No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

v.

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

Respondents.

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

BRIEF FOR THE GOVERNMENT OF THE ARGENTINE REPUBLIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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June 13, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

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

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The Government of the Argentine Republic respectfully submits this brief as *Amicus Curiae* in support of Petitioners.[1]

[1] Written consent from both parties to the filing of *amicus curiae* briefs are on file with the Clerk. None of the counsel appearing in the Petition for Writ of Certiorari authored this

STATEMENT OF INTEREST OF THE GOVERNMENT OF THE ARGENTINE REPUBLIC

Filartiga v. Peña-Irala, 630 F. 2d 876 (2nd Cir. 1980) made it possible for an independent court in a democratic country to hear a case involving a horrific torture and killing by an official of the Government of Paraguay at a time of ruthless dictatorship in Paraguay when the Paraguayan courts could not hear such cases. It was a significant step against the impunity of the dictatorships that dominated Latin America at that time.

Argentina today is a democracy that views the international protection of human rights as integral to the spread of international peace and stability, and that regards domestic as well as international tribunals as central to the advancement of human rights. Those tribunals were important sources of international assistance for victims during the darkest days of Argentina's dictatorship and during its transition to democracy, and continue to be important for oppressed regions of the world today.[2] Reconsider-

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brief, in whole or in part, and no person or entity other than the Government of the Argentine Republic made any monetary contribution toward the preparation or submission of this brief.

[2] A number of government officials in the Argentine government today owe their own lives or those of close relatives and friends to international pressure placed on the dictatorship that ruled Argentina from 1976-1983. For example, Argentina's Foreign Minister, Héctor Timerman, is the son of Jacobo Timerman, a prominent Argentine journalist who was imprisoned and tortured from 1977-1979, was released thanks to international pressure, and who subsequently acted as an expert witness on torture in the *Filartiga* case. His book, published in the United States under the title *Prisoner Without a Name, Cell Without a Number* (Knopf 1981) offers his personal

ation by the United States Supreme Court of the use of the Alien Tort Statute in cases like *Filartiga* because the cause of action arose in the territory of a sovereign outside the United States places at risk an important contribution by the United States to the cause of international human rights. *Filartiga* represented a step against impunity when no other remedies were available, and its loss as a precedent would undermine the international system for the protection of human rights that the foreign policy of the Argentine Republic seeks to uphold.

SUMMARY OF ARGUMENT

The *Filartiga* decision was a significant step toward ending the impunity of human rights violators in repressive regimes, and has been applauded as such in Latin America. Critics who insist that the Alien Tort Statute was not intended to apply to causes of action arising abroad ignore the importance of Emmerich de Vattel as a scholar whose work informed late 18th century conceptions of the Law of Nations. Vattel insisted on the natural rights of the individual and supported universal jurisdiction against criminals who through heinous acts became enemies of all mankind. Latin America shares the heritage of Vattel with the United States, and while International Law's focus changed over the course of the 19th and early 20th centuries, the individual has returned to the fore since World War II.

Concerns that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) improperly opened the door to excessive exercise of prescriptive jurisdiction by the United

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recounting of the brutality and antisemitism he suffered at the hands of the Argentine *junta*.

States are unfounded given the universal nature of the limited set of norms that *Sosa* protects and the fact that virtually all nations have legislated them domestically.

INTRODUCTION

The relatives of Joelito Filartiga, a seventeen-year-old boy who was tortured to death by the Inspector General of the Asunción police because of the political activities of his father, had no remedies available to them in Paraguay when they discovered his torturer living in Brooklyn. When the family initiated a criminal action in the Paraguayan courts, their attorney was arrested and disbarred and the photographs of Joelito's body showing his torture were ignored by Paraguay's courts. *Filartiga*, 630 F.2d at 878. Joelito's case was one of over 18,000 torture cases and several hundred cases of executions and disappearances that have since been documented from the Stroessner regime (1954-1989), *see* United States Institute for Peace, *Truth Commission: Paraguay* http://www.usip.org/publications/truth-commission-paraguay.

