No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF OF EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS ADDRESSED BY AMICUS CURIAE

The Court ordered further briefing regarding:

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

Amicus herein demonstrates that:

1. The plain language and original purposes of the ATS require that it apply to conduct that occurs abroad.

2. Violations of the law of nations occurring within the territory of foreign sovereigns may be adjudicated in U.S. courts based on the same principles as other transitory torts, to the extent that the cause of action otherwise meets the test established by *Sosa*.

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STATEMENTS PURSUANT TO SUPREME COURT RULE 37

Amicus respectfully submits this Supplemental Brief in support of the Petitioners pursuant to Supreme Court Rule 37.[1] The parties have given blanket consent to the filing of *amicus* briefs.[2]

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings in foreign countries. *E.g., Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.).

Amicus therefore has an interest in ensuring that new, unwarranted territorial limits are not engrafted onto the scope of ATS jurisdiction,

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[1] *Amicus* affirms that no counsel for a party authored the brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution to this brief.

[2] Consent letters have been filed with the Court.

contrary to the text and the intent of the Framers, and that international law is properly interpreted to allow domestic fora to hear claims for violations of universally recognized human rights norms against perpetrators found within the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

From before the Founding, the common law has recognized that torts are transitory. The tortfeasor can be sued wherever found. Thus, courts then and today adjudicate transitory tort actions involving foreign defendants, foreign conduct, and foreign plaintiffs. The forum has always been thought to have a sufficient nexus to adjudicate precisely because the defendant has brought the dispute to our shores.

The ATS incorporates this hornbook common law doctrine. It explicitly grants jurisdiction over "torts," and, as this Court has held, allows courts to adjudicate claims for violations of the law of nations under the common law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Since common law torts are transitory, the ATS allows courts to hear claims arising within the territory of a foreign sovereign.

The First Congress passed the ATS in part because it preferred claims involving international law to be heard in federal rather than state court. There is no question that transitory torts arising in other countries could and still can be heard in state court. Congress would not have excluded from

federal court such suits involving violations of the laws of nations even though those same suits would be heard in state court. An unprecedented categorical bar to hearing claims arising abroad cannot be squared with the statute's text or purposes.

The circumstances under which courts may hear transitory claims under the ATS are also clear. The claim must meet the *Sosa* threshold test, which permits jurisdiction over only a narrow set of international law violations. Personal jurisdiction must lie over the defendant. And, as in transitory tort cases generally, a court may decline jurisdiction in favor of an alternative, more convenient forum. These hurdles sharply limit the scope of the ATS, rendering unnecessary Respondents' attempt to rewrite it.

Respondents' and their *amici* nonetheless assert that it would somehow violate international law for a domestic court to enforce international law. Not surprisingly, there is no basis for that conclusion.

First, transitory tort actions involving private litigants do not implicate international prescriptive jurisdiction limits on public regulatory law—tax, antitrust and the like. These limits have never been thought to circumscribe the ability of courts to adjudicate transitory tort claims. Courts regularly hear such claims, and, when their own choice-of-law principles dictate, they apply forum law.

Second, the ATS in particular is not "prescriptive." Congress has merely authorized courts to adjudicate claims involving violations of universally recognized norms that *already* apply everywhere. While the ATS enforces those norms through federal common law, courts apply standards that best implement international law. Moreover, international human rights law reflects a universal consensus that all nations owe an obligation to all other nations to adhere to certain minimum standards in their treatment of their own citizens. And it permits states to decide for themselves how to enforce that obligation. In short, international law encourages, if not requires, external scrutiny of human rights violations. Thus, ATS cases do not implicate prescriptive jurisdiction standards or the territorial sovereignty concerns that animate them.

Third, even if prescriptive jurisdiction limits did apply, they would be satisfied in the overwhelming majority of ATS cases. Ordinary prescriptive jurisdiction standards permit nations to regulate or criminalize the conduct of their own nationals, or as here, abuses that give rise to universal jurisdiction. Respondents' categorical assertion that applying the ATS to claims arising abroad necessarily violates international law is flat wrong, and their argument for a categorical bar therefore fails.

Transitory tort cases do, of course, often require a choice-of-law analysis, but such an analysis is not appropriate under the ATS. Uniformity is

desirable in ATS cases. Unlike ordinary transitory torts, ATS cases involve the violation of universally recognized rights, and uniform rules should be applied to give effect to those norms. Crimes against humanity committed in Nigeria should be treated the same as those committed in Sudan. Any other approach conflicts with the statute's original purpose to avoid divergent rules, this Court's holding that federal common law applies under the ATS, and its usual approach to federal claims.

The transitory tort doctrine fulfills two of tort law's main purposes. First, it ensures injured parties a means of redress. A defendant present in one forum may not be subject to process in any other. That alone refutes Respondents' argument for a categorical rule. At oral argument, Justice Kennedy posited a distinction between cases in which the defendant can only be found in the forum and those in which the defendant may be subject to suit in another jurisdiction. Transcript at 13:21-14:5. The transitory tort doctrine permits both types of cases to be heard, but where the alternative forum is adequate and more appropriate, courts may decline jurisdiction over the latter type under the doctrine of *forum non conveniens*.

Second, the doctrine serves the forum's overriding interest in ensuring that disputes among those within the jurisdiction are peacefully resolved. Indeed, subjecting such disputes to the rule of law is among the primary reasons states establish courts in the first place.

It is difficult to overstate how broad, and thus how mistaken, Respondents' position is. Their claim that adjudicating torts committed abroad is somehow problematic, if adopted, would cast doubt upon the transitory tort doctrine, which applies in every state. It would render uncertain the status of the choice-of-law rules that permit courts to apply forum law in cases involving foreign elements—rules that exist in at least 40 states. And it would call into question the act of state doctrine, since its balancing prong is based on the fact that consideration of the validity of a foreign government's official act is not barred by international law. In short, Respondents' approach would generate vast uncertainty and potentially an avalanche of unnecessary and unpredictable litigation.

