>4</sup> There has been substantial debate and uncertainty concerning the legitimacy of the passive personality category, which allows a nation to “apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.” Restatement (Third) of Foreign Relations Law § 402 comment g (1987). Nevertheless, this category has become increasingly accepted in recent years for certain kinds of conduct, such as terrorism. *Id.*

may also be subject to a “reasonableness” limitation.<sup>5</sup> However, for offenses covered by the fifth category—“universal jurisdiction”—no such nexus is required, and no reasonableness test is applied. Rather, those who commit such offenses are *hostes humani generis*—“enemies of all mankind”—and all nations of the world are said to have the authority to regulate their conduct.

United States courts invoked universal jurisdiction in the nineteenth century to justify the regulation of piracy on the high seas.<sup>6</sup> Although there is some debate over what additional offenses are now subject to universal jurisdiction, most scholars seem to agree that it extends to the slave trade, genocide, war crimes, and torture.<sup>7</sup> The Nuremberg trials and other war crimes trials following World War II arguably involved the exercise of universal jurisdiction.<sup>8</sup> In addition, Israel invoked universal jurisdiction (along with other jurisdictional concepts) to justify its trial of Adolf Eichmann after it had abducted him from Argentina.<sup>9</sup> More recently, Spain invoked the universal jurisdiction theory in its effort to obtain custody of and try Augusto Pinochet for human rights abuses committed in Chile, and by the British House of Lords in its decision denying Pinochet residual head-of-

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<sup>5</sup> See Restatement (Third) of Foreign Relations Law § 403 (1987). There has been some debate over whether international law in fact imposes a reasonableness limitation. Compare Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 Am J Intl L 53 (1995) (arguing that international law does not contain reasonableness limitation), with Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996) (defending reasonableness limitation on jurisdiction to prescribe).

<sup>6</sup> See, for example, *United States v Smith*, 18 US (5 Wheat) 153, 161 (1820) (referring to piracy as “an offence against the universal law of society, a pirate being deemed an enemy of the human race”); *United States v Klinton*, 18 US (5 Wheat) 144, 152 (1820) (stating that persons committing piracy “are proper subjects for the penal code of all nations”); see also Harvard Research in International Law, *Draft Convention on Piracy*, 26 Am J Intl L 739, 743 (Supp 1932); John Bassett Moore, *A Digest of International Law* 951 (GPO 1906). But see Alfred P. Rubin, *Ethics and Authority in International Law* 84–110 (Cambridge 1997) (arguing that universal jurisdiction over pirates was more rhetoric than reality). For a useful discussion of early American piracy law, and its relationship to British piracy law, see Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 Harv L Rev 334 (1925).

<sup>7</sup> See, for example, Restatement (Third) of Foreign Relations Law § 404 (1987). The only offense listed in the original Restatement as subject to universal jurisdiction was piracy. See Restatement (Second) of Foreign Relations Law § 34 (1965). The original Restatement noted, however, that other crimes, such as the slave trade, were becoming universally condemned. See *id.*, reporters’ note 2.

<sup>8</sup> See Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 Cal L Rev 177 (1945).

<sup>9</sup> See *Attorney General of Israel v Eichmann*, 36 Intl L Rep 277, 298–304 (Sup Ct Israel 1962). For a U.S. decision relying on the universal jurisdiction theory to authorize extradition of a suspected Nazi war criminal to Israel, see *Demjanjuk v Petrovsky*, 776 F2d 571, 582–83 (6th Cir 1985).

state immunity.<sup>10</sup> Furthermore, there is growing support for extending the universal jurisdiction theory to certain acts of terrorism, and a number of U.S. terrorism statutes appear to rely on this theory.

There are many uncertainties concerning the sources and scope of universal jurisdiction. How exactly did this jurisdictional concept become international law? What role has national consent played in the formation of universal jurisdiction? What is the relationship between the customary international law of universal jurisdiction and treaties that authorize this form of jurisdiction? Is the universal jurisdiction concept relevant only to national (and subnational) exercises of jurisdiction, or is it also relevant to exercises of jurisdiction by international tribunals (such as the proposed International Criminal Court)?<sup>11</sup>

In addition to these legal uncertainties, universal jurisdiction implicates difficult questions of international policy. Although the exercise of universal jurisdiction may in some instances promote international justice and accountability, it may also entail significant costs. By vesting individual nations with worldwide prosecutorial power—including nations that may have a particular axe to grind—the universal jurisdiction concept is subject to potential manipulation and abuse. There is also no assurance that the prosecuting nations will apply fair standards of criminal procedure in adjudicating these cases. And there is a danger that the prosecution of foreign citizens under this concept—especially foreign leaders—will undermine peaceful international relations.<sup>12</sup>

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<sup>10</sup> See *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 2 WLR 827, 830 (HL 1999). See also Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich L Rev 2129, 2133–34 (1999) (discussing the role of universal jurisdiction in the *Pinochet* case).

<sup>11</sup> For a discussion of some of these (and other) conceptual questions regarding universal jurisdiction, see Alfred P. Rubin, *Is International Criminal Law "Universal"?*, 2001 U Chi Legal F 351.

<sup>12</sup> For a discussion of some of these costs, see Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 Foreign Aff 86 (Jul/Aug 2001). For a discussion of these costs in the specific context of the *Pinochet* case, see Curtis A. Bradley, *The "Pinochet Method" and Political Accountability*, 3 Green Bag 2d 5 (1999). Recent developments in Belgium may highlight some of the dangers associated with universal jurisdiction. In June 2001, four Rwandan Hutus were convicted, in a Belgian court, of committing genocide in Rwanda, in violation of a Belgian universal jurisdiction statute. See Agence France-Presse, *Belgian Jury Convicts 4 in '94 Rwanda Massacre*, NY Times A3 (June 8, 2001). A group of Palestinians subsequently initiated an action in Belgium seeking to have Israeli Prime Minister Ariel Sharon tried for his alleged involvement in the massacre of Palestinian refugees in Lebanon in 1982. See Keith B. Richburg, *Belgium "Embarrassed" by Probe of Sharon*, Wash Post A 18 (July 6, 2001). A group of Israelis recently returned the favor by seeking to have Palestinian leader Yasser Arafat tried in Belgium for his alleged role in terrorist

For purposes of this Article, I put those international law and policy questions to one side and focus instead on the relationship between the universal jurisdiction concept and U.S. law. Assuming the universal jurisdiction theory is valid, what implications does it have for the scope and application of U.S. law? This question is becoming increasingly important in light of recent expansions of international criminal law, the broadening of U.S. efforts to regulate criminal activity beyond its borders, and the ever-growing number of civil lawsuits concerning foreign human rights abuses. The terrorist attacks on the United States on September 11, 2001, which occurred as this Article was in page proofs, will likely further enhance the significance of this topic.

I begin in Part I by considering the relationship between the universal jurisdiction concept and congressional power. I argue here that the exercise of universal jurisdiction by the United States is ultimately determined by Congress, not international law or the federal courts. Nevertheless, the international law of prescriptive jurisdiction may properly have some role in the *interpretation* of Congress's enactments. This role is likely to be modest, however, and is always subject to congressional override.

I examine in Part II the relationship between the universal jurisdiction concept and the U.S. Constitution. As I explain, under current doctrine, the U.S. Constitution does not impose any significant restraint on the exercise of universal jurisdiction. Contrary to some academic commentary, however, I conclude that the most promising areas for constitutional limitation of universal jurisdiction appear to be structural rather than due process-oriented.

In Part III, I consider the relationship between the universal jurisdiction concept and U.S. civil litigation. I argue here that judicial and congressional reliance on the universal jurisdiction concept is legally more problematic in the civil rather than criminal context. This civil versus criminal distinction, while counter-intuitive at first glance, is supported by a number of conceptual and practical considerations.<sup>13</sup>

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attacks in Israel. See Philip Jacobson, *Israeli Terror Victims Sue Arafat under Belgian War Crime Law*, Sunday Telegraph 28 (Sept 23, 2001).

<sup>13</sup> I do not explore in this Article the potential limitations on *state* efforts to exercise universal jurisdiction, other than to note that states presumably would be subject to Fourteenth Amendment due process limits and, perhaps more importantly, potential federal preemption pursuant to treaty or statute. For recent decisions applying these limitations, see, for example, *Gerling Global Reinsurance Corp v Gallagher*, 267 F3d 1228 (11th Cir 2001) (holding that Florida could not constitutionally compel production of information regarding non-payment of amounts owed under Holocaust-era insurance policies by Ger-

## I. UNIVERSAL JURISDICTION AND CONGRESSIONAL POWER

In this Part, I consider the relationship between the universal jurisdiction theory and Congress's power. I begin by describing some examples in which Congress has exercised universal jurisdiction or something close to it. I then explain why, given well-settled doctrines governing the relationship between international law and U.S. law, Congress, rather than international law or the federal courts, has ultimate control over the exercise of universal jurisdiction by the United States. Finally, I consider the role of international law in the interpretation of congressional enactments.

