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

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS OF CONSTITUTIONAL AND FEDERAL CIVIL PROCEDURE LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is respectfully submitted pursuant to Supreme Court Rule 37 in support of the Respondents.[1] *Amici* (listed in the Appendix) are constitutional and federal civil procedure law professors who have an interest in the proper jurisdictional limitations being applied to the Alien Tort Statute, 28 U.S.C. § 1350.

Before reaching the substantive merits of this case, this Court must first determine the threshold question of whether federal courts have Article III subject-matter jurisdiction over "foreign-cubed" lawsuits brought under the Alien Tort Statute – that is, lawsuits where foreign defendants are sued by foreign plaintiffs for conduct committed exclusively in foreign countries. Because the Constitution precludes such jurisdiction, *Amici* respectfully ask this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this Court's grant of *certiorari* principally concerns the question of whether corporations can be held liable for actions brought pursuant to the Alien Tort Statute (the "ATS"), a necessary precedent question is whether the federal courts have subject-matter jurisdiction over "foreign-cubed" ATS lawsuits.[2]

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *see also Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1868) ("[t]he first question necessarily is that of jurisdiction for . . . it is useless, if not improper, to enter into any discussion of other questions" if jurisdiction is absent); *Steel Co. v. Citizens For Better Env't*, 523 U.S. 83, 93 (1998) ("statutory arguments, since they are 'jurisdictional,' would have to be considered by this Court even though not raised earlier in the litigation – indeed, this Court would have to raise them *sua sponte*"). Unless a case or controversy falls within one of the

[2] *See Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010) (Stevens, J., concurring) (defining "foreign-cubed" actions under the Securities Exchange Act as those in which "(1) *foreign* plaintiffs [are] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries") (alteration in original) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008)).

grants enumerated in Article III, the federal courts have no power to hear it.

The threshold question of jurisdiction is not "a mere doorsill but a formidable obstacle." *Sarei v. Rio Tinto*, No. 02-56256, slip op. 19321, 19465 (9th Cir. Oct. 25, 2011) (en banc) (Ikuta, J., dissenting). As four dissenting judges in the Ninth Circuit Court of Appeals recognized in *Rio Tinto*, "foreign-cubed" ATS lawsuits, such as this case, fail to meet this threshold requirement. *See generally Rio Tinto*, slip op. at 19465.

For the reasons explained below, the federal courts lack both Article III and statutory subject matter jurisdiction over such lawsuits, including this suit, and the proper result in this case should be dismissal for lack of subject matter jurisdiction.

ARGUMENT

I. ARTICLE III JURISDICTION DOES NOT EXIST FOR "FOREIGN-CUBED" ATS LAWSUITS

The *Kiobel* lawsuit was brought by twelve citizens of Nigeria against three foreign corporations: Royal Dutch Petroleum Company, now Shell Petroleum N.V., a Dutch corporation, the "Shell" Transport and Trading Company p.l.c., now the Shell Transport and Trading Company, Ltd. (collectively with Shell Petroleum N.V., "Shell"), an English Corporation, and the Shell Petroleum Development Company of Nigeria,

Ltd. ("SPDC"), a Nigerian corporation. Kiobel alleges that Shell, through its indirect subsidiary SPDC, "aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs." (*See* Pet. App. A-22 & n.25.) Kiobel's claims against Shell include charges of: extrajudicial killing; crimes against humanity; torture or cruel, inhuman, and degrading treatment; arbitrary arrest and detention; violation of the rights to life, liberty, security, and association; forced exile; and property destruction. (*Id*. at A-23.) No relevant act occurred within the United States; no plaintiff was a citizen or resident of the United States at the time the alleged torts were committed; and no defendant was incorporated or had its principal place of business – or any business operations whatsoever – in the United States. Yet, despite no connection between the United States and the conduct, plaintiffs, or defendants, Petitioners seek to have a United States federal court adjudicate their claims.

A. The Foreign Diversity Clause Does Not Reach Suits Between Aliens

Article III, section 2, clause 1 of the United States Constitution limits the federal judicial power to:

> . . . all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty

> and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1. "This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden, B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) (citing *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809) and *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922)).