Argentina, from March 1976 through December 1983, lived under a series of military juntas that caused what may have been as many as 30,000 people to permanently "disappear" through abductions followed by torture, murder and the hiding of the bodies, with thousands more detained, tortured and released, and with frequent plunder of the victims' property. U.S. Department of State, *Background Note: Argentina* http://www.state.gov/r/pa/ei/bgn/26516.htm; *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* 1 (Elias Caneti trans., Farrar, Straus & Giroux 1986) (1985). Yet even the inauguration of a democratically-elected

President on December 10, 1983 failed to open Argentine courts to civil actions by victims. Cases brought during the early years of Argentina's democratic rule were thrown out on statute of limitations grounds, with the Argentine Supreme Court holding that the statute of limitations had run during the military government. According to that Court, to extend statutes of limitations based on the de facto lack of access to the courts that existed for human rights victims "would imply a parenthesis in Argentine life" that the Court would not admit – regardless of the provision in the Argentine Civil Code for suspending the statute of limitations in the event of impossibility or great difficulty in bringing suit. *Olivares c/Estado Nacional Argentino*, CSJN, 311 Fallos 1490, 1494 (1988) (refusing to apply art. 3980 of the Argentine Civil Code to extend the statute of limitations); *Di Cola c/Estado Nacional*, CSJN, 311 Fallos 1478, 1482 (1988); *see also* Report No. 1/93 – Argentina, Inter-American Commission on Human Rights, March 3, 1993 http://cidh.org/annualrep/92eng/Argentina10.288.htm (describing the Inter-American Commission's mediation and settlement of human rights cases dismissed by the Argentine courts on statute of limitations grounds). The Alien Tort Statute cases emerging from the atrocities of Argentina's military government could not have received a hearing in Argentina at the time they were brought. For example, the murders, torture and property theft that formed the central counts in *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) occurred in 1977 and would have been barred by a two-year statute of limitations, Cód. Civ. art. 4037.

But more than as individual decisions, the *Filartiga* and *Suarez Mason* cases need to be viewed in histori-

cal context. Prior to *Filartiga* there simply were no modern examples of the human rights violations of Latin American dictatorships getting exposed in a court of law. The *Filartiga* decision gave an outlet for and strengthened the work of human rights groups working at great personal risk in Latin American dictatorships to document the atrocities taking place in their countries. *See* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 Chi. J. Int'l L. 1, 8-9 (2001). Together, the *Filartiga* and *Suarez Mason* decisions form part of a movement that has broadly impacted human rights practices in Latin America to end the impunity of dictators and their accomplices and to compensate their victims. *See id*. at 8-10, 13-15.[3] A retreat by the United States to no longer hear human rights actions arising abroad will hurt that movement internationally.

ARGUMENT

I. APPLICATION OF THE ALIEN TORT STATUTE TO UNIVERSALLY ACCEPTED, WELL-DEFINED VIOLATIONS OF INTERNATIONAL LAW THAT ARISE IN FOREIGN STATES IS CONSISTENT WITH BOTH VATTEL AND WITH INTERNATIONAL LAW'S POST-WORLD WAR II CONCERN FOR THE INDIVIDUAL

Both International Law as understood in 1789 and International Law developments since World War II

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[3] Since the restoration of democracy in December 1983, the promotion and protection of human rights has been a consistent State policy in Argentina, with laws since the 1990's to compensate the victims of human rights violations, and with criminal proceedings against the violators reinstated in 2003.

allow countries to offer a civil forum to aliens suing their oppressors for human rights violations committed in foreign States. In Latin America, *Filartiga* is cited as a valuable legal advance.

Emmerich de Vattel supported the concept of universal jurisdiction, and he was by far the most widely cited international law scholar at the time the Alien Tort Statute was passed as part of the Judiciary Act of 1789, *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 463 n.12 (1978); Anthony Bellia, Jr. & Bradford Clark, *The Federal Common Law of Nations*, 109 Colum. L. Rev. 1, 15-16 (2009); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 484-487 (1989); Thomas Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 847-848 (2006). Moreover, his book, *The Law of Nations or the Principles of Natural Law*, (Charles Fenwick trans., Carnegie Institution, 1916) (1758) sets out the same three international law crimes that this Court notes in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) as the international law torts that would have existed at the time of the Framers – violations of safe conducts, attacks on ambassadors, and piracy. *Id*. bk. 3, §268 (safe conducts); bk. 4, §80 (ambassadors); bk. 1, §233 (pirates). Vattel certainly maintains that as a general rule States should limit themselves to punishing crimes committed within their own territory. *Id.* bk. 1, §233. But that is only the general rule. Vattel also believes in universal jurisdiction for especially heinous criminals – and not just for pirates. *Id.* bk. 1, §233.

Vattel's starting point is that "every moral being should act according to its nature" and that "there are certain acts of a Nation which affect its character

as a Nation . . . so that it is not a matter of indifference whether it perform some of them and omit others. The natural law prescribes certain duties in this respect." *Id.* bk. 1, §13. The end of a civil society is to secure the happiness of its citizens. *Id.* bk. 1, §13. While men enter into a compact of civil society and owe an obligation of obedience to their rulers, they do not give up their natural rights, and they retain the right to rebel against an oppressive ruler. *Id.* bk. 1, §54. In fact, such rulers are international criminals. "[T]hose monsters who, under the name of sovereigns, act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth." *Id*. Certain individuals by their heinous conduct – monstrous sovereigns, poisoners, assassins, arsonists, and pirates – are subject not just to the positive law sanctions of the domestic legal systems where they commit their crimes, but to the universal justice of the Law of Nations. *See id*. bk. 1, §233; bk. 2, §56.