ARGUMENT

This Court has done precisely what the Question Presented asks, i.e. "recognize[d] a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." In *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba*, the Court upheld a counterclaim for the expropriation of property by the Cuban government in Cuba. As here, the claim "ar[o]se[] under international law." 462 U.S. 611, 623 (1983). Moreover, the Court applied standards common to federal common law and international law, explicitly refusing to apply Cuban law. *Id.* at 621-23. *FNCB* thus refutes any contention

that it somehow violates international law for U.S. courts to apply U.S. law to foreign acts.

The text and history of the ATS make clear that the law applies to torts arising abroad. And the claim that it violates international law for U.S. courts to apply the statute as it was intended cannot withstand scrutiny.

I. The ATS applies to conduct that occurs abroad.

A. The text of the ATS and the common law nature of the claim demonstrate that the law is not limited to domestic conduct.

The text of the ATS makes clear that the law was meant to confer jurisdiction on cases arising abroad. Pet.' Supp. Br. at 21-24. The absence of any geographical limitation despite such limits in adjacent provisions, along with the plain meaning of each term Congress chose, compel this conclusion. *Id.*

In particular, by providing jurisdiction over a "tort," the text clearly contemplates jurisdiction over torts arising in foreign lands, since torts under the common law were and are transitory. *Id.* at 23. Plaintiffs may sue wherever the defendant can be found, even if the tort occurred abroad and all of the parties are aliens. A court's power to adjudicate transitory torts has been recognized since at least 1665. *See Mason v. Warner*, 31 Mo. 508, 511–12 (1862) (referring to April 12, 1665 order from the king in council in the *Skinner* case). This Court

traced the doctrine to *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), among other cases, noting that:

> [t]he courts in England have been open in cases of trespass . . . to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm . . . .

McKenna v. Fisk, 42 U.S. 241, 249 (1843). Indeed, the doctrine was the original basis for state court jurisdiction over out-of-state torts. *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

Based on the fact that, from the Founding to today, common-law courts have regularly adjudicated transitory tort claims arising outside of their jurisdiction, *Filártiga* expressly held that the ATS applies to claims arising abroad. *Id.* (collecting authorities); *accord Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 24–25 (D.C. Cir. 2011). And since *Sosa* confirmed that the ATS provides jurisdiction for common-law claims, 542 U.S. at 724, Brief of Earthrights International as *Amicus Curiae* in Support of Petitioners (No. 10-1491), at 8-13 (filed Dec. 10, 2011) ("ERI Br."), and expressly endorsed *Filártiga*, 542 U.S. at 725, 731, there can be no dispute that this analysis applies.

B. Congress's original purpose of providing a federal forum confirms that the ATS applies to conduct arising abroad.

Limiting ATS jurisdiction to injuries that occurred domestically would conflict with the statute's original purposes. In passing the ATS, Congress sought to provide a federal forum for a limited subset of torts that implicate the law of nations. As *Sosa* recognized, the First Congress was concerned about "the inadequate vindication of the law of nations" and the United States' failure to provide a uniform forum for redress of crimes against ambassadors and violations of the law of neutrality; it also wished to prove our credibility as a new nation. *Id.* 542 U.S. at 715–19.

State courts already had jurisdiction over such suits. *Id.* at 542 U.S. at 722; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 790 (D.C. Cir. 1984) (Edwards, J., concurring). The transitory tort doctrine confirms as much. Congress was worried about the potential for inconsistent or biased outcomes in state courts; it therefore provided an alternative federal forum. *Id.*; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 235–36 (1996). Thus, the First Congress desired to make federal courts *more accessible* to foreigners bringing tort claims for law of nations violations. *See* 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, 21 (1985).

Given these aims, the First Congress would not have wanted a claimant injured abroad, who

could sue in state court, to be barred from federal court. *Tel-Oren*, 726 F.2d at 790–91 (Edwards, J., concurring). But that is the logical result of any argument that seeks to confine the ATS to conduct within U.S. borders.

Indeed, in many modern ATS cases, the plaintiffs also plead municipal common law tort claims.[3] Precluding ATS jurisdiction would disadvantage aliens' claims arising under the law of nations vis-a-vis their state law claims, thus "treat[ing] torts in violation of the law of nations less favorably than other torts"— contrary to the Framers' intent. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 110 (2004). It would undermine the statute's purposes to leave such plaintiffs recourse only to state court.

The Framers sought to provide redress for transitory torts, uphold international law, and ensure that claims that involve violations of international law are heard in federal, not state courts. All of those concerns would be subverted if this Court now read the ATS to exclude claims against those who violated international law abroad.

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[3] *See, e.g., Exxon Mobil*, 654 F.3d at 15; *see also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010) (noting that its holding does not limit suits against corporations under state law).

II. The transitory tort doctrine has long been a feature of the common law.

Tort claims arising abroad are transitory. This is as true of ATS claims as any other common law tort claim. *See Filártiga*, 630 F.2d at 885. Thus, an ATS defendant can be sued in tort wherever it may be subject to personal jurisdiction.

The transitory tort doctrine has been an ordinary facet of the common law in every period of our history. As earlier noted, the transitory tort doctrine was well-established by the time the ATS was passed. *See supra* Section I.A; Pet. Supp. Br. at 27-31. And courts commonly recognized and applied it in our nation's early years. Pet. Supp. Br. at 29 and n. 20. Thus, for example, Justice Story noted that the doctrine applies because "every nation may . . . rightfully exercise jurisdiction over all persons within its domains." Justice Story, *Commentaries on the Conflict of Laws* §§ 542-43, 554 (1834). This did not violate international law. *Id.* § 542.