Unless a case or controversy falls within one of the grants enumerated in Article III, the federal courts have no power to hear it. The final clause of Article III, on its face, extends the federal judicial power to cases brought by "foreign States, Citizens or Subjects" only when the adversary is a State or one of its citizens. Unless a "foreign-cubed" ATS case satisfies some other grant of jurisdiction in Article III (*e.g.*, cases arising under maritime law, cases involving ambassadors), Article III jurisdiction is absent.

In the original Judiciary Act of 1789, the First Congress established the statutory jurisdiction of the federal courts, cabined, of course, by Article III. The

original version of the ATS, now codified at 28 U.S.C. § 1350, was contained in Section 9 of the Judiciary Act, and provided the district courts with "cognizance" of "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.[3]

In Section 11 of the Judiciary Act, the First Congress provided the district courts with jurisdiction over "all suits of a civil nature at common law or in equity, where . . . an alien is a party." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. Neither Section 9 (the ATS) nor Section 11 specifies that the party adverse to an alien must be a citizen of the United States. Nevertheless, several early decisions of this Court hold that the alienage jurisdiction provided by the Judiciary Act cannot expand federal jurisdiction to cases by aliens against aliens, in contravention of Article III. Therefore, the Judiciary Act must be read narrowly, within its Constitutional confines.

For example, in *Mossman v. Higginson*, 4 U.S. 12 (1800), a British citizen sued persons whose citizenship was not disclosed in the pleadings. Counsel for petitioner argued, "that the jurisdiction of the court, did not appear upon the record, as there was no

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[3] The statute has been modified since its original enactment. It now reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

designation of the citizenship of the defendants." *Id*. at 13. This Court agreed, holding:

> [T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is *a party*"; but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other.

Id. at 14; *see also Montalet v. Murray*, 8 U.S. 46, 47 (1807) ("The Court was unanimously of the opinion that the courts of the United States have no jurisdiction of cases between aliens"); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (holding federal courts lacked jurisdiction over suit by British citizen against persons of unknown citizenship because Section 11 of the Judiciary Act "cannot extend the jurisdiction beyond the limits of the constitution").

Just as Section 11 of the Judiciary Act cannot create Article III jurisdiction for suits between aliens, neither can Section 9, which contains the ATS. *See Rio Tinto*, slip op. at 19481-83 (Ikuta, J., dissenting).

B. Violations of the "Law of Nations" Do Not Confer "Arising Under" Jurisdiction

Because the alienage grant in Article III does not confer jurisdiction over suits between aliens, and because Petitioners' lawsuit does not fall within any other specific grant of jurisdiction under Article III, the only remaining ground for Article III jurisdiction would be the grant of jurisdiction over cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. However, no constitutional or treaty-based claim is present here. Therefore, the "arising under" clause would provide a basis for Article III jurisdiction over Petitioners' claims only if those claims arise under the "Laws of the United States." However, claims for violations of the law of nations do not "arise under" federal law, for several reasons.

First, the ATS is not itself a "Law[ ] of the United States" capable of creating "arising under" jurisdiction. As this Court held in *Sosa v. Alvarez-Machain*, the ATS is a purely jurisdictional statute that creates no causes of action. 542 U.S. 692, 712 (2004) ("we agree the statute is in terms only jurisdictional"); *id*. at 724 ("the ATS is a jurisdictional statute creating no new causes of action"); *id*. at 729 ("All Members of the Court agree that § 1350 is only jurisdictional"); *id*. at 713 ("[Petitioner] says the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in

violation of international law. We think that reading is implausible"). As such, the ATS cannot itself provide a basis for Article III "arising under" jurisdiction: a statute that is merely jurisdictional by definition does not set forth substantive law supporting a cause of action "arising under th[e] . . . Laws of the United States." U.S. Const. art. III, § 2, cl. 1; *see Mesa v. California*, 489 U.S. 121, 136 (1989) ("Section 1442(a) . . . is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction."); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 452 (1851) (rejecting the view that the jurisdictional statute at issue itself provided a basis for "arising under" jurisdiction because "the jurisdiction to administer the existing laws upon [the subjects of commerce and navigation] is certainly not a regulation within the meaning of the Constitution. And this act of Congress merely creates a tribunal to carry the laws into execution but does not prescribe them.").