### A. Congress's Reliance on Universal Jurisdiction

There are a number of federal criminal statutes that rely, at least in part, on the universal jurisdiction concept. As one might expect, there is a federal piracy statute, which states simply that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."<sup>14</sup> One could argue that this statute does not rely on universal jurisdiction in its fullest sense, since it does not extend U.S. regulatory authority to conduct in the physical territory of another nation. In any event, there are no recent reported cases applying that statute (although piracy continues to be a problem in some parts of the world).

Of more contemporary relevance are a number of terrorism- and human rights-related statutes that invoke a form of universal jurisdiction. These statutes criminalize certain acts, such as hostage-taking, aircraft hijacking, and aircraft sabotage, committed outside the United States by citizens of other countries, as long as the offender is "found" within the United States.<sup>15</sup> There

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man insurers having no contact with the state); *In re World War II Era Japanese Forced Labor Litigation*, 114 F Supp 2d 939, 945 (N D Cal 2000) (concluding that claims under California slave labor statute were preempted by peace treaty).

<sup>14</sup> Piracy and Privateering Act, 18 USC § 1651 (1994).

<sup>15</sup> See Hostage Taking Act, 18 USC § 1203(b)(1)(B) (1994); Antihijacking Act, 49 USC § 46502(b) (1994), superseding 49 USC Appendix § 1472(n); Destruction of Aircraft Act, 18 USC § 32(b)(3) (1994). Some defendants have argued that the "found" requirement is not met if they are brought to the United States by force. To date, courts have rejected this argument, holding that the requirement is met as long as the defendant is physically in the United States when prosecuted. See, for example, *United States v Rezaq*, 134 F3d 1121, 1132 (DC Cir 1998); *United States v Yunis*, 924 F2d 1086, 1090 (DC Cir 1991). It is also well settled that due process does not require dismissal of a prosecution when a de-

is also a statute, enacted in 1994, that criminalizes acts of official torture committed in foreign nations by foreign citizens, although there are not yet any reported decisions applying that statute.<sup>16</sup> Perhaps surprisingly, the federal genocide statute does *not* assert universal jurisdiction; rather, the offense must occur in the United States or the offender must be a U.S. national.<sup>17</sup> Nor does the federal war-crimes statute, enacted in 1996, assert universal jurisdiction. Rather, it requires that the person committing the war crime or the victim of the war crime be a member of the U.S. armed forces or a U.S. national.<sup>18</sup>

In considering Congress's reliance on universal jurisdiction, another relevant statute is the Maritime Drug Law Enforcement Act,<sup>19</sup> which comes close to asserting universal jurisdiction and which has generated a number of decisions addressing Congress's authority to regulate extraterritoriality. The Act makes it "unlawful for any person . . . on board a vessel subject to the ju-

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defendant's custody is obtained through a forcible abduction. See *Frisbie v Collins*, 342 US 519, 522 (1952); *Ker v Illinois*, 119 US 436, 444 (1886). But see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 Am J Intl L 880, 889 (1989) (arguing that this violates due process).

<sup>16</sup> See 18 USC § 2340A (1994). On the civil side, there is the Torture Victim Protection Act, 28 USC § 1350 note (1994), which also asserts a form of universal jurisdiction and which has been applied in a number of cases. See Part III. While not asserting universal jurisdiction, a recent amendment to the Foreign Sovereign Immunities Act, 28 USC § 1605(a)(7) (1994 & Supp 2000), allows U.S. nationals to bring civil claims against "state sponsors of terrorism" for foreign acts of torture, extrajudicial killing, and terrorism.

<sup>17</sup> See Genocide Convention Implementation Act, 18 USC § 1091(d) (1994). This statute is an implementation of U.S. obligations under the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948, 78 UN Treaty Ser 277, TIAS No 1021 (1951). Unlike certain other human rights- and terrorism-related treaties, the Genocide Convention does not contain a "prosecute or extradite" provision authorizing universal jurisdiction. Instead, it provides that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." *Id.* at Art 6. Nevertheless, many commentators have expressed the view that *customary international law* allows nations to exercise universal jurisdiction over genocide. See, for example, Restatement (Third) of Foreign Relations Law § 404 (1987); Blakesley, *Extraterritorial Jurisdiction* at 77 n 241 (cited in note 1); Randall, 66 Tex L Rev at 835-37 (cited in note 1).

<sup>18</sup> See 18 USC § 2441(b) (Supp 1996). In reporting on the bill that became this statute, the House Committee on the Judiciary rejected suggestions by the Departments of State and Defense to assert universal jurisdiction over war crimes. The Committee reasoned that the assertion of universal jurisdiction "could draw the United States into conflicts in which this country has no place and where our national interests are slight" and would pose "daunting" problems with respect to obtaining the necessary witnesses and evidence. The Committee also reasoned that there were alternate means of punishing war criminals, including prosecutions by the nations involved in the conflict or by an international tribunal. See Report from the Committee on the Judiciary on the War Crimes Act of 1996, HR Rep No 104-698, 104th Cong, 2d Sess at 8 (1996).

<sup>19</sup> 46 USC Appendix § 1903(a) (1994).

isdiction of the United States . . . to possess with intent to manufacture or distribute, a controlled substance.”<sup>20</sup> The Act includes in its definition of a “vessel subject to the jurisdiction of the United States” both “a vessel without nationality” and “a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States.”<sup>21</sup> There is no express requirement in these situations of a nexus with the United States, and most courts have declined to read such a requirement into the statute.<sup>22</sup>

## B. Congress’s Control over Universal Jurisdiction

It is not clear that all of the above exercises of jurisdiction by Congress are consistent with international law. For example, the degree to which universal jurisdiction applies to acts of terrorism is still contested and uncertain. Conversely, international law may in some instances authorize *more* jurisdiction than is currently reflected in federal statutes—with respect to genocide, for example. Ultimately, however, the exercise of prescriptive jurisdiction by the United States is determined by Congress, not international law or the federal courts. This is so for several reasons.

First, since the early 1800s, it has been settled in the United States that there is no federal common law of crimes.<sup>23</sup> Rather,

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<sup>20</sup> *Id.*

<sup>21</sup> 46 USC Appendix § 1903(c)(1)(A) and (C) (1994).

<sup>22</sup> Courts have not required a nexus with the United States when the vessel is stateless. See, for example, *United States v Caicedo*, 47 F3d 370, 371 (9th Cir 1995); *United States v Victoria*, 876 F2d 1009, 1010–11 (1st Cir 1989); *United States v Alvarez-Mena*, 765 F2d 1259, 1265 (5th Cir 1985); *United States v Pinto-Mejia*, 720 F2d 248, 261 (2d Cir 1983), modified, 728 F2d 142 (2d Cir 1984); *United States v Marino-Garcia*, 679 F2d 1373, 1383 (11th Cir 1982); *United States v Howard-Arias*, 679 F2d 363, 371–72 (4th Cir 1982). Similarly, most courts have not imposed a nexus requirement when the vessel is registered with a foreign nation and that nation consents to the application of U.S. law. See, for example, *United States v Cardales*, 168 F3d 548, 553 (1st Cir 1999); *United States v Martinez-Hidalgo*, 993 F2d 1052, 1056 (3d Cir 1993). The Ninth Circuit, however, has imposed a nexus requirement in this situation. See *United States v Klimavicius-Viloria*, 144 F3d 1249, 1257 (9th Cir 1998); *United States v Davis*, 905 F2d 245, 248–49 (9th Cir 1990).

<sup>23</sup> See *United States v Coolidge*, 14 US (1 Wheat) 415 (1816) (affirming, in a brief opinion, the holding of *United States v Hudson & Goodwin*); *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32 (1812) (holding that federal courts cannot “exercise a common law jurisdiction in criminal cases”). See also, for example, *United States v Liparota*, 471 US 419, 423 (1985) (noting that “federal crimes . . . are solely creatures of statutes”). Of course, the details of federal statutory crimes are often filled in by courts. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345. For a discussion of the historical events preceding the Supreme Court’s repudiation of a federal common law of crimes, see Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson &*

federal criminal liability can be created in the United States only by a domestic enactment. As a result, even if customary international law has the status in the United States of federal common law—a proposition I have disputed in other writings<sup>24</sup>—neither the customary international law of universal jurisdiction nor the customary international law (if any) prohibiting the specific conduct in question could by itself create criminal liability under U.S. law.<sup>25</sup> Nor, as a matter of public policy, will U.S. courts apply *foreign* criminal law.<sup>26</sup>

Second, courts and scholars have long assumed that, for separation-of-powers and accountability reasons, treaties may not create domestic criminal liability.<sup>27</sup> Thus, even when a treaty calls for the criminalization of conduct or for the exercise of jurisdiction over offenders, the treaty does not by itself create criminal liability under U.S. law. The treaty provisions, in other words, are “non-self-executing” and take effect domestically only when Congress implements them.<sup>28</sup> As a result, a treaty granting uni-

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Goodwin, *The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 Yale L J 919 (1992).

