No. 03-339

IN THE
Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALIEN FRIENDS REPRESENTING HUNGARIAN JEWS AND BOUGAINVILLEANS INTERESTS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE* [1]

The Hungarian Jews, as denominated herein, are the plaintiffs in *Rosner v. United Sates*, Case No. 01-1859-CIV-SEITZ, pending in U.S. District Court in the Southern District of Florida and reported at 231 F. Supp. 2d 1202. They include aliens who allege that their personal possessions and family heirlooms were accepted into protective custody by the United States Army in occupied Austria in 1945 after World War II had ended, but the U.S. never returned their property to them or paid compensation for their property. Among other things, the Hungarian Jews have a claim against the United States under the Alien Tort Statute or Alien Tort Claims Act, 28 U.S.C. § 1350 (hereinafter "ATCA").

The Bougainvilleans, as denominated herein, are the plaintiffs in *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, reported at 221 F. Supp. 2d 1116 (C.D. Cal.), which is pending in the Ninth Circuit Court of Appeals. The Bougainvilleans, one of whom is a Californian, are involved in an ATCA case and have asserted claims of genocide, war crimes, and crimes against humanity, among other things, against Rio Tinto, a private corporation.

Amici's interest in this case stems from the unwarranted effort of the Executive Branch and many multinational commercial interests to undo the traditional understanding that aliens are entitled to assert tort claims in the federal courts for violations of the law of nations. *Amici* have also filed a brief in the consolidated proceeding *Rasul v. Bush*, Nos. 03-334 & 03-343, pending before this Court which includes a discussion of some issues that are relevant – albeit indirectly – to the considerations here.

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1. Pursuant to Supreme Court Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amici* and their counsel, contributed monetarily to the preparation and submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk.

I. Summary of Argument

The issue is whether provisions of the First Judiciary Act of 1789, now codified at 28 U.S.C. § 1350, which state that federal courts are empowered to hear "any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," means that aliens may bring legal claims in the federal courts for a decision on the merits provided that their injuries are caused by an alleged "violation of the law of nations" or U.S. treaty. From the express words of the statute, it is clear that resolution of this issue is not about whether and when an individual may enforce his or her federal statutory or constitutional right in a federal court. Instead, this case is about whether and under what circumstances Congress has given its approval for aliens to bring civil claims in federal courts against another party for violating the law of nations to obtain a judgment or vindicate the private rights that are recognized under customary international law.

Amici submit that the answer to this issue is the same answer that every lower federal court has adopted, including the *en banc* panel of the Ninth Circuit Court of Appeals here, namely that Congress intended the federal courts to hear and decide all tort claims alleged to be committed in violation of the law of nations. As explained below, this position is amply supported by the Framers' understanding of the law of nations, the role of the courts in adjudicating individual private rights, the opinions of the political branches, and this Court's holdings and other judicial decisions.

II. The Alien Tort Statute Provides The Federal Courts With The Authority To Adjudicate All Claims Asserted By Aliens Alleging A Violation Of The Law Of Nations

The Alien Tort Statute or Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), provides:

> 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. Originally, Congress, in the Judiciary Act of 1789, Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789), enacted

ATCA's predecessor statute, which provided:

> The district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, 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.

United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Although the ATCA has undergone other modifications, these two provisions are the entire text of the statute at issue.

A. No Court Has Ever Required Additional Congressional Action Before Adjudicating Tort Claims Brought by Aliens Alleging a Violation of the Law of Nations

For over 200 years, based on the above statutory text, every court of this country has permitted aliens to bring tort claims for violations of the law of nations without any additional Congressional legislation. Indeed, Justice Story, writing for this Court, apparently rejected the argument that more was needed from Congress before adjudicating claims brought under the law of nations. *United States v. Smith*, 18 U.S. (5 Wheat.) at 157-59. Moreover, every Circuit Court of Appeals that has addressed the question of whether more is required from Congress before an alien may bring such claims to the courts of the United States has uniformly rejected all arguments, including those presented by Petitioner, that asked the federal courts to require more from Congress, including creating an express cause of action for the particular right allegedly already protected by the law of nations, before permitting international tort law claims to be adjudicated in the federal courts.[2] *Amici* can find only two circuit judges'

2. *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-88 (2d Cir. 1980); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). There are a host of district court opinions that have also rejected the argument that more is required from Congress before an alien may assert a tort claim for violations of the law of nations. *E.g.*, *Xuncax v. Gramajo*, 886

(Cont'd)

opinions, writing for themselves, who have accepted the argument that more is required. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring); *Al-Odah v. U.S.*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring).

Simply stated, there is no federal court decision that *Amici* has located that has accepted Petitioner's argument that Congress must create a separate express cause of action for suits brought under the ATCA. To require more from Congress now, in the face of such a uniform body law, would reverse Congress's understanding of the law interpreting ATCA, including the understanding that Congress had when it recently enacted the Torture Victim Protection Act ("TVPA"). Nevertheless, this is what Petitioner asks, contending that some additional Act of Congress is required before an alien may assert a tort claim to enforce rights guaranteed under the law of nations. Petitioner's position is belied not only by the uniform body of law that exists now, but also by the historic understanding of the law of nations and the Framers' and Congress's intent in enacting the ACTA.

B. History, Common Law Practices, and the Framers' Understanding all Confirm that the ATCA was Intended to Provide Aliens with a Federal Forum to Enforce Rights Recognized by the "Law of Nations"

According to the Court, a