This Court's analysis of the scope of a congressional grant of jurisdiction through the creation of a body of substantive laws, as opposed to a mere conferral of jurisdiction over a specific category of suits, was expressed in *Verlinden, B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

In *Verlinden*, this Court addressed whether Congress had exceeded the scope of Article III by authorizing suits by foreigners against foreign sovereigns,

under the Foreign Sovereign Immunities Act ("FSIA"). Citing *Mossman*, this Court held that Article III's foreign diversity clause did not provide sufficient grounds for the FSIA's authorization of suits by aliens against aliens, and then proceeded to consider whether the FSIA's grant of jurisdiction could be justified under Article III's "arising under" clause. *Verlinden*, 461 U.S. at 482. The Court concluded that if the FSIA "sought to do nothing more than grant jurisdiction over a particular class of cases," the FSIA's grant of jurisdiction for aliens to sue aliens would be unconstitutional. *Id*. at 496. However, because Congress, in enacting the FSIA, "expressly exercised its power to regulate foreign commerce," Article III's "arising under" provision was sufficient to justify the FSIA's jurisdictional grant. *Id*. at 482.

The Court in *Verlinden* further noted that the FSIA expressly "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," and was binding on the state courts as well as the federal courts. *Id*. at 494. Thus, by exercising its Article I foreign commerce power to create a comprehensive and substantive body of federal law governing foreign entities and foreign relations, the FSIA was properly within Article III's arising under jurisdiction. *Id*. at 495; *see also Rio Tinto*, slip op. at 19481-83 (Ikuta, J., dissenting).

The ATS, in sharp contrast, is purely jurisdictional, doing nothing more than granting "federal courts jurisdiction over a species of claims that incorporate 'the law of nations'." *Id*. at 19469, and

therefore cannot provide a basis for "arising under" jurisdiction.

Second, the Constitution itself does not include the law of nations as part of the laws of the United States. Although Articles III and VI include treaties as a source of supreme federal law, *see* U.S. Const. art. III, § 2, cl. 1 and art. VI, they do not include any mention of the "law of nations." Indeed, the only mention of the law of nations in the Constitution is contained
in Article I, which gives *Congress*, not the courts, the discretionary authority to "define and punish" – and thereby incorporate into federal law – "Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.

The omission of the "law of nations" from Articles III and VI, is made even more significant by the fact that at least two proposed drafts of the Constitution would have granted the federal judiciary the authority to hear cases arising under the law of nations. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 597-98 (2002) ("The Pinckney Plan would have given the Supreme Court appellate jurisdiction over state court decisions 'in all Causes wherein Questions shall arise . . . on the Law of Nations" and "there is evidence suggesting that the New Jersey Plan would have given the federal judiciary authority to hear, on appeal, all cases 'which may arise . . . on the Law of Nations, or general commercial or marine Laws'"); *see also Rio Tinto*, slip op. at 19472-73 (Ikuta, J., dissenting).

In contrast to the Constitution's grant to Congress of the power to define and punish violations of the law of nations, the Framers conceived of a federal judiciary with limited jurisdiction, "declared by the constitution to comprehend certain cases particularly specified." James Madison, The Federalist, No. 83 (1788). The "particularly specified" grants extending to matters within the law of nations include jurisdiction over: "Treaties made, or which shall be made . . . all Cases affecting Ambassadors, other public Ministers and Consuls [and] all Cases of admiralty and maritime Jurisdiction." U.S. Constitution, art. III, sec. 2. The argument that, because the law of nations is incorporated into federal common law, cases based on the law of nations arise under the laws of the United States, *see*, *e.g.*, *Sarei v. Rio Tinto*, slip op. at 19342-51, is inconsistent with the structure of the Constitution itself. If law of nations claims arise under the laws of the United States, the specific jurisdictional grants over cases involving treaties, ambassadors, admiralty law and maritime law would have been superfluous. *See generally*, Donald Kochan, *Constitutional Structure as a Limitation on the Scope of the 'Law of Nations' in the Alien Tort Claims Act*, 31 Cornell Int'l L. J. 153, 170-76 (1998); Arthur Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1223 (1988).