<sup>24</sup> For debate over the status of customary international law in U.S. courts, compare Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997), and Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260 (1998), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv L Rev 1824 (1998), and Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371 (1997).

<sup>25</sup> But see Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv L Rev 1217, 1253–54, 1266 (1992) (suggesting, without explanation, that when U.S. courts are exercising universal criminal jurisdiction, there is no prescriptive jurisdiction issue because the courts are simply applying international law).

<sup>26</sup> See, for example, Restatement (Second) of Conflict of Laws § 89 (1971); *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 448 (1964) (“Our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign.”).

<sup>27</sup> See Restatement (Third) of Foreign Relations Law § 111 comment (i) and reporters’ note 6 (1987); Louis Henkin, *Foreign Affairs and the United States Constitution* 203 (Oxford 2d ed 1996); Quincy Wright, *The Control of American Foreign Relations* 356 (MacMillan 1922); *Hopson v Kreps*, 622 F2d 1375, 1380 (9th Cir 1980); *United States v Postal*, 589 F2d 862, 877 (5th Cir 1979); *The Over the Top*, 5 F2d 838, 845 (D Conn 1925). But see Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 Am J Intl L 444, 449–50 (1926) (questioning the proposition that treaties defining crimes cannot be considered self-executing by citing historical examples of treaties dealing with forfeitures of slaves and liquor that were assumed to be self-executing).

<sup>28</sup> For a recent debate concerning the circumstances under which treaties should be considered non-self-executing, compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum L Rev 1955 (1999), and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural De-*

versal jurisdiction to prosecute certain crimes does not by itself allow such prosecutions in the United States.

Finally, U.S. law has long allowed federal statutes to supersede earlier inconsistent international law. The Supreme Court has held that when there is a conflict between a federal statute and a treaty, the later in time prevails as a matter of U.S. law.<sup>29</sup> And the lower courts uniformly have held that when there is a conflict between a federal statute and customary international law, the statute prevails, apparently without regard to timing.<sup>30</sup> As a result, Congress is free to override the limitations of international law, including the international law of prescriptive jurisdiction, when enacting a criminal statute. Congress, not international law or the federal courts, ultimately controls the exercise of universal criminal jurisdiction in the United States.

### C. Interpretive Role of International Law

Despite Congress's control over U.S. exercises of universal jurisdiction, the international law of universal jurisdiction may be relevant to the *interpretation* of federal criminal statutes. Under the *Charming Betsy* canon of construction, courts attempt to construe federal statutes, where reasonably possible, so that they do not violate international law.<sup>31</sup> For a variety of reasons, including a desire to avoid conflicts with international law, courts also generally presume that federal statutes do not apply extraterritorially.<sup>32</sup>

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*fense of Non-Self-Execution*, 99 Colum L Rev 2218 (1999), with Martin S. Flaherty, *History Right? (Historical Scholarship), Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum L Rev 2095 (1999), and Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum L Rev 2154 (1999).

<sup>29</sup> See, for example, *Breard v Greene*, 523 US 371, 376 (1998); *The Chinese Exclusion Case*, 130 US 581, 600 (1889); *Whitney v Robertson*, 124 US 190, 194 (1888); *Head Money Cases*, 112 US 580, 597–99 (1884).

<sup>30</sup> See, for example, *Barrera-Echavarria v Rison*, 44 F3d 1441, 1451 (9th Cir 1995); *Gisbert v Attorney General*, 988 F2d 1437, 1447–48 (5th Cir 1993); *Garcia-Mir v Meese*, 788 F2d 1446, 1453 (11th Cir 1986).

<sup>31</sup> In *Murray v The Schooner Charming Betsy*, the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 US (2 Cranch) 64, 118 (1804). For general discussions of this canon, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Georgetown L J 479 (1998), and Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand L Rev 1103 (1990).

<sup>32</sup> See *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991). For general discussions of this presumption, see Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L & Pol in Intl Bus 1 (1992); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va J Intl L 505, 510–19, 545–61 (1997); William S.

These interpretive principles were applied recently in the *United States v Bin Laden*<sup>33</sup> embassy bombing case in New York. The defendants in that case challenged the extraterritorial application of numerous criminal statutes. In evaluating their challenge, the district court considered both the *Charming Betsy* canon and the presumption against extraterritoriality and ultimately dismissed several charges on the ground that Congress did not intend to apply the statutes in question extraterritorially.<sup>34</sup> In particular, the court concluded that federal statutes authorizing criminal jurisdiction over acts committed within “the special maritime and territorial jurisdiction of the United States” did not authorize the United States to exercise concurrent criminal jurisdiction over U.S. embassy premises in other countries, in part because the court believed such jurisdiction would violate both international law and the presumption against extraterritoriality.<sup>35</sup>

The influence of these interpretive rules should not be overstated. The *Charming Betsy* canon does not apply when the reach of a statute is clear.<sup>36</sup> As one court explained in rejecting a prescriptive jurisdiction challenge to a broad anti-terrorism statute, “[o]ur 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.”<sup>37</sup> Nor does the *Charming Betsy* canon require the *harmonization* of U.S. law and international law; it requires simply the avoidance of conflict. As a result, it is not a mandate for *extending* a statute to the fullest reaches allowed by the international law of universal jurisdiction.<sup>38</sup> In addition,

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Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J Intl L 85 (1998); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 S Ct Rev 179.

<sup>33</sup> See *United States v Bin Laden*, 92 F Supp 2d 189 (S D NY 2000).

<sup>34</sup> See *id* at 204–16.

<sup>35</sup> In reaching this conclusion, the court disagreed with the Fourth Circuit’s contrary decision in *United States v Erdos*, 474 F2d 157 (4th Cir 1973). In *Erdos*, the court held that 18 USC § 7(3) (1994), which defines the “special maritime and territorial jurisdiction of the United States,” covers U.S. embassies located in other countries. *Id* at 159. For a circuit conflict over whether 18 USC § 7(3) extends to territory outside the United States, compare *United States v Corey*, 232 F3d 1166 (9th Cir 2000) (concluding that it does), with *United States v Gatlin*, 216 F3d 207 (2d Cir 2000) (concluding that it does not).

<sup>36</sup> See, for example, *United States v Yunis*, 924 F2d 1086, 1091 (DC Cir 1991); *Garcia-Mir v Meese*, 788 F2d 1446, 1453 (11th Cir 1986).

<sup>37</sup> *Yunis*, 924 F2d at 1091.

<sup>38</sup> See Bradley, 86 Georgetown L J at 497–504 (cited in note 31) (explaining and documenting this point). For an unsuccessful effort to invoke the *Charming Betsy* canon in this way, see *Princz v Federal Republic of Germany*, 26 F3d 1166, 1183 (DC Cir 1994) (Wald dissenting). In *Princz*, Judge Wald argued in dissent that the Foreign Sovereign

courts are likely to give deference to the views of the executive branch regarding the content of international law.<sup>39</sup>

As for the presumption against extraterritoriality, its effect is limited because it is not applied to all federal statutes. The Supreme Court has not applied it, for example, in the area of anti-trust law.<sup>40</sup> More importantly, the Court suggested, in *United States v Bowman*,<sup>41</sup> that the presumption against extraterritoriality does not apply to criminal statutes that are, by their nature, focused on extraterritorial matters.<sup>42</sup> As the Court explained, some criminal statutes “are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.”<sup>43</sup> Exercises of universal criminal jurisdiction may be especially likely to fall within this exception. Indeed, the district court in *Bin Laden* relied on this exception as a basis for upholding many of the charges.<sup>44</sup> In any event, the presumption against extraterritoriality, like the *Charming Betsy* canon, can be overcome by clear legislative intent.<sup>45</sup>

In sum, the exercise of universal jurisdiction by the United States is ultimately determined by Congress, not international law or the federal courts. While international law may play some role in the interpretation of congressional enactments, its influence is likely to be modest in this area, and, in any event, it cannot be used to override clear legislative intent.