The practice of hearing torts without regard to the citizenship of the parties and the location of the tort continued at both the state and federal level though the nineteenth and twentieth centuries.[4] As

[4] *See, e.g., Yucatan v. Argumedo*, 92 Misc. 547 (N.Y. Sup. Ct. 1915) (tort action between Mexican parties over conduct in Mexico); *Panama Elec. Ry. Co. v. Moyers, 249. F. 19 .20*(5th Cir. 1918) (noting that courts anywhere will exercise jurisdiction if the defendant is properly served, regardless of the parties' citizenship); *Mauser v. Union Pac. R.R. Co.*, 243 F. 274, 276 (S.D. Cal. 1917)

the California Supreme Court noted in reversing dismissal of a suit between British subjects arising in Canada, but for the doctrine, "a person might in some cases escape such liability by simply going into another state." *Roberts v. Dunsmuir*, 75 Cal. 203, 203-204 (1888) (collecting cases).[5]

And, of course, courts to this day continue to adjudicate transitory torts, even between non-U.S. residents for conduct outside of the United States. Examples abound.[6]

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[5] Some have cited *Molony v. Dows*, 8 Abb. Prac. 316, 329-30 (N.Y. Sup. Ct. 1859) as rejecting the transitory tort doctrine as applied between foreigners. *See e.g.* Brief of *Amici Curiae* BP America, *et al*, in Support of Respondents (No.10-1491) (filed Feb.3, 2012) at 26; *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 826 n.6 (9th Cir. 2011) (Ikuta, J., dissenting). But Molony's holding was not only wrong; it was expressly overruled. *Burdick v. Freeman*, 120 N.Y. 420, 426 (1890).

[6] *See e.g. Roxas v. Marcos*, 969 P.2d 1209, 1252 (Haw. 1998) (upholding tort judgment in action between Filipino parties for torture and conversion in the Philippines); *Wultz v. Bank of China Ltd.,* (S.D.N.Y. May 25, 2012) (holding tort action against Chinese bank by victims of suicide bombing in Israel could proceed); *British-Am. Ins. Co., Ltd. v. Cladakis*, 321 So. 2d 448, 449 (Fla. Dist. Ct. App. 1975) (finding jurisdiction over conversion suit between Bahamian and English parties regarding conduct in Middle East); *Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474 (N.Y. 1984) (recognizing jurisdiction over tort suit by Iran against its former ruler but granting *forum non conveniens* dismissal).

This Court recently noted that where personal jurisdiction lies, a court may "resolve both matters that originate within the State and those based on activities and events elsewhere." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011). Similarly, in *Perkins v. Benguet Consol. Min. Co.,* this Court affirmed the propriety of adjudicating torts that arise abroad between non-residents; there Philippine residents sued a Philippine mining company in Ohio for injuries in the Philippines. 342 U.S. 437, 439 (1952). The Court held that since the defendant's contacts with the forum permitted personal jurisdiction, *id.* at 441, 444-49, whether Ohio courts would hear the case was for Ohio to decide. *Id.* at 448. At no point did the Court suggest that adjudication would violate international law.

Indeed, Respondents concede the jurisdiction of U.S. courts over transitory torts committed on the high seas. Resp. Br. at 4, 54-55. But the above cases arising in foreign nations reveal the arbitrariness of their line drawing.[7]

III. By adjudicating transitory torts committed in violation of international law, courts uphold, not contravene, international law.

[7]Indeed, this Court has long held that the transitory tort doctrine is equally applicable to torts occurring in the territorial waters of foreign sovereigns. *Panama R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 284 (1897).

Respondents and some of their *amici* argue that applying the ATS to enforce international norms with respect to acts that occur abroad would itself violate international law. Resp. Br. at 55; Brief of Chevron Corp., *et al*, as *Amici Curiae* in Support of Respondents (No.10-1491) (filed Feb.3, 2012) ("Chevron Br.") at 2-3, 10-11. This claim is baseless. But even if it had merit, the text of the ATS provides a federal forum for all claims involving qualifying torts for which the defendant is subject to personal jurisdiction. *Supra* Section II. Courts must apply the statute as written and intended, even if doing so would strain international jurisdictional limits. Restatement (Third) of the Foreign Relations Law of the United States § 402 cmt. i (1987) (hereinafter Restatement (Third) of Foreign Relations Law).

ATS cases, however, do not exceed such limits. Respondents and their *amici* mistakenly couch their argument in terms of prescriptive jurisdiction. Transitory torts have nothing to do with jurisdiction to prescribe. Courts hearing such claims exercise jurisdiction to adjudicate, even when they apply their own law. This has never been thought to violate international restrictions. Moreover, the specific causes of actions recognized by federal common law under the ATS are different in one critical sense from transitory tort claims applying ordinary domestic law—they are derived from and enforce international norms that apply everywhere.

Even if prescriptive jurisdiction limits applied, they are always met where the defendant is a

national of the forum or where there is universal jurisdiction. And there can be no tension between the ATS and international jurisdictional limits, even in the small number of cases that do not involve a U.S. national or universal jurisdiction, absent a showing that foreign law materially differs from the rule applicable under the ATS.

A. International law permits courts to hear transitory tort claims arising abroad.

1. Transitory tort cases, including ATS cases, implicate the international law limitations on adjudicatory jurisdiction, not prescriptive jurisdiction.

Respondents and their *amici* confuse the power to enact regulatory laws—"legislative jurisdiction" or "jurisdiction to prescribe," as put by section 402 of the Restatement (Third) of Foreign Relations Law—with the power to exercise personal jurisdiction and decide claims—"jurisdiction to adjudicate." *Id.* § 421. Hearing transitory tort claims under the ATS falls squarely within the latter.