Third, this Court has held that uncodified international law, such as the law of nations, does not present a federal question or comprise the laws of the United States for jurisdictional purposes. *See New*

York Life Insurance Co. v. Hendren, 92 U.S. 286 (1875). In *Hendren*, this Court dismissed for lack of jurisdiction a suit for dissolution of an insurance contract based on "the general laws of war, as recognized by the law of nations applicable to this case," as the suit was "premised upon principles of general law alone" and that it "nowhere appear[ed] that the constitution, laws, treaties, or executive proclamations[ ] of the United States were necessarily involved" in reaching a decision. 92 U.S. at 286-87; *see also Ker v. Illinois*, 119 U.S. 436, 444 (1886) (the decision of whether "forcible seizure in another country" prevents the criminal prosecution in the United States of the person seized is "as much within the province of the State court, as a question of common law, or the law of nations, of which that court is bound to take notice, as it is of the courts of the United States" and is "one . . . which we have no right to review").

Fourth, cases prior to this Court's decision in *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938), that recognized the law of nations as "part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), or as "a part of the law of the land," *The Neriede*, 13 U.S. (9 Cranch) 388, 423 (1815), on which courts have relied in asserting that the law of nations provides an Article III basis for ATS suits, *see*, *e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980), are not to the contrary. "In the eighteenth and nineteenth centuries, the law of nations was considered to be a form of general law." Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of*

Nations, 78 U. Chi. L. Rev. 445, 528 n.396 (2011). As *Sosa* explained, when the First Congress enacted the ATS and until this Court's decision in *Erie*, "the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Sosa*, 542 U.S. at 725. This general common law "was not federal law under the Supremacy Clause" and it did not by itself confer jurisdiction on the federal courts. *Id*. at 740 (Scalia, J., concurring).[4]

In *Erie*, this Court rejected the ability of the federal courts to apply the general common law, instead requiring federal courts to apply either state or federal substantive law. 304 U.S. at 78. As a result, federal courts can no longer create substantive federal common law except in limited circumstances not relevant here. *Id*. Any contention that, as a result of Erie, federal courts can now manufacture their own "arising under" jurisdiction by decreeing federal common law would be entirely antithetical to *Erie*, and inconsistent with *Sosa*'s admonition that federal

[4] *See also* Curtis A. Bradley & Jack L. Goldsmith III, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 823 (1997) ("general common law was not part of the 'Laws of the United States' within the meaning of Articles III and VI of the Constitution: federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not by that fact alone establish federal question jurisdiction"); *Id.* (explaining that both pre- and post-*Erie* customary international law is not federal law).

common law is generally limited to areas "defined by express congressional authorization" or "interstitial areas of particular federal interest." 542 U.S. at 725.

II. THE ATS DOES NOT PROVIDE STATUTORY SUBJECT MATTER JURISDICTION OVER "FOREIGN-CUBED" LAWSUITS

The ATS does not provide statutory subject-matter jurisdiction over "foreign-cubed" suits for two reasons: (1) if inconsistent with Article III's grant, the ATS must be narrowed in a way to render it constitutional; and (2) the "law of nations" is not synonymous with "international law," and excludes "foreign-cubed" torts by definition.