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Immunities Act should be construed to have an exception for “peremptory norms” of international law. She relied in part on the universal jurisdiction concept. See *id.* at 1181. For additional decisions rejecting that argument, see *Sampson v Federal Republic of Germany*, 250 F3d 1145 (7th Cir 2001); *Smith v Socialist People’s Libyan Arab Jamahiriya*, 101 F3d 239, 244–45 (2d Cir 1996); *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 718–19 (9th Cir 1992).

<sup>39</sup> See Restatement (Third) of Foreign Relations Law § 112 comment c (1987); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649, 701–15 (2000).

<sup>40</sup> See, for example, *Hartford Fire Insurance Co v California*, 509 US 764 (1993). For a decision refusing to apply the presumption in a criminal antitrust case, see *United States v Nippon Paper Industries Co*, 109 F3d 1 (1st Cir 1997).

<sup>41</sup> 260 US 94 (1922).

<sup>42</sup> *Id.* at 98. For lower court decisions applying this exception, see, for example, *United States v Plummer*, 221 F3d 1298 (11th Cir 2000) (attempted cigar smuggling); *United States v Harvey*, 2 F3d 1318 (3d Cir 1993) (sexual exploitation of children); *United States v Larsen*, 952 F2d 1099 (9th Cir 1991) (drug possession and attempted distribution). For a decision construing the *Bowman* exception narrowly to apply only to crimes against the U.S. government, see *United States v Gatlin*, 216 F3d 207 (2d Cir 2000).

<sup>43</sup> 260 US at 98.

<sup>44</sup> See *Bin Laden*, 92 F Supp 2d at 193–94.

<sup>45</sup> See, for example, *Kollias v D & G Marine Maintenance*, 29 F3d 67, 70–75 (2d Cir 1994); *Bin Laden*, 92 F Supp 2d at 193.

## II. UNIVERSAL JURISDICTION AND THE CONSTITUTION

When Congress attempts to enact universal criminal liability, it is subject to potential constitutional restraints. In particular, Congress must act within its delegated constitutional powers and not infringe on constitutionally protected rights. Under current doctrine, neither of these two constitutional limitations is likely to impose significant restraint on Congress's exercise of universal jurisdiction. Contrary to the views of some commentators, however, the delegated powers limitations show somewhat more promise than individual rights limitations for cabinining the exercise of universal jurisdiction.

## A. Delegated Power Limitations

I begin with the proposition that Congress has only the powers delegated to it by the U.S. Constitution. This is true, I will assume, even when foreign affairs matters are concerned. Although the Supreme Court has suggested at times that the national government may have extraconstitutional powers in foreign affairs, its suggestions have been widely criticized and, in any event, have been directed primarily at the executive branch rather than Congress.<sup>46</sup> When speaking of Congress, the Court has stated:

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the

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<sup>46</sup> For example, although the Court in *Curtiss-Wright* said that the "investment of the federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," it also said that "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 US 304, 318, 319 (1936) (emphasis added). The "external sovereignty" analysis in *Curtiss-Wright* has been heavily criticized, on historical and other grounds. See, for example, Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *Yale J Intl L* 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L J* 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *Yale L J* 1 (1973); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 *Wm & Mary L Rev* 379 (2000). The district court in *Bin Laden* nevertheless invoked this theory as partial support for Congress's exercise of broad jurisdiction over acts of terrorism. See *Bin Laden*, 92 *F Supp 2d* at 221. The court's reliance on this theory was dicta, however, since the court found all of the exercises of jurisdiction before it to be within Congress's delegated powers.

Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.<sup>47</sup>

More recently, the Supreme Court has repeatedly emphasized that the national government has only “limited and enumerated powers,” and it has given no indication that foreign affairs activities are exempt from this proposition.<sup>48</sup>

Congress’s delegated powers may be sufficient, however, to support its exercises of universal jurisdiction. Perhaps most importantly, Congress has the power to “define and punish . . . Offences against the Law of Nations.”<sup>49</sup> The Supreme Court has indicated that this clause gives Congress broad authority to regulate criminal activity that violates international law.<sup>50</sup> While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to “define.”<sup>51</sup> Although the founders may not have envisioned that this power would be used to regulate conduct on foreign soil, I am not aware of any evidence showing that they meant to disallow such power if and when international law evolved to allow for its exercise.<sup>52</sup>

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<sup>47</sup> *Perez v Brownell*, 356 US 44, 58 (1958); see also *Ex Parte Quirin*, 317 US 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”).

<sup>48</sup> See, for example, *United States v Morrison*, 529 US 598, 669 (2000); *Alden v Maine*, 527 US 706, 713 (1999); *City of Boerne v Flores*, 521 US 507, 516 (1997); *United States v Lopez*, 514 US 549, 566 (1995).

<sup>49</sup> US Const Art I, § 8, cl 10.

<sup>50</sup> See, for example, *In re Yamashita*, 327 US 1, 7 (1946); *Ex Parte Quirin*, 317 US at 26; *United States v Arjona*, 120 US 479, 484–88 (1887).

<sup>51</sup> During the Federal Constitutional Convention, James Wilson objected to adding the word “define” in this clause, contending that for the United States to “pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us look ridiculous.” 2 Max Farrand, ed, *The Records of the Federal Convention* 615 (Yale 1911). Gouverneur Morris responded that a power to define was necessary because the law of nations was “often too vague and deficient to be a rule.” *Id.* See also *Bin Laden*, 92 F Supp 2d at 220 (“[P]rovided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to define and punish offenses against the law of nations.”). Despite its power to “define,” Congress presumably does not have unlimited power to declare something a violation of the law of nations. See, for example, *United States v Furlong*, 18 US (5 Wheat) 184, 198 (1820) (suggesting that Congress could not validly exercise universal jurisdiction over murder on the high seas by labeling it piracy).

<sup>52</sup> The Supreme Court has approved Congress’s use of the Define and Punish power to prosecute war crimes. See *Ex Parte Quirin*, 317 US at 45–49; *In re Yamashita*, 327 US at 7. It is possible that, when adopting the Define and Punish Clause, the Framers had in mind offenses against the law of nations that could implicate the international responsi-

Of course, Congress also has the power to regulate commerce with foreign nations.<sup>53</sup> The precise limits of that power are unclear, but presumably it allows Congress at least the power to regulate foreign conduct that has substantial effects or intended effects on U.S. commerce. The Supreme Court has held that the *domestic* commerce power allows Congress the ability to regulate interstate commerce itself as well as intrastate activities having a substantial effect on interstate commerce,<sup>54</sup> and it has suggested that the scope of the Foreign Commerce Clause may be even broader.<sup>55</sup> To be sure, if the regulated activity has effects or intended effects in the United States, Congress may not need to rely on the universal jurisdiction theory to regulate it—the territorial category of prescriptive jurisdiction may be sufficient. Nevertheless, whether necessary or not, at least some invocations of the universal jurisdiction concept by Congress are likely to involve situations in which there are effects on foreign commerce—for example, the disruption of shipping lanes or air traffic due to piracy.<sup>56</sup>

Even if there are some instances in which Article I of the Constitution would not supply Congress with authority to enact a statute exercising universal jurisdiction, Congress may have the authority to do so by virtue of existing treaty commitments. Most of the universal jurisdiction statutes described above are implementations of treaties, which require nations to “prosecute or ex-

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bility of the United States, such as an assault on an ambassador in this country. See, for example, *Respublica v De Longchamps*, 1 US (1 Dall) 111 (1784) (allowing prosecution in Pennsylvania, under the law of nations, of an attack by a French nobleman on a French ambassador). The text of the Define and Punish Clause, however, does not contain such a “U.S. responsibility” limitation, and the war crimes decisions implicitly reject such a limitation.

<sup>53</sup> See US Const Art I, § 8, cl 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations.”).

<sup>54</sup> See, for example, *Reno v Condon*, 528 US 141 (2000); *United States v Lopez*, 514 US 549, 558–59 (1995).

<sup>55</sup> See *Japan Line, Ltd v Los Angeles*, 441 US 434, 448 (1979). See also Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law* § 4.2 (West 3d ed 1999) (arguing for a broad construction of the foreign commerce power).