The Restatement, on which Respondents' *amici* rely heavily, makes clear that the prescriptive jurisdiction limits it identifies do not apply. The Restatement states that its chapter on "jurisdiction to prescribe" applies only to regulatory statutes, *i.e.* "public law—tax, antitrust, securities regulation, labor law, and similar legislation." *Id.*, pt. IV, ch. 1,

subch. A, Intro. Note. The ATS is not antitrust or labor law; it does not implicate prescriptive jurisdiction limits. And indeed, even in that context, these limits do not necessarily apply to civil claims. Although "[u]nder international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe," "[a] judgment of a court awarding or denying damages in a civil action would generally not be seen as enforcement." *Id.* § 431, comments a & b.[8]

ATS claims do, of course, involve adjudication. There is a domestic nexus to the case sufficient to provide jurisdiction to adjudicate, so long as there is personal jurisdiction over the defendant. *Id.* § 421; Pet. Supp. Br. at 37-39. The defendant has brought the dispute here, and the forum has an interest in resolving suits between those within its borders. *Filártiga*, 630 F.2d at 885. States may—and, as shown above, do—adjudicate torts that occur outside their territorial jurisdiction.

Not surprisingly, this Court rejected an argument similar to Respondents' almost 50 years ago, in *Banco Nacional de Cuba v. Sabbatino*, 376

[8] The Restatement also notes that "[i]n a number of contexts the question of jurisdiction to prescribe resembles questions traditionally explored under the heading of conflict of laws or private international law. . . but the rules stated in this chapter do not necessarily apply to controversies unrelated to public law issues." Restatement (Third) of Foreign Relations Law, pt. IV, ch. 1, subch. A, Intro. Note. Choice of law issues are addressed below.

U.S. 398 (1964). Based on a review of state practice, the Court held that international law does not preclude domestic courts from reviewing the official sovereign acts of another state committed within the latter's territory. *Id.* at 421-22 ("We do not believe that [the act of state] doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law."). If international law allows one nation's courts to adjudicate the validity of a sovereign act of another nation committed on the latter's territory, then surely it allows a tort claim between private parties.

Amici supporting Respondents misunderstand the nature of adjudicatory jurisdiction. The U.K. and Dutch governments' insistence on a "factual nexus to the U.S.," 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 (No. 10-1491), at 8 (filed Feb. 3, 2012) ("U.K. Br."), overlooks the fact that the transitory tort doctrine—which is of U.K. origin—recognizes just such a nexus whenever there is personal jurisdiction because the defendant has brought the dispute here.

That ATS cases require personal jurisdiction also refutes Chevron's argument against universal civil jurisdiction. Chevron Br. at 11-17. In universal jurisdiction cases, no personal connection to the defendant is necessary; it is sufficient that the substantive offense is one that states can prosecute universally. *Arrest Warrant of 11 April 2000* (Dem.

Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3, ¶ 45 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).The ATS, like all transitory tort cases, is not predicated on universal jurisdiction.

2. International law permits courts hearing transitory tort claims to apply forum law.

Courts do not, of course, always apply their own substantive standards to ordinary transitory torts. Sometimes they apply foreign law, sometimes forum law. But courts resolve this question pursuant to their own choice-of-law principles. International law does not compel courts to apply the law of the place of the tort, and most U.S. courts do not follow such a rule.

As a threshold matter, forum law determines the form of the action—law or equity, tort or contract—for a claim involving foreign elements. Restatement (Second) of the Conflict of Laws § 124 and cmt. a (1971). Moreover, most U.S. states' choice of law doctrines under some circumstances direct courts hearing cases involving foreign conduct or foreign parties to apply forum law. Thus, many courts have applied U.S. law to torts occurring abroad. Some courts apply forum law unless there is a compelling reason not to.[9] Courts also apply forum

[9] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31 (Wis. 2002); *Browne v. McDonnell Douglas Corp.*, 504 F. Supp. 514, 517 (N.D. Cal. 1980).

law because foreign law is the same as, or is not pled or not proved to be different from, the law of the forum.[10] Under the interests analysis approach, there is a presumption that forum standards apply; and if the law of two states conflict, states apply forum law where there is a "false conflict," (*i.e.* the foreign sovereign lacks a cognizable interest in the application of its law), the forum state's interests would be more impaired than the foreign state's if its standards did not apply, or neither state has an interest in the application of its rule.[11]

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[10] *See, generally,* Restatement (Second) of Conflicts Section 136, cmt h. *See, e.g.*, *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988) (applying forum law to suit brought by Massachusetts couple against Cayman Islands corporation for tort in Mexican waters); *Mexican Cont. Ry. Co. v. Marshall*, 91 F. 933 (5th Cir. 1899) (applying Texas law to injury sustained in Mexico on assumption that it is same as Mexican law); *Roxas*, 969 P.2d at 1235 n.16 (applying Hawaii law to some aspects of suit by Philippine national against former Philippine president because parties failed to show evidence of foreign law); *see also Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006-1007 (5th Cir. 1990); *Cavic v. Grand Bahama Dev. Co.*, 701 F.2d 879, 882 (11th Cir. 1983); *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 641 (10th Cir. 1962); *Lane v. St. Louis Union Trust Co.*, 356 Mo. 76, 82-83 (Mo. 1947); *Leary v. Gledhill*, 8 N.J. 260, 266-270 (N.J. 1951); *Savage v. O'Neil*, 44 N.Y. 298, 301 (N.Y. 1871); *Arams v. Arams*, 182 Misc. 328, 332-335 (N.Y. Sup. Ct. 1943).

[11] *See, e.g.*, *Hurtado v. Superior Court*, 11 Cal. 3d 574, 580-82 (Cal. 1974); *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884, 890 (5th Cir.1970); *Pycsa Pan., S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1218-1219 (S.D.