A. The ATS Must be Narrowly Construed to Exclude "Foreign-Cubed" Lawsuits

The ATS, like the statutory grant of alienage jurisdiction contained in Section 11 of the Judiciary Act of 1789, purports to grant statutory jurisdiction over suits by aliens, regardless of the citizenship of the adverse party. As discussed *supra* at I.A, when confronted with the problem that Section 11's statutory grant appeared to exceed Article III's grant, by providing for jurisdiction in suits between aliens, this Court narrowed Section 11's literal language to make it consistent with the Constitution. Thus, in *Mossman*, *Montalet* and *Hodgson*, the Court repeatedly constricted the language of Section 11 so that it was "confined to suits between citizens and foreigners,"

despite the statute's broader literal reading. *Mossman*, 4 U.S. at 14; *Hodgson*, 9 U.S. at 304; *Montalet*, 8 U.S. at 47. That same result must apply to the ATS; there is no reason to treat Sections 9 and 11 of the Judiciary Act differently.

B. The Law of Nations Does Not, by its Own Definition, Include "Foreign-Cubed" Torts

No nation has an obligation to adjudicate claims that do not involve it. Indeed, the law of nations compels nations to refrain from purporting to adjudicate controversies as to which they have no connection, because each must respect the sovereignty of the others.

In *Sosa*, this Court was careful not to confuse the "law of nations" with "international law." The law of nations concerns: (1) "'the rights subsisting between nations or states, and the obligations correspondent to those rights,' . . . [which] occupie[s] the executive and legislative domains, not the judicial"; and (2) "a body of judge-made law regulating the conduct of individuals *situated outside domestic boundaries* and consequently carrying an international savor." 542 U.S. at 714-15 (quoting E. de Vattel, THE LAW OF NATIONS, Preliminaries § 3 (emphasis added)).[5] The

[5] Vattel's landmark work, The Law of Nations, first published in 1758, "was unrivaled among such treatises in its influence on the American founders." Peter Onuf & Nicholas Onuf, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 11 (1993). *See also*

(Continued on following page)

Court noted that the law of nations implicated individuals as to a "narrow set of violations" only, where a nation's failure to provide redress for an offense "threaten[ed] serious consequences in international affairs." *Id*. at 715.

Historically, "nations were responsible under the law of nations to punish and compensate offenses committed *by their citizens*; although there might also have been circumstances under which nations had an obligation to punish offenses by foreign citizens committed in their territory, nations were not themselves liable for the damages caused by such foreign citizens." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 630 (2003). However, the law of nations imposed no duty on any nation to provide redress for injuries caused by aliens within the territory of another nation. Indeed, the "law of nations" as it existed in the 18th and 19th centuries would have viewed the prosecution of a "foreign-cubed" lawsuit as a direct infringement of one nation's sovereignty by another:

U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978) ("The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel. 1 J. Kent, Commentaries on American Law 18 (1826). In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting. . . .' 2 F. Wharton, United States Revolutionary Diplomatic Correspondence 64 (1889).").

> It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect, if they would not do her an injury.

E. de Vattel, THE LAW OF NATIONS, bk. II, ch. IV, § 54.

In the present case, judging the liability of Respondents necessarily requires judging the conduct of a foreign sovereign. In this case, Petitioners allege that Shell, through its Nigerian subsidiary, SPDC, aided and abetted the Nigerian government by, for example, reporting that oil pipelines have been sabotaged, providing the use of helicopters to transport Nigerian government personnel, coming to a prison to identify perpetrators of violence (which SPDC allegedly failed to do), and hosting a cocktail party for witnesses at trial, which resulted in verdicts of death. Judging the liability of Respondents necessarily requires judging the Nigerian government's actions within Nigeria against Nigerians. J.A. 60-77.

The law of nations places obligations on states, not individuals. "[I]t would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not, then, to say, in general, that we have received an injury from a nation because we

have received it from one of its members." E. de Vattel, THE LAW OF NATIONS, bk. II, ch. VI, § 73. However, when a nation "refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or, finally, to deliver him up, [that sovereign] renders himself in some measure an accomplice in the injury, and becomes responsible for it." *Id*. at § 77. The law of nations is therefore not violated simply because a private citizen injures a foreigner; it is violated when the nation whose citizen has caused the injury fails to provide adequate redress. *See Rio Tinto*, slip op. at 19475-77 (Ikuta, J., dissenting).