Vattel's natural law approach toward the Law of Nations is part of the common heritage of the United States with Hispanic America, *see* Victor Tau Anzoátegui, *Las ideas jurídicas en la Argentina (siglos XIX - XX)* 37 (Editorial Perrot, 2nd ed., 1987) and while Vattel does not obligate a State to try "monsters" who commit crimes against humanity in other countries, he certainly hopes that such trials will occur. Even if part of the concern of the drafters of the Alien Tort Statute was to ensure U.S. compliance with its international obligations to protect ambassadors and avoid violating safe-conducts (which may or may not have been the case, since the history is opaque), the Law of Nations in 1789 clearly allowed foreigners harmed abroad to seek justice

against "monsters" who took refuge in the United States. Moreover, the common mechanism for victims to seek justice in the U.S. Federal courts would have been a tort action, since the Judiciary Act of 1789 likely barred private prosecutions, *see* Judiciary Act of 1789, ch. 20, §35, 1 Stat. 73, 92-9 (referring to the duty of district attorneys "to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States"); Harold Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 293 (1989); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 n. 12 (2004); *Young v. United States*, 481 U.S. 787, 817 n. 2 (1987) (Scalia, J., concurring in judgment).

In fact, the concept of universal jurisdiction arising out of Vattel was not confined to U.S. legislation. Art. 118 of the Argentine Constitution, which dates back to 1853, provides that "[crimes] committed outside of the borders of the Nation, against the Law of Nations, shall have their place of trial determined by a special law of Congress." The provision has never been applied, but some Argentine scholars assume that its likely source was the Alien Tort Statute, since all of the other provisions of the Argentine Constitution dealing with the judiciary are taken from Art. III of the U.S. Constitution and the Judiciary Act of 1789. *See* Carlos Colautti, *El artículo 188 de la Constitución y la jurisdicción extraterritorial*, 1998-F La Ley 1100, 1101 (1998); Alejandro Morlachetti, *El caso "Arancibia Clavel". Principio de legalidad e imprescriptibilidad de los crímenes de lesa humanidad. ¿Una nueva exégesis del art. 18 CN*, 2005-II Jurisprudencia Argentina 1001, 1012 (2005). A similar provision appears in art. 117 of the Venezuelan Constitution of 1810.

International Law moved away from natural law during the late 19th and early 20th centuries to focus on the voluntary acceptance by States of legal rules through treaties and generally accepted practice, *see The Case of the S.S. Lotus*, P.C.I.J., Ser. A, No. 10, at 18 (1927) (emphasizing that the rules of law binding on States emanate from their decisions to accept them and that therefore International Law cannot presume restrictions on the ability of States to act, even in their exercise of judicial jurisdiction, without a specific International Law obligation not to act). The *Lotus* decision's approach toward International Law, as only able to impose a restriction in the event of deliberately undertaken obligations by States, inevitably de-emphasized the natural rights of the individual. But since the Second World War, thanks in significant part to the efforts of the United States, International Law has renewed its focus on the individual as a subject of International Law with both rights and obligations. International Law's broadening of direction began with the U.N. Charter's focus on human rights and the trial of the Nazis at Nuremberg for Crimes Against Humanity as well as for War Crimes. It continued with the American Declaration of the Rights and Duties of Man of the Organization of American States (1948), the Universal Declaration of Human Rights of the United Nations (1948) and human rights treaties drafted under the auspices of the United Nations, the Organization of American States, the Council of Europe and more recently, by the Organization of African Unity and the African Union. *See generally* Thomas Buergenthal, *Centennial Essay: The Evolving International Human Rights System*, 100 Am. J. Int'l L. 783, 783-801 (2006). Part of the renewed concern for human rights has included the right to compensation

for human rights violations, as an element of the obligation of States to protect human rights and end the impunity of human rights violators. Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693, 699-702 (2008); *see generally* Thomas M. Antkowiak, 47 Stan. J. Int'l L. 279, 286-292 (2011) (offering a recent overview of compensation approaches taken by international tribunals).