<sup>56</sup> See generally Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 Law & Contemp Probs 11, 37 (1987) (concluding that the foreign commerce power will generally be broad enough to support the extraterritorial application of U.S. law). Courts may require, however, that the disruption of foreign commerce have some connection to the United States in order to fall within Congress’s foreign commerce power. See, for example, *Yunis*, 681 F Supp at 907 n 24 (reasoning that Congress “is not empowered to regulate foreign commerce which has no connection with the United States”).

tradite" offenders found in their territory.<sup>57</sup> Congress presumably has flexibility under the Necessary and Proper Clause to determine how these treaty commitments should be enforced.<sup>58</sup> And, under *Missouri v Holland*,<sup>59</sup> Congress may not be subject to the limitations of its Article I powers when implementing treaty commitments.<sup>60</sup> Although I have questioned whether the *Holland* rule still makes sense in light of changes in international law, the growth of Congress's domestic lawmaking powers, and the Supreme Court's recent federalism jurisprudence, the decision remains good law for now.<sup>61</sup> In addition, while the treaties by themselves may not give Congress the power to exercise universal jurisdiction over citizens of non-party countries, the treaties are likely to add support for such exercises of jurisdiction—for example, by bolstering the claim that such jurisdiction is supported by the "law of nations."

Given these various powers, Congress is not, under current doctrine, likely to face substantial delegated power limitations when exercising universal criminal jurisdiction. That said, arguments regarding limits on federal power may be the most promising challenge to universal jurisdiction. As noted above, the scope of the Define and Punish Clause is unclear, the Foreign Commerce Clause is not limitless, the continuing validity of *Missouri v Holland* is at least open to debate, and the jurisdictional authority granted by treaties may not extend to conduct by citizens of non-party countries. Indeed, contrary to the views of some

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<sup>57</sup> See, for example, Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 UST 565, 570, TIAS No 7570 (1973); Hague Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 UST 564, TIAS No 7570 (1973); Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 20 UST 2941, 2944 TIAS No 6768 (1963); International Convention for the Taking of Hostages, 34 UN GAOR Supp (No 39) at 23, UN Doc A/34/39, TIAS No 11081, 6 (1979).

<sup>58</sup> See US Const Art I, § 8, cl 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

<sup>59</sup> 252 US 416 (1920). In *Holland*, the Court held that Congress had the authority to enact legislation implementing a migratory birds protection treaty, even though the legislation may have exceeded the scope of Congress's Article I powers. *Id.* at 431, 435.

<sup>60</sup> See, for example, *United States v Lue*, 134 F3d 79 (2d Cir 1997); *United States v Georgescu*, 723 F Supp 912, 918 (E D NY 1989).

<sup>61</sup> For a debate over whether the holding of *Missouri v Holland* should be reconsidered, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390 (1998), Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich L Rev 98 (2000), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich L Rev 1075 (2000).

commentators, these congressional power arguments may in fact be stronger than individual rights-oriented arguments.

## B. Individual Rights Limitations

Another potential limitation on Congress's exercise of universal jurisdiction is the Bill of Rights. Even congressional implementations of treaty commitments are subject to the individual rights provisions of the Bill of Rights.<sup>62</sup> The most likely candidate for a restraint on universal jurisdiction is the Due Process Clause of the Fifth Amendment. Some commentators—most notably Professor Lea Brilmayer and Mr. Charles Norchi—have argued that there are in fact due process limits on the extraterritorial application of federal law.<sup>63</sup>

At first glance, the possibility of a due process limitation on the extraterritorial application of federal law seems promising. After all, the Supreme Court has held that the extraterritorial application of law by U.S. states is subject to Fourteenth Amendment due process limits, and that such application therefore cannot be “arbitrary” or “fundamentally unfair.”<sup>64</sup> In addition, it is well settled that foreign defendants are entitled to due process protection with respect to exercises of personal jurisdiction by U.S. courts.<sup>65</sup> Nevertheless, there is substantial uncertainty regarding whether the Fifth Amendment limits federal extraterritoriality.

As an initial matter, it may be logically awkward for a defendant to rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law. In addition, the Supreme Court has held, in *United States v Verdugo-Urquidez*,<sup>66</sup> that the

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<sup>62</sup> See *Boos v Barry*, 485 US 312, 324 (1988); *Reid v Covert*, 354 US 1, 16–19 (1957) (plurality).

<sup>63</sup> For debate over this issue, compare Brilmayer and Norchi, 105 Harv L Rev 1217 (cited in note 25), with A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 Colum J Transnatl L 379 (1997), and Paul B. Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 Conn L Rev 831 (1987).

<sup>64</sup> See, for example, *Phillips Petroleum Co v Shutts*, 472 US 797, 822–23 (1985); *Allstate Insurance Co v Hague*, 449 US 302, 310–11 (1981) (plurality).

<sup>65</sup> See, for example, *Asahi Metal Industry v Superior Court*, 480 US 102, 113 (1987); *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408, 413–15 (1984). Both of those cases involved state long-arm statutes. Lower courts have held that there are due process limits on the exercise of personal jurisdiction over foreign defendants in cases involving federal long-arm statutes. See Gary B. Born, *International Civil Litigation in United States Courts* 178–82 (Kluwer 3d ed 1996).

<sup>66</sup> 494 US 259 (1990).

Fourth Amendment does not apply to searches and seizures conducted against non-U.S. citizens abroad,<sup>67</sup> and, arguably, the Fifth Amendment Due Process Clause is similarly inapplicable to the extraterritorial regulation of non-U.S. citizens (even though it does apply, for example, to the exercise of personal jurisdiction over them within the United States).<sup>68</sup> Resolving this question would require examining potential differences between the Fourth and Fifth Amendments and perhaps also answering the metaphysical question of where the purported violation of due process occurs when a federal law is applied to foreign conduct. While the Ninth Circuit has held, in the context of the Maritime Drug Law Enforcement Act, that the Fifth Amendment Due Process Clause does apply to extraterritorial applications of federal law,<sup>69</sup> a number of courts have either distinguished or disagreed with its decision.<sup>70</sup> Moreover, the Supreme Court held some years ago that the Fifth Amendment did not apply to the trial abroad by U.S. authorities of enemy aliens.<sup>71</sup>

Perhaps more importantly, even if the Fifth Amendment Due Process Clause does apply in this situation, compliance with international law standards for universal jurisdiction may satisfy due process requirements. In both its international personal jurisdiction decisions and its state law extraterritoriality decisions, the Supreme Court has emphasized fairness to the defendant, including sufficient notice, the regulatory interests of the forum, and interjurisdictional comity. Thus, for example, the Court has required that the exercise of jurisdiction comport with notions of "fair play and substantial justice,"<sup>72</sup> that the defendant should "reasonably anticipate being haled" into the forum,<sup>73</sup> and that the

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<sup>67</sup> *Id.* at 274–75.

<sup>68</sup> By contrast, the district court in the *Bin Laden* case concluded that Fifth Amendment protections relating to self-incrimination apply to the use, in a U.S. court, of statements obtained in a foreign custodial interrogation by U.S. government agents. The court reasoned that the application of the Fifth Amendment in this situation is not extraterritorial, since any violation of the Fifth Amendment protections occurs not when the statements are obtained, but rather when the statements are used at trial. See *Bin Laden*, 132 F Supp 2d at 186–87.

<sup>69</sup> See *United States v Davis*, 905 F2d 245, 248–49 (9th Cir 1990).

<sup>70</sup> See, for example, *United States v Cardales*, 168 F3d 548 (1st Cir 1999) (distinguishing *Davis*); *United States v Martinez-Hidalgo*, 993 F2d 1052 (3d Cir 1993) (disagreeing with *Davis*).

<sup>71</sup> See *Johnson v Eisentrager*, 339 US 763 (1950). See also *United States v Balsys*, 535 US 666 (1998) (holding that the privilege against self-incrimination in the Fifth Amendment is not triggered by the risk of a foreign prosecution).

<sup>72</sup> *International Shoe Co v Washington*, 326 US 310, 316 (1945), quoting *Milliken v Meyer*, 311 US 457, 463 (1940).

<sup>73</sup> *World-Wide Volkswagen v Woodson*, 444 US 286, 297 (1980).

application of forum law be “neither arbitrary nor fundamentally unfair.”<sup>74</sup>

These considerations are arguably satisfied when a defendant has engaged in conduct subject to universal jurisdiction: individuals are presumed to be on notice that if they commit a universal crime, they are subject to prosecution wherever they are found; all nations are understood as having an interest in prosecuting international crimes; and the exercise of universal jurisdiction is not viewed as infringing on the sovereign prerogatives of other nations.<sup>75</sup> Obviously, these points depend on acceptance of the universal jurisdiction theory as a proper international law basis for jurisdiction. To date, however, all courts—as well as Congress—have accepted the theory.

The prosecution of drug offenders under the Maritime Drug Law Enforcement Act provides a useful analogy. A number of courts have held that, notwithstanding the Due Process Clause, no nexus with the United States is required when the defendant is found on a stateless vessel.<sup>76</sup> In this situation, courts have reasoned, the defendant is an “international pariah.”<sup>77</sup> Similarly, individuals engaging in crimes subject to universal jurisdiction are viewed as having made themselves “enemies of all mankind.” In neither context are courts likely to conclude that the requirements of due process disable the U.S. government from prosecuting individuals in a manner allowed by international treaties and custom.