Other nations' choice of law regimes likewise will apply forum law in some cases. Thus, for example, all civil and common law systems allow application of forum law over foreign law when public policy so dictates. *See* Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 Tul. L. Rev. 623, 649 (2012).

Application of forum law does not implicate international sovereignty concerns. As this Court has held,

> [i]f a transaction takes place in one jurisdiction and the forum is in another, the forum does not . . . by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely . . . makes applicable its own law to parties or property before it.

Sabbatino, 376 U.S. at 421. Thus, in *FNCB*, the Court applied federal common law and international law to a claim for the expropriation of property by Cuba in Cuba, explicitly declining to apply Cuban law. 462 U.S. at 621-23.

Fla. 2008); *Thompson v. Islam*, 2005 U.S. Dist. LEXIS 37114, 10-11 (D.D.C. July 29, 2005); *see also Marsh v. Burrell*, 805 F. Supp. 1493, 1496-98 (N.D. Cal. 1992) (applying California law to assault and battery against Dutch plaintiffs that occurred in the Netherlands, because the Netherlands was presumed to have no interest in applying its laws to limit recovery by its nationals).

That choice of law principles are decided locally, not compelled by international law, is also evidenced by the wide variation in choice-of-law methodologies,[12] which is inconsistent with the notion of a uniform international rule governing suits between private litigants. Indeed, in international choice-of-law cases involving private parties, U.S. courts "have usually not treated the foreign element as having special significance" for choice of law purposes. *See* Harold G. Maier, *Extraterritorial Jurisdiction at A Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 289 (1982).

Respondents' *amici* Chevron *et al.* claim that the transitory tort doctrine is inapposite because a transitory tort claim "vests outside the jurisdiction under foreign law" and can only be enforced under foreign law. Chevron Br. at 15, n.7. But this was not the rule when the ATS was passed, it has been mostly abandoned today, and other countries do not follow it.

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[12] *See* Grossi, 86 Tul. L. Rev. at 647 (describing American choice of law rules as "somewhat chaotic"). In addition to the multiplicity of American approaches, European countries follow different approaches still, which are derived from the "theory of 'seat of the relationship.'" Lea Brilmayer & Jack Goldsmith, *Conflict of Laws: Cases and Materials* 237 (5th ed. 2002) (citing F. Von Savigny, *System des Heutigen Romischen Rechts* (1849)). European countries are also likely to have choice-of-law issues determined by treaty. *See id.*

At the Founding, courts hearing transitory torts would simply apply forum law. Moffatt Hancock, *Torts in the Conflict of Laws* 21-22 (1942); *Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 623 (K.B.); 2 Black. W. 1055, 1058–59.

As Professor Goldsmith's choice of law textbook explains, the theory that transitory torts "vest" exclusively under the law of the place of the tort did not arise until "the turn of the [twentieth] century" and was abandoned by most states in the latter half of that century. Brilmayer & Goldsmith, *supra,* xxviii.

"Vested rights" is "used in connection with theories that indicate, for example, that the victim of a tort would acquire a vested right to recovery under the law of the place where the tort occurs, a right that thereafter accompanies the person." *Id.* at xxix. This theory was reflected in the First Restatement of the Conflicts of Laws (1934), which endorsed a strict *lex loci delicti* rule. *See id.* at 12 (quoting the First Restatement).

The "vested rights" theory, however, was explicitly rejected in the Restatement (Second) of the Conflict of Laws, ch. 7, topic 1, intro. note, n.2. As of 2000, "only ten states continue to adhere to the First Restatement approach to choice of law for tort cases." Brilmayer & Goldsmith, *supra* at 21. Forty states and the District of Columbia have abandoned it in favor of more modern doctrines. The interests analysis approach discussed above has been "enormously influential"; courts determine which

jurisdictions have an interest in applying their laws, which may result in the application of forum law if the forum has a legitimate interest in applying its law. *Id.* at 218. Similarly, the "seat of the relationship" theory applied by many European nations has "nothing to do with protection of 'vested rights.'" *Id.* at 237. The notion that transitory torts are "vested" under the law of the place where the injury occurred, and cannot involve the application of U.S. law to harms occurring abroad, is therefore outdated and unpersuasive.[13]

In sum, courts hearing transitory tort cases are applying adjudicatory jurisdiction. In so doing, they apply a choice-of-law analysis and sometimes apply substantive forum law to claims arising abroad. This long-established process, familiar throughout the world, does not run afoul of any international jurisdictional principles.

3.Courts sometimes decline to hear transitory torts where there is a more convenient forum, but not because hearing such cases would violate international law.

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[13] Chevron cites only a law review article, written by Chevron's own counsel in *Bowoto v. Chevron Corp.*, that in turn relies on one of the few remaining "vested rights" jurisdictions and a couple of archaic cases. Chevron Br. at 15, n.7 (citing David Wallach, The Alien Tort Statute and the Limits of Individual Accountability in Int'l Law, 46 Stan. J.Int'l L. 121,138 n.108 (2010)).

The transitory tort doctrine unquestionably permits courts to hear cases involving non-residents and conduct outside of the United States, irrespective of whether the defendant can be sued in another forum. But courts do not always do so. Rather, they may decline jurisdiction under the *forum non conveniens* doctrine if an alternative, more convenient forum exists. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).[14] Critically, however, that doctrine is not compelled by international law. *See id.* at 241, 249-50, 255-56 (noting plaintiff's forum choice should rarely be disturbed and that doctrine is flexible and discretionary).

B. The ATS does not contravene any limits on jurisdiction to prescribe because it implements rights that are universally accepted and obligations owed to the United States.