Latin American scholars have celebrated the *Filartiga* decision's contribution to ending impunity for human rights violations, *see e.g.* Adrián F. J. Hope, *Reflexiones sobre el caso "Filartiga" y el nuevo derecho internacional*, 97 El Derecho 975, 975 (1982) (celebrating the *Filartiga* decision as part of the changed approach of International Law towards human rights since World War II); Carlos E. Colautti, *La jurisdicción extraterritorial y los delitos contra el derecho de gentes*, 1999-E La Ley 996, 996 (1999) (calling the *Filartiga* decision a "classic of U.S. jurisprudence for the manner in which it refers to extraterritorial jurisdiction when human rights violations exist"); Pablo L. Manili, *Las empresas multinacionales y los derechos humanos*, 2003-I Jurisprudencia Argentina 995, 1002 (2003) (referring to the *Filartiga* decision as "renowned"). Justice Maqueda of the Argentine Supreme Court traced the Alien Tort Statute as a critical link in the history of ending impunity for gross human rights violations in *Simón*, CSJN, 328-2 Fallos 2056, 2237 (2005) (Maqueda, J. concurring), a decision in which the Argentine Supreme Court set aside the statute of limitations defenses of defendants accused of participating in disappearances and changing the identities of the infant children of the disappeared during the Argentine military government. The

Filartiga line of cases easily fits International Law's renewed focus on responsibility and reparation of gross violations of human rights because it involves what is essentially "a tort against humanity." Ruti G. Teitel, *Transitory Justice* 145 (Oxford, 2000).

II. SOSA'S APPLICATION OF COMMON LAW PRINCIPLES CAREFULLY DERIVED FROM INTERNATIONAL LAW DOES NOT INVOLVE AN ASSERTION OF PRESCRIPTIVE JURISDICTION, SINCE THE RULES ARE UNIVERSAL IN NATURE

Unlike transitory tort scenarios where a court may be tempted to apply its own law to events arising abroad, the Alien Tort Statute and accompanying federal common law as enunciated in *Sosa* do not involve issues of the United States projecting its own law abroad. The substantive International Law norms that *Sosa* would have U.S. courts apply are already universal in nature and have been incorporated into the domestic law of most countries. For example, the Argentine Constitution already gives pride of place to international human rights law. As a result of reforms in 1994, Art. 75, § 22 of the Argentine Constitution raises various international human rights instruments to "constitutional hierarchy," and provides that they may only be denounced after a vote of two-thirds of the membership of each house of Congress.

Jurisdiction to prescribe refers to "'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate,'" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J. dissenting) (quoting *Restatement (Third) of Foreign*

Relations Law of the United States 231 (1987)). However neither *Filartiga* nor *Sosa* involved problems of jurisdiction to prescribe. *Filartiga* assumed a choice of law inquiry under which Paraguayan law could well govern the action, 630 F.2d at 889, and Paraguayan law would have allowed a civil action for torture, *see* Adrián F. J. Hope, *Reflexiones sobre el caso "Filartiga" y el nuevo derecho internacional*, 97 El Derecho 975, 985 (1982). The United States did not need to prescribe its own law. *Sosa* applies Federal common law based on International Law but calls for discretion, indicating that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [of violations of safe conducts, attacks on ambassadors and piracy]." 542 U.S. at 725. These are universally accepted norms. Certainly there is sometimes room for argument regarding the specific content of an international human rights norm, but that should not occur in Alien Tort Statute litigation given that *Sosa* insists "that federal courts should not recognize private claims under federal common law with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted," 542 U.S. at 732. The basic legal principles governing any proper action brought using the Alien Tort Statute are not prescribed by the United States but by International Law. While there may still be some choice of law issues on questions such as damages, those issues would presumably be resolved using traditional choice of law principles designed to avoid unfairness, *see Filartiga*, 630 F.2d at 889 (citing *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930)),

and are much less problematic than the typical transitory tort action in the United States, which requires a choice of law analysis for all of the substantive law involved.

Moreover, most Alien Tort Statute cases present situations where the conduct involved could have formed the basis of an action under the law in the country where the action arose. Dictators usually leave the formal protections of existing legislation in place. *See Hilao v. Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1471 (9th Cir. 1994) (denying an act of state defense for acts of torture because torture was illegal under Philippine law even during the Marcos regime).

Since only the most established of international law rules are involved, there simply is little risk of the United States improperly prescribing conduct to foreign jurisdictions. The foreign sovereigns will have accepted the prescription on their own, and in most instances will have also already incorporated it into their domestic law.

CONCLUSION

The Alien Tort Statute offers a valuable instrument to promote goals shared by all democratic republics. Many Alien Tort Statute cases arising abroad are brought in contexts where no alternative forum exists – as was certainly the case in the *Filartiga* and *Suarez Mason* cases. Loss of the Alien Tort Statute as a tool for human rights victims seeking justice would be a serious blow to the cause of democracy and human rights.

Respectfully submitted,

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