There is at least one potential wrinkle in this analysis—the possibility that the United States will impose the death penalty. Many nations have abolished the death penalty, even for the most serious crimes.<sup>78</sup> Moreover, the statutes establishing the

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<sup>74</sup> *Allstate*, 449 US at 313.

<sup>75</sup> See, for example, *Flatow v The Islamic Republic of Iran*, 999 F Supp 1, 14 (D DC 1998) (“As international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States.”). See also *Demjanjuk v Petrovsky*, 776 F2d 571, 583 (6th Cir 1985) (“Demjanjuk had notice before he applied for residence or citizenship in the United States that this country, by participating in post-war trials of German and Japanese war criminals, recognized the universality principle.”).

<sup>76</sup> See text accompanying note 22.

<sup>77</sup> See *United States v Caicedo*, 47 F3d 370, 372 (9th Cir 1995); *United States v Pinto-Mejia*, 720 F2d 248, 261 (2d Cir 1983); *United States v Marino-Garcia*, 679 F2d 1373, 1382 (11th Cir 1982).

<sup>78</sup> See <<http://www.deathpenaltyinfo.org/dpicintl.html>> (visited Jan 28, 2001) [on file with U Chi Legal F]. According to the website for the Death Penalty Information Center, as of April 1, 2000, seventy-three countries had abolished the death penalty for all crimes, thirteen had abolished it for ordinary crimes, and twenty-two had stopped using the death penalty as a matter of practice.

international criminal tribunals for Yugoslavia and Rwanda and the treaty authorizing the creation of a permanent International Criminal Court do not provide for the death penalty.<sup>79</sup> Furthermore, it is increasingly claimed that the death penalty in general, or certain aspects of it, are contrary to international law.<sup>80</sup> On this and other grounds, some nations refuse to extradite suspects to the United States without an assurance that the suspects will not be subject to the death penalty.<sup>81</sup> A foreign defendant subjected in the United States to universal jurisdiction could argue that imposing the death penalty would exceed the United States's international regulatory authority and, because the scope of that authority may be relevant to the due process analysis, the U.S. Constitution as well. A foreign defendant might argue, for example, that although there is fair warning that all nations may prosecute crimes subject to universal jurisdiction, there is not fair warning that those who commit such crimes are subject to the death penalty.<sup>82</sup>

In sum, the Constitution is not likely to impose significant restraint, under current doctrine, on Congress's exercise of universal criminal jurisdiction. Courts will allow Congress broad authority to regulate extraterritorial conduct, and any due process limitations on such regulation are likely to be weak at best. Contrary to the views of some commentators, structural constitutional principles appear to offer greater potential than the Due Process Clause for limiting universal jurisdiction.

### III. UNIVERSAL JURISDICTION AND CIVIL CASES

Congress has relied on the universal jurisdiction concept in connection with at least one civil statute: the Torture Victim Pro-

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<sup>79</sup> See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Art 24(1), UN Doc S/25704 at 36, annex 1 (1993); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 101(A), UN Doc ITR/3/REV.1 (1995).

<sup>80</sup> See generally William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge 2d ed 1997) (discussing international law arguments against the death penalty).

<sup>81</sup> See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 634-43 (Oceana Publications 3d ed 1996).

<sup>82</sup> The district court in the *Bin Laden* case initially reserved judgment on precisely this issue. See *Bin Laden*, 92 F Supp 2d at 224-25. In a subsequent decision, the court rejected the international law challenge to the death penalty, reasoning that "the United States is not party to any treaty that prohibits capital punishment per se, and . . . capital punishment has not yet risen to the level of customary international law." *United States v Bin Laden*, 126 F Supp 2d 290, 294 (S D NY 2001).

tection Act, which was enacted in 1992.<sup>83</sup> This statute provides a cause of action for damages against any individual who, "under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to torture or extrajudicial killing.<sup>84</sup> Because this statute does not require a citizenship or territorial connection with the United States, it can be viewed as an exercise of universal jurisdiction, and the Senate report accompanying the bill expressly referred to the universal jurisdiction concept.<sup>85</sup>

In addition to the Torture Victim Protection Act, a number of courts have construed the Alien Tort Statute,<sup>86</sup> which was first enacted in 1789 as part of the First Judiciary Act, as creating a federal cause of action for torts that violate international law, no matter where committed.<sup>87</sup> Those courts implicitly construe the statute, which states that "[t]he 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," as establishing a form of universal jurisdiction.<sup>88</sup> Relying

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<sup>83</sup> Torture Victim Protection Act, 28 USC § 1350 (1994).

<sup>84</sup> *Id.* at note § 2(a) (1994).

<sup>85</sup> See Torture Victim Protection Act, S Rep No 102-249, 102d Cong, 1st Sess 5 (1991) (noting that "according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over 'offenses of universal interest'").

<sup>86</sup> 28 USC § 1350.

<sup>87</sup> See, for example, *Kadic v Karadzic*, 70 F3d 232, 236 (2d Cir 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F3d 1467, 1474-75 (9th Cir 1994); *Xuncax v Gramajo*, 886 F Supp 162, 179 (D Mass 1995). For criticism of that conclusion, see Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319, 357-63 (1997).

<sup>88</sup> One court has noted this expressly. See *Xuncax*, 886 F Supp at 182 n 25. Importantly, this was *not* how the seminal *Filartiga v Pena-Irala* decision construed the statute. 630 F2d 876 (2d Cir 1980). Although the court in *Filartiga* stated in passing that torturers were now like pirates and thus subject to universal jurisdiction, see *id.* at 890, the court assumed for the sake of argument that the Alien Tort Statute was purely jurisdictional and thus did not itself create a cause of action. See *id.* at 887. The court did not identify precisely what law did create the cause of action, but it appeared to believe that the law of nations did so. If this were correct, there would be no prescriptive jurisdiction question, since the court would not be applying U.S. law extraterritorially. See Daniel Bodansky, *Human Rights and Universal Jurisdiction*, in Mark Gibney, ed, *World Justice? U.S. Courts and International Human Rights* 1, 10 (Westview 1991). Similarly, if the cause of action were derived from foreign law (for example, Paraguayan law in *Filartiga*), no prescriptive jurisdiction issue would arise, since the law being applied would be the same as the law in the territory where the acts occurred.

A principal objection to both of these approaches stems from Article III of the Constitution. It is not clear that federal courts have Article III jurisdiction over suits between aliens for customary international law claims, and it is almost certain that they do not have Article III jurisdiction over suits between aliens for foreign law claims. See Bradley and Goldsmith, 110 Harv L Rev at 847-48 (cited in note 24). In addition, it is far from clear that international law creates a private cause of action for human rights abuses,

on this construction of the statute, courts have adjudicated claims concerning alleged human rights abuses in numerous foreign countries, including the Philippines, Guatemala, Ethiopia, and the former Yugoslavia. Recently, human rights claims were brought under the Alien Tort Statute against Li Peng, the Chinese prime minister at the time of the 1989 Tiananmen Square crackdown, and Robert Mugabe, president of Zimbabwe.<sup>89</sup>

As I explain below, these exercises of universal jurisdiction in civil cases are legally more problematic than the exercise of universal jurisdiction in criminal cases. While this distinction between the permissibility of civil and criminal jurisdiction may seem counterintuitive at first glance, I will suggest several justifications for it.

#### A. Why Universal Jurisdiction Is More Problematic in Civil Cases

As an initial matter, it is not clear that the international law theory of universal jurisdiction even applies to civil liability. The Restatement (Third) of Foreign Relations Law asserts that it does, but it cites no support for that proposition.<sup>90</sup> The Second Circuit made a similar statement in the famous *Filartiga* decision,<sup>91</sup> but it too failed to cite any authority, and the statement was dicta because the court assumed that the Alien Tort Statute was a purely jurisdictional statute that did *not* create a cause of action.<sup>92</sup> Furthermore, the treaty provisions that purportedly authorize universal jurisdiction do not refer to civil claims; rather, these treaty provisions require that nations either prosecute or extradite the offender—*aut dedere aut judicare*—an obligation

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such as those alleged in *Filartiga*. See *Tel-Oren v Libyan Arab Republic*, 726 F2d 774, 811 (DC Cir 1984) (Bork concurring). The private cause of action concern was a principal reason for Congress's enactment of the Torture Victim Protection Act. See Torture Victim Protection Act, HR Rep No 102-367, 102nd Cong, 1st Sess (1991), reprinted in 1992 USCCAN 84, 86.