Even if Respondents could show that restrictions on prescriptive jurisdiction extend beyond regulatory statutes to tort claims between private parties, the ATS still does not prescribe. ATS

[14] *See e.g., Islamic Republic of Iran,* 62 N.Y.2d 474; *Krieger v. Am.-Israeli Shipping Co.*, 202 N.Y.S.2d 940, 942 (Sup. Ct. 1960) (affirming power to hear claims for personal injuries by Israeli plaintiffs against Israeli corporations arising aboard a vessel at sea, but dismissing based on *forum non conveniens*); *Faulkner v. S. A. Empresa de Viaco Airea Rio Grandense (Varig)*, 222 So. 2d 805 (Fla. Dist. Ct. App. 1969) (affirming dismissal of suit by non-resident plaintiffs against foreign airline for accident in Peru).

causes of action, unlike other tort claims recognized by states, are derived from and give effect to rights—such as the prohibitions on torture and genocide—that already apply everywhere. *Sosa*, 542 U.S. at 732. By simply providing a forum in which to remedy violations of such universally held norms, U.S. courts do not prescribe conduct but rather exercise their adjudicative authority. Pet. Supp. Br. at 10; *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 746 (9th Cir. 2011).

To be sure, the ATS applies federal common law to issues other than the substantive right. *Sosa,* 542 U.S. at 724, 732; Pet. Br. at 24-25, 35-37; ERI Br. at 5-24. But the ancillary application of federal common law rules simply provides a remedy for violations of universal international law rights —as contemplated by international law. *See* Pet. Br. at 18; ERI Br. at 17-21; *see also FNCB*, 462 U.S. at 621-22 (applying federal common law and international law, not Cuban law, to claim arising under international law). This does not implicate, let alone exceed, prescriptive jurisdiction limits, for at least three reasons.

First, the federal law that applies is that which best implements the customary international law right at issue. ERI Br. at 27; *Sosa,* 542 U.S. at 727-28.[15]

[15]Respondents erroneously argue that international law controls every issue in an ATS case. Resp. Br. at 17-26. But if that were true, there can be no prescriptive jurisdiction concern because the U.S. would not be applying

Second, the universal human rights norms that support an ATS cause of action by definition limit nations' treatment of their own citizens; states have agreed that the right at issue is inviolate. *Sosa*, 542 U.S. at 725, 732. Thus, the starting point for Chevron's argument—the claim that a nation has absolute sovereignty over the regulation of activities within its territory, subject to exceptions based on consent—is inapposite, since states have consented to these norms. *See* Chevron Br. at 10-11.

Indeed, international human rights law "contemplates external scrutiny of such acts." Restatement (Third) of Foreign Relations Law § 443 cmt. c. (1987).[16] Chevron's view of sovereignty has been outdated at least since the adoption of the U.N. Charter, which expressly provides that all nations shall take joint and separate action to promote universal respect for human rights. *See* U.N. Charter, arts. 55-56. It is now widely accepted that the Charter "internationalized" human rights, such that "states could no longer validly claim that human rights as such were essentially domestic in

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its own law in any possible sense, but rather would be applying law that undoubtedly applies in the foreign jurisdiction. The U.K. concedes as much. U.K. Br. at 28-29.

[16] A state "cannot with impunity ignore the rules governing the conduct of all nations and expect that other nations and tribunals will view its acts as within the permissible scope of territorial sovereignty." *Sabbatino*, 376 U.S. at 457 (White, J., dissenting). This conclusion is fully consistent with *Sabbatino*'s holding that the act of state doctrine is not compelled by international law. *Id.* at 421-22.

character." Thomas Buergenthal, *The Evolving International Human Rights System*, 100 A.J.I.L. 783, 787 (2006). Customary international human rights norms are *erga omnes* obligations that are owed to all states; all states, including the United States, have a legal interest in violations. Restatement (Third) of Foreign Relations Law § 702 cmt. o; Petitioners Supp. Br. at 40-41; *Filártiga*, 630 F.2d at 890 (holding that all nations have a collective interest in certain fundamental rights, and that violators have become *hostis humanis generis,* the enemy of all mankind). Our courts certainly have a sufficient nexus to adjudicate where U.S. legal interests have been harmed.

Congress has reached the same conclusion. The Torture Victim Protection Act (TVPA), permits certain human rights claims arising abroad by foreigners against foreigners. 28 U.S.C. § 1350, note (2006). In passing that law, Congress apparently rejected the notion that prescriptive jurisdiction limits preclude adjudication of such cases. Pet. Supp. Br. at 14-15 and n. 5.

Third, international human rights law itself generally leaves the manner in which it is enforced by states to their own discretion. ERI Br. at 17-19; Pet. Br. at 54.[17] "Whether [individual victims of

[17] *See, e.g.*, *Exxon Mobil*, 654 F.3d at 42 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1020 (7th Cir. 2011); *Marcos*, 25 F.3d at 1475; *Kadic*, 70 F.3d at 246; *Kiobel*, 621 F.3d at 172–76, 187–89 (Leval, J., concurring); *Khulumani*, 504 F.3d at 286 (Hall, J.,

human rights abuses] have a remedy under the law of a state depends on that state's law." Restatement (Third) of Foreign Relations Law § 703 cmt. c (citing Reporters' Note 7, which discusses the ATS). Thus, *Sosa* held that under the ATS, international law need not provide a private cause of action. 542 U.S. at 714, 724, 729–31. Chevron's contention that the state in which the tort arose must consent to the particular forms of action, liability, and remedy, Chevron Br. at 16-17, is therefore wrong. Indeed, the ordinary U.S. rule, applicable in tort cases generally, is that these issues are determined by forum law. Restatement (Second) of the Conflict of Laws § 124 and cmt. a. No international law rule prohibits states from exercising the discretion to enact civil remedies for international law violations that international law itself affords.[18]

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concurring); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

[18] More than one state may have an interest in hearing a case in all kinds of contexts. Thus, the fact that a state may have an interest in adjudicating abuses within its territory does not suggest that international law bars other states from doing so. It may be a reason to "consider [an exhaustion] requirement in an appropriate case," *Sosa*, 542 U.S. at 733, n.21, but exhaustion applies case-by-case, and requires adequate and available foreign remedies. *See* TVPA, 28 U.S.C. § 1350, note, section 2(b). Thus, a foreign state's interest in affording redress provides no support for Respondents' categorical argument that U.S. courts cannot hear human rights cases.