Thus, the meaning of the phrase "in violation of the law of nations" contained within the ATS does not – and cannot – encompass torts committed by foreigners, against foreigners, in a foreign country. In *Sosa*'s terms, there is no "obligatory" norm requiring enforcement by the United States. 542 U.S. at 732. As Judge Kleinfeld, dissenting in *Sarei v. Rio Tinto*, put it, asserting jurisdiction under the ATS over a "foreign-cubed" lawsuit:

> violates the most long established, central and fundamental principle of the law of nations: "equality of sovereignty," as it is called, meaning each sovereign's authority over its subjects in its own territory equals that of other sovereigns within their respective territories, and excludes other sovereigns' authority within that sovereign's territory. Whether this is always a good rule as a matter of policy is debatable, but

> whether it is historically the most fundamental rule of the law of nations is not.

Sarei v. Rio Tinto, slip op. at 19431. The United States would not have had – and still does not have – any duty or obligation under the law of nations to provide redress for such a tort, and therefore, the failure of the United States to provide such redress does not constitute a violation of the law of nations. To the contrary, a decision of the United States to adjudicate such a claim would constitute a breach of the law of nations, of exactly the type the First Congress sought to avoid.

Early decisions of this Court embody the fundamental principle set out in Vattel. For example, in *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824), a French ship destined for Charleston was diverted to a Spanish port in Florida, in an attempt to avoid customs duties due to the United States. The ship had to traverse the St. Mary's River, which was the dividing line between the United States and the territory of Spain. After concluding that the river had the character of international territory, the Court concluded that even though the cargo was bound for the United States by subterfuge, the laws of the United States could not authorize the seizure of the ship or its cargo, because "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." *Id*. at 370.

In *Rose v. Himeley*, 8 U.S. (4 Cranch) 241, 277-79 (1808), a tribunal in Santo Domingo issued a

judgment of condemnation as to a cargo of coffee seized in international waters, which thereafter never entered the sovereign territory of Santo Domingo. Starting from the proposition "that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens," the Court held that because the Santo Domingo tribunal had "exercise[d] a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts." *Id*.

Finally, in *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825), Chief Justice Marshall, for a unanimous Court, held that:

> No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all can be devested only by consent, and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations, and this traffic remains lawful to

> those whose governments have not forbidden it.[6]

Id.

The failure of the United States to provide a forum to adjudicate "foreign-cubed" lawsuits does not constitute a violation of the law of nations. Accordingly, the ATS's grant of jurisdiction over torts committed "in violation of the law of nations" does not provide jurisdiction over "foreign-cubed" claims.

[6] The development of treaty law, particularly multilateral treaties formulated under the auspices of the United Nations, is the way the modern world has implemented Justice Marshall's "devested by consent" requirement. There presently are multilateral treaties and conventions covering a multitude of subjects, including torture, extrajudicial killing, cruel, inhuman and degrading treatment, and other abuses of human rights. Under the constitutional framework in the United States, the treaty power is reserved to the President, with the advice and consent of the Senate – not the courts. In almost all cases, the United States' adoption of treaties has been with the reservation that they are not self-executing. As Justice Scalia noted in his concurrence in *Sosa*, were the courts to rely on the law of nations to create private rights of action where the Executive and Legislative branches have expressly refused to do so would put the courts "directly into confrontation with the political branches" to whom the Constitution has entrusted those matters. 542 U.S. at 748.

CONCLUSION

This case should be dismissed for lack of subject matter jurisdiction.

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APPENDIX

LIST OF *AMICI CURIAE**

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Professor of Law, Regent University School of Law

Professor Duane has taught at Regent Law School since 1991 in the areas of Evidence, Civil Procedure, Trial Practice, and Appellate Advocacy, and has published more than thirty articles in those fields.

Leslie Y. Garfield

Professor of Law, Pace University School of Law

Professor Garfield has taught at Pace University School of Law since 1990, and published numerous articles on Constitutional and Tort Law.

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* Affiliations are provided for identification purposes only.