<sup>89</sup> See Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown*, NY Times A6 (Sept 1, 2000); Bill Miller, *Mugabe Sued in New York Over Rights Abuses*, Wash Post A3 (Sept 9, 2000).

<sup>90</sup> See Restatement (Third) of Foreign Relations Law § 404, comment b (1987). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 113 (Routledge 7th rev ed 1997) (citing Restatement (Third) for this proposition).

<sup>91</sup> See *Filartiga v Pena-Irala*, 630 F2d 876, 890 (2d Cir 1980) (“[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”).

<sup>92</sup> See *Tel-Oren*, 726 F2d at 781 (Edwards concurring). Judge Edwards, in his concurrence in *Tel-Oren*, similarly asserted that the universal jurisdiction principle applies to civil cases, but he cited only the draft Restatement (Third).

that does not appear to encompass imposing civil liability.<sup>93</sup> And the 1935 Harvard Research Project, which provided an early summary of the five categories of prescriptive jurisdiction, addressed only jurisdiction with respect to crime.<sup>94</sup>

On the other hand, it is possible that the universal jurisdiction concept does not apply in civil actions because there are simply no prescriptive jurisdiction limits on creating civil liability. At least one commentator has asserted this proposition,<sup>95</sup> but most commentators have concluded otherwise.<sup>96</sup> Furthermore, the extraterritorial application of civil statutes, such as U.S. antitrust law and the Helms-Burton Act, has generated significant international controversy and protest. The participants in these controversies have generally assumed that the international law of prescriptive jurisdiction applies to civil liability; they have simply disagreed over whether that international law was violated.<sup>97</sup>

Ultimately, of course, the reach of the civil statutes, like the reach of the criminal statutes, is a matter of Congress's intent. In applying the interpretive rules in this context, however, courts may be more likely to find that the statute does not confer universal jurisdiction. There is no equivalent in civil cases of the *Bowman* exception to the presumption against extraterritoriality (concerning statutes that by their nature encompass extraterritorial conduct), presumably because civil liability concerns the

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<sup>93</sup> See generally M.C. Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty To Extradite or Prosecute in International Law* (Nijhoff 1995) (discussing the obligation only in terms of extradition or criminal prosecution, not civil liability).

<sup>94</sup> For a U.S. decision holding that the universal jurisdiction concept applies only to criminal liability, see *Amerada Hess Shipping Corp v Argentine Republic*, 638 F Supp 73, 77 (S D NY 1986), revd on other grounds, 830 F2d 421 (2d Cir 1987), revd, 488 US 428 (1989).

<sup>95</sup> See, for example, Michael Akehurst, *Jurisdiction in International Law*, 46 Brit YB Intl L 145, 177 (1972-73).

<sup>96</sup> See, for example, Ian Brownlie, *Principles of Public International Law* 302 (Oxford 5th ed 1998); Louis Henkin, *International Law: Politics and Values* 260 (Nijhoff 1995); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *Receuil des Cours* 1, 73 (1964).

<sup>97</sup> The Helms-Burton Act, among other things, created a cause of action against anyone in the world trafficking in the property of U.S. citizens confiscated by Cuba. Pub L No 104-114, 110 Stat 785, 790-91 (1996). For a description of some of the foreign protests against the Act, see Steven Lee Myers, *Clinton Troubleshooter Discovers Big Trouble from Allies on Cuba*, NY Times A1 (Oct 23, 1996). For discussion and debate regarding the legality of the Act under international law, see Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 Am J Intl L 434 (1996); William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 *Hastings Intl & Comp L Rev* 713 (1997); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 Am J Intl L 419 (1996); *International Symposium on the Cuban Liberty and Cuban Solidarity (Libertad) Act of 1996*, 30 *Geo Wash J Intl L & Econ* 201-347 (1996/1997).

rights of private victims rather than “the right of the government to defend itself.”<sup>98</sup> Moreover, although the presumption is not consistently applied, the Supreme Court already has relied on the presumption in a civil case involving a fairly egregious violation of the law of nations, notwithstanding the plaintiff’s reliance on the concept of universal jurisdiction.<sup>99</sup> And, if the international law of universal jurisdiction does not apply to civil cases, then the *Charming Betsy* canon and presumption against extraterritoriality could be employed to limit the exercise of jurisdiction in a way that might not occur in the criminal setting. Thus, for example, it might suggest implying some sort of a territorial connection requirement for the Alien Tort Statute.<sup>100</sup>

As for constitutional limits, it is far from clear that the Define and Punish Clause of the Constitution authorizes purely civil causes of action. Rather, Congress’s power to punish offenses may be limited to establishing criminal, or at least quasi-criminal, liability.<sup>101</sup> This possible limitation could pose a problem for the Torture Victim Protection Act, as well as the “cause of action” construction of the Alien Tort Statute, since it may be hard to justify those exercises of jurisdiction under other congressional powers. Nor is it clear that the relevant treaties, which under *Missouri v Holland* might give Congress broader authority than

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<sup>98</sup> *United States v Bowman*, 260 US 94, 98 (1922). See also *Kollias v D & G Marine Maintenance*, 29 F3d 67, 71 (2d Cir 1994).

<sup>99</sup> See *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428, 440–41 (1989).

<sup>100</sup> See Bradley and Goldsmith, 66 *Fordham L Rev* at 361–63 (cited in note 87) (arguing for application of presumption against extraterritoriality to the Alien Tort Statute).

<sup>101</sup> Most scholars who have studied the Define and Punish Clause have assumed that it applies only to criminal liability. See, for example, Charles D. Siegal, *Deference and Its Dangers: Congress’ Power to Define and Punish Offenses Against the Law of Nations*, 21 *Vand J Transnatl L* 865 (1988); Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 *Duke L J* 1305 (1999); Howard S. Fredman, Comment, *The Offenses Clause: Congress’ International Penal Power*, 8 *Colum J Transnatl L* 279 (1969). In a recent article, however, Professor Beth Stephens argues that the Define and Punish Clause authorizes the creation of civil causes of action. See Beth Stephens, *Federalism and Foreign Affairs: Congress’ Power to “Define and Punish . . . Offenses Against the Law of Nations”*, 42 *Wm & Mary L Rev* 447 (2000). As she notes, there are references to the Define and Punish power (along with other powers) in the legislative history of both the Foreign Sovereign Immunities Act and the Torture Victim Protection Act. *Id.* at 454. Two senators dissented from the report of the Senate Judiciary Committee on the Torture Victim Protection Act, however, in part because of a concern that the Act may have exceeded Congress’s legislative authority under the Define and Punish Clause. See S Rep No 102-249 at 13–14 (cited in note 85) (minority views of Senators Simpson and Grassley). This constitutional concern also was expressed by the Justice Department during the hearings on the bill that became the Torture Victim Protection Act. See Hearing Before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 101st Cong, 2d Sess 13–14 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel).

provided for under Article I of the Constitution, authorize the creation of civil causes of action, since, as noted above, these treaties require simply that nations "prosecute or extradite."<sup>102</sup> As for due process, there might be more of an unfair surprise or reasonable expectation problem in extending universal jurisdiction to civil liability, given that most nations do not provide for civil remedies against foreign conduct under these circumstances.

### B. Why This Distinction Might Make Sense

At first glance, the fact that the exercise of universal jurisdiction is legally more problematic in the civil rather than criminal context appears counterintuitive. After all, the exercise of criminal jurisdiction would seem to be more serious and sensitive than a mere civil lawsuit. As the Restatement (Third) of Foreign Relations Law notes, "the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive."<sup>103</sup>

Nevertheless, there are a number of potential justifications for this distinction between civil and criminal law. The first is conceptual: the theory of universal jurisdiction hypothesizes that each nation is delegated the authority to act on behalf of the world community, not on behalf of the particular victims. Nations have a legal interest in punishing individuals subject to universal jurisdiction in order to deter and redress breaches of international order. To the extent that private civil causes of action are designed primarily to redress harm to particular victims, they

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<sup>102</sup> Article 14 of the Torture Convention does provide that each state party "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." Convention Against Torture at Art 14(1). It is far from clear that this provision was intended to apply to situations in which the torture occurred outside the party's territory, and the United States attached an "understanding" to its ratification of the Convention stating that Article 14 "requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec S 17486-01 (Oct 27, 1990). Compare *Hilao v Estate of Marcos*, 94 F3d 539, 547 (9th Cir 1996) ("Even if the Philippines does have a duty under [Article 14 of the Torture Convention] to help in the redress of torture and other abuses committed by the Marcoses against citizens of the Republic, the Convention does not mandate that such redress occur in the United States courts.").