In short, the transitory tort doctrine, while permitted by international law when applied to ordinary torts, is particularly warranted when applied to violations of universally recognized human rights norms. The notion that international law forbids a court from adjudicating the most well-established human rights law norms, to which all states have consented, and whose violation breaches an obligation owed to the forum state, makes no sense.

C. Even if prescriptive jurisdiction limits states' ability to provide private tort remedies, and even if the ATS is seen as prescribing U.S. law, the ATS will rarely implicate such limits.

Respondents and their *amici* claim that the ATS can *never* apply to conduct abroad. But even if prescriptive jurisdiction limits apply, nationality and universal jurisdiction principles would permit prescriptive jurisdiction in the vast majority of ATS cases. And there can be no prescriptive jurisdiction concern unless the defendant shows that foreign law differs from the substantive law applied under the ATS. There is no basis to eviscerate the statute by creating a new blanket bar on its application to acts that occur abroad.

1. A state always has prescriptive jurisdiction with respect to acts committed by its own nationals or

acts that trigger universal jurisdiction.

Even if application of the ATS could ever exceed international jurisdictional limits, it plainly does not where the defendant is a U.S. national or the rights violation at issue gives rise to universal jurisdiction.

The United States always has jurisdiction to prescribe with respect to its own nationals, whether outside or inside its territory. Restatement (Third) of Foreign Relations Law § 402(2); *accord Sosa*, 542 U.S. at 761 (Breyer, J., concurring); *see also Steele v. Bulova Watch Co.,* 344 U.S. 280, 282-83 (1952) ("Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States"). *Amici* Chevron *et. al.* apparently concede as much. Chevron Br. at 11. Thus, their prescriptive jurisdiction argument has no conceivable application to five of its six signatories, which are U.S. companies.

Moreover, as Respondents and their *amici* concede, certain egregious, universally condemned conduct triggers "universal jurisdiction" and "thus may be prosecuted by any nation regardless where the conduct occurs." Resp. Br. at 55 (citing Restatement (Third) of Foreign Relations Law § 404); *see also* Chevron Br. at 11-12. Universal jurisdiction reflects the international community's determination that some wrongs are so intolerable that every state has a sufficient interest in their suppression and

punishment to apply its own law, regardless of any connection to the act, the victim or the perpetrator. Restatement (Third) of Foreign Relations Law § 404, cmt. a. Accordingly, where there is "procedural agreement that universal jurisdiction exists to prosecute . . . allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

Respondents argue that since some nations have objected to ATS cases, this Court should just ignore universal jurisdiction. Resp. Br. at 55. But to demonstrate that ATS jurisdiction over conduct abroad violates international law, they would have to prove that the norm upon which they rely actually exists—just as plaintiffs must with respect to the right at issue. Respondents clearly cannot show that the international rules recognized in the Restatement have changed; such rules cannot be rewritten by a handful of countries' objections in a handful of cases. *Sosa,* 542 U.S. at 736. Application of a U.S. statute that is consistent with a universally accepted basis for jurisdiction cannot be barred by a heckler's veto.

Chevron's claim that universal jurisdiction only permits criminal, not civil, actions, Chevron Br. at 12-14, is equally wrong. Pet. Supp. Brief at 48-51; Restatement (Third) of Foreign Relations Law § 404 cmt. b. Indeed, "consensus as to universal criminal

jurisdiction itself suggests that universal tort jurisdiction would be no more threatening [to international comity]." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (citing Restatement § 404, cmt b).

That universal jurisdiction permits civil claims is hardly surprising. It is simply another manifestation of the basic principle—which Respondents and their *amici* ignore at every turn—that international law does not prescribe the means of its own enforcement.

There can be no objection to ATS cases involving universal jurisdiction-conferring acts, since ATS jurisdiction is far narrower than universal jurisdiction permits. Although universal jurisdiction would permit suits that lack any connection to the forum, in the ATS context there always must be a personal jurisdiction conferring connection to the defendant.

2. There could be no prescriptive jurisdiction concern in a particular case where ATS standards are consistent with foreign law.

Even if jurisdiction to prescribe applies to the ATS and should limit its scope, and if in a particular case there is no nationality or universal jurisdiction, such a case still would not necessarily raise any prescriptive jurisdiction concern. To make that showing, the defendant would have to demonstrate that the law of the foreign forum differs materially from the federal common law rule applicable under

the ATS. And the difference must be in the substantive law; as noted above, the form of the action is always determined by local law. If the substantive rule is the same, the U.S. could hardly be prescribing.

The law to which prescriptive jurisdiction limits actually apply, such as tax, antitrust and securities regulation, are detailed statutory schemes involving highly idiosyncratic rules. While ordinary tort principles are by no means uniform, many concepts are often alike, particularly where, as here, the foreign nation's law is based upon the common law. This Court cannot simply presume that every other nation's tort rules materially differ from federal common law principles.[19] This is yet another reason to reject a categorical bar.

IV. Courts should apply uniform federal common law rules under the ATS.

The ATS was passed in part to ensure that qualifying torts were adjudicated under uniform rules. See *supra* Section I.B.; *Sabbatino*, 376 U.S. at 427 n.25 (finding the ATS "reflect[s] a concern for uniformity in this country's dealings with foreign

[19] Indeed, even in the context of our detailed antitrust scheme, this Court considered whether prescriptive comity should be addressed on a case-by-case basis. *F. Hoffman-LaRoche Ltd. V. Empagran* S.A. 542 U.S. at 168-169. (2004). While the Court ultimately decided not to employ this approach, it did so only because it assumed foreign law would differ and because the subject matter was so complex. *Id.*

nations."). While ordinary transitory tort claims involve a choice of law analysis, in the ATS context, this approach could lead to a multiplicity of state and foreign laws applying to the same tort in different cases—a result utterly at odds with the statute's purpose.

The fact that the ATS gives effect to universally recognized norms and this Court's holding that ATS claims are claims under federal common law require uniform federal liability standards. As demonstrated above, this is perfectly compatible with international law. *See supra* Section III.

This Court has repeatedly held that federal causes of action should be subject to uniform liability rules.[20] Federal courts nearly always apply uniform federal rules of liability to give effect to federal tort causes of action, because "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Likewise, uniformity is the norm in laws that potentially touch upon foreign relations. *Sabbatino*,

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[20] *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law."); *Carlson v. Green*, 446 U.S. 14, 23 (1980) (applying uniform federal survivorship rule because "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules").

376 U.S. at 427 and n.25 (collecting constitutional and statutory provisions that reflect concern for such uniformity).

The ATS itself mandates this approach. The right whose violation confers jurisdiction is derived from international law, and only "'specific, universal and obligatory'" norms qualify. *Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)). This universality makes choice of law irrelevant; it is functionally equivalent to finding a lack of conflict, in which case courts typically apply forum law.

Moreover, this Court has already determined the law applicable to subsidiary issues in ATS cases: *federal common law* governs. *Sosa*, 542 U.S. at 724, 732. The federal common law rules that apply give effect to the international norms. *Id.* at 732. Accordingly, they must reflect the universal condemnation of the underlying violations.

Given this, applying a uniform federal rule implements the policies that typically underlie choice of law rules. The "most important function" of choice of law is "to make the interstate and international systems work well," and choice of law rules should account for the needs "of the community of states." Restatement (Second) of Conflict of Laws § 6 cmt. d (1971). Where, as here, the nations of the world have universally agreed that a right reflects the shared values and interests of humanity,

uniform federal rules promoting that right must take precedence over any conflicting foreign rules.[21]

Accordingly, this Court has specifically held that the domestic law of the place where an international law violation occurred cannot apply to bar redress. In *FNCB,* the Court refused to apply Cuban law because doing so "would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." 462 U.S. at 621-22. Since that principle was applied to a foreign government entity, there can be little objection to applying it to private parties.

Since international law leaves the manner of its enforcement to individual States, it permits them to implement a uniform response. Our law's response to genocide or crimes against humanity should not vary based on the happenstance of where the atrocity occurred.

V. Adjudicating transitory torts fulfills vital societal functions, especially in human rights cases.

[21] Put another way, where foreign law would undermine enforcement of international norms cognizable under the ATS, any conflict with federal common law principles that give effect to such norms would necessarily be a "false conflict." No state has a cognizable interest in preventing the implementation of universally recognized human rights norms or in denying its own citizens redress for violations.

Respondents argument for impunity rests on the flawed assumption that a state in which the victims find those responsible has no interest in the dispute. But as demonstrated above, all states have an interest in enforcing fundamental human rights norms.

More generally, the transitory tort doctrine prevents a defendant from avoiding all liability simply by being absent from the place of the injury. *Roberts*, 75 Cal. at 203-04. While the forum always has an interest in not becoming a safe haven for tortfeasors, it has a particularly strong interest in not being seen by the international community as a law-free oasis for torturers and genocidaires.

Last, a nation "has a legitimate interest in the orderly resolution of disputes among those within its borders." *Filártiga*, 630 F.2d at 885. That is why a tortfeasor may be sued wherever he is found. *Id*. So long as the defendant is in the jurisdiction, a state faces a risk to public order if those harmed cannot turn to the law for help.

VI. A ruling that the ATS does not apply to conduct that occurred abroad could cut a wide swath through long-established state and federal law.

A holding that prescriptive jurisdiction limits preclude the ATS from applying to claims that arise abroad will, at a minimum, result in such claims being brought in state court—exactly what the Framers sought to avoid. But that assumes such a

holding could be limited to the ATS—which is far from clear. In fact, the implications of Respondents and their *amici*'s crabbed theory of prescriptive jurisdiction are breathtaking.

For starters, such a ruling could knock the pins from under the act of state doctrine. Since that doctrine is based upon separation of powers concerns, courts only abstain if such concerns require it. *Sabbatino*, 376 U.S. at 421-22, 427-28; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 408-09 (1990). Respondent and their *amici*'s erroneous view of prescriptive jurisdiction would suggest that act of state abstention is compelled by international law, thus presumably requiring the doctrine to be applied to *every* act of state, and the balancing prong to be abandoned.

Perhaps even more troubling would be the potential effect on ordinary common law doctrines. A holding that adjudicating transitory torts under the ATS violates international law would call into question the transitory tort doctrine in every state. *See* Restatement (Third) of Foreign Relations Law § 402, cmt. k (under the Supremacy Clause, state exercise of jurisdiction that contravenes international limits on jurisdiction to prescribe is invalid). And the notion that some international standard bars the application of domestic law to tort claims arising abroad would cast doubt upon countless choice-of-law rules in the United States and across the world.

In short, under Respondents' approach, a host of rules, long-thought settled, would be open to challenge in unpredictable litigation in virtually every state and federal court. If adopted, that approach could—in a wide variety of contexts—replace certainty with chaos.

CONCLUSION

For the foregoing reasons, this Court should hold that the ATS provides jurisdiction for claims arising abroad.

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Respectfully submitted,

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