<sup>103</sup> Restatement (Third) of Foreign Relations Law § 403 reporters' note 8 (1987). See also Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv Intl L J 53, 85-86 (1981) (arguing that domestic courts should have broader jurisdiction in civil cases).

may be conceptually outside of the universal jurisdiction authority. To be sure, domestic prosecutorial authority is sometimes delegated to private attorneys general, but it may be difficult to characterize international human rights lawsuits in this manner, given that they seek monetary rather than equitable relief and are not pre-cleared or supervised in any way by national or international authorities.

Second, civil lawsuits—unlike criminal prosecutions, at least in the United States—are not subject to governmental control.<sup>104</sup> Rather, private plaintiffs alone decide whether to bring these lawsuits and the relief to be sought. Whereas the government is responsible in the criminal context for considering the foreign policy costs of exercising universal jurisdiction, private plaintiffs in civil cases have no such responsibility and, in any event, are unlikely to have the incentive or expertise to do so.<sup>105</sup> Moreover, neither the private plaintiffs nor the courts that adjudicate these cases can be expected to accurately assess and balance the competing foreign policy concerns implicated by these lawsuits. Nor is there public accountability for such foreign policy decisions in the way that there is in the prosecutorial context.

These structural differences between criminal and civil litigation help explain the following anomaly: there is substantial treaty and statutory authority for exercising universal jurisdiction in the criminal context, yet the United States has rarely if ever exercised universal criminal jurisdiction. By contrast, there is little treaty or statutory authority for exercising universal jurisdiction in the civil context, and yet U.S. courts are increasingly being asked to assert universal civil jurisdiction. To take one of many examples, a civil suit was recently filed against Chinese leader Li Peng for his role in the 1989 crackdown in Tiananmen Square, but of course no criminal suit has been initiated against him (and, in fact, the State Department tried to resist accepting

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<sup>104</sup> In some countries, prosecutions may be initiated by private complaint. Indeed, this is how the charges were initiated against Augusto Pinochet in Spain. See Richard J. Wilson, *Prosecuting Pinochet in Spain*, 6 Hum Rts Br 3, 3 (1999). The world trend, however, has been away from such private prosecutions, especially for serious offenses, and when these prosecutions are allowed they are often subject to some sort of screening or veto by a political or judicial officer. Thus, for example, efforts to subject Pinochet to private prosecution in Great Britain were unsuccessful because Britain's attorney general declined to consent to the prosecution. See Michael Byers, *The Law and Politics of the Pinochet Case*, 10 Duke J Comp & Intl L 415, 425 (2000).

<sup>105</sup> For elaboration on this point, see Bradley and Goldsmith, 97 Mich L Rev at 2158–59, 2181–83 (cited in note 10).

service of process against Mr. Li in the civil case).<sup>106</sup> This anomaly is likely due to the fact that private plaintiffs, unlike the executive branch, do not take into account the foreign relations consequences of universal jurisdiction when deciding whether to bring suit.<sup>107</sup>

Finally, there is much less “universality” with respect to the availability of private causes of action in cases involving foreign parties and foreign conduct. Whereas nations are increasingly exercising universal criminal jurisdiction,<sup>108</sup> very few exercise universal civil jurisdiction. Indeed, the United States is almost alone in opening its courts to civil suits between foreign parties for human rights abuses around the world.<sup>109</sup> Needless to say, U.S. procedures in civil cases, such as the availability of jury trials; the large potential damage awards, including the availability of punitive damages; and the allowance of “tag” jurisdiction based on the transient presence of a defendant, distinguish this country from many others. The recent \$4.5 billion jury verdict in New York against Radovan Karadzic, for human rights abuses com-

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<sup>106</sup> See Wong, *Chinese Leader Sued*, NY Times at A6 (cited in note 89). Of course, some civil cases involving foreign parties could be dismissed under the forum non conveniens doctrine. This doctrine, however, is highly discretionary with the trial judge, contains a presumption in favor of retaining jurisdiction, and may be unavailable in many universal jurisdiction cases because of the lack of an adequate alternate forum. See, for example, *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88 (2d Cir 2000) (reversing forum non conveniens dismissal in case brought under the Alien Tort Statute and Torture Victim Protection Act, in part because of the difficulty the plaintiffs would have in bringing the claims elsewhere); *Filartiga v Pena-Irala*, 577 F Supp 860, 862 (E D NY 1984) (refusing to dismiss on forum non conveniens grounds because the defendant “submitted nothing to cast doubt on plaintiffs’ evidence showing that further resort to Paraguayan courts would be futile”).

<sup>107</sup> For a discussion of these and other problems associated with international human rights litigation, see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi J Intl L 457 (2001).

<sup>108</sup> In the wake of the *Pinochet* case in Great Britain, there have been a number of efforts around the world to prosecute individuals on the basis of universal criminal jurisdiction. See, for example, *Rwandans on Trial*, NY Times A22 (May 1, 2001) (describing trial of four Rwandans in Belgium); Marlise Simons, *Dutch Court Orders an Investigation of ‘82 Killings in Suriname*, NY Times 12 (Nov 26, 2000) (describing criminal investigation in Holland of Desi Bouterse, former military dictator of Suriname); Norimitsu Onishi, *An African Dictator Faces Trial in His Place of Refuge*, NY Times A3 (Mar 1, 2000) (describing efforts to prosecute Hissene Habre, former president of Chad, in Senegal).

<sup>109</sup> See Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J Intl L 65, 101 (1995); Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 Ga J Intl & Comp L 191, 200 (1996). In the hearings on the Torture Victim Protection Act, a representative from the State Department testified that, “To the best of our knowledge, no other country has similar legislation.” Hearing before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 101st Cong, 2d Sess 24 (1990) (statement of David P. Stewart, Assistant Legal Adviser, Department of State).

mitted abroad against foreign citizens, is a particularly dramatic example of the unique nature of the U.S. civil liability system.<sup>110</sup>

### CONCLUSION

As crime has become increasingly international in scope, the reach of U.S. law has understandably grown. To effectively protect and regulate its citizens, and to otherwise safeguard its national interests, the United States cannot be limited strictly to territorial boundaries when applying its law. The terrorist attacks on the United States on September 11, 2001, and the resulting “war on terrorism,” only confirm this proposition. Universal jurisdiction, however, purports to extend the concept of “national interest” further, deeming the United States to have an interest—even a duty—to punish egregious violations of international law occurring anywhere in the world.

Ultimately, it is Congress, not international law or the federal courts, that determines when the United States exercises universal jurisdiction. Nevertheless, international law may play a background role in helping courts ascertain the reach of federal statutes. The Constitution also imposes potential restraints, but, as I have discussed, these restraints are likely to be modest under current doctrine. To the extent that constitutional restraints on Congress are desirable in this context, the most promising areas of limitation, contrary to the views of some commentators, are structural rather than individual rights-oriented.

To some extent, the relationship between universal jurisdiction and U.S. law is hypothetical in the criminal context. While there have been some broad exercises of criminal jurisdiction in recent years—most notably in the areas of terrorism and drug trafficking—there are few if any examples of the United States

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<sup>110</sup> See David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, NY Times A10 (Sept 26, 2000). Large damage awards also have been awarded recently under the “state sponsor of terrorism” exception in the Foreign Sovereign Immunities Act, 28 USC § 1605(a)(7) (1994 & Supp 2000). See, for example, *Eisenfeld v The Islamic Republic of Iran*, 2000 US Dist Lexis 9545 (D DC) (awarding \$150 million in punitive damages as well as millions in compensatory damages); *Anderson v The Islamic Republic of Iran*, 90 F Supp 2d 107 (D DC 2000) (awarding \$300 million in punitive damages as well as millions in compensatory damages); *Flatow v The Islamic Republic of Iran*, 999 F Supp 1 (D DC 1998) (awarding \$225 million in punitive damages as well as millions in compensatory damages); *Alejandre v The Republic of Cuba*, 996 F Supp 1239 (S D Fla 1997) (awarding over \$187 million in punitive and compensatory damages). That exception to immunity does not involve the exercise of universal jurisdiction, because it requires that the claimant or victim have been a U.S. national at the time of the offending conduct, and because it applies only to a small class of nations determined by the executive branch to be state sponsors of terrorism.

exercising full universal criminal jurisdiction. By contrast, an increasing number of civil cases in U.S. courts rely on universal jurisdiction, and these cases are in some ways more legally problematic than the criminal cases. While this distinction between the propriety of criminal and civil jurisdiction appears counterintuitive at first glance, there are in fact conceptual and practical justifications for it.

If nothing else, these justifications may suggest that U.S. courts should await congressional authorization and guidance before extending the universal jurisdiction concept any further into the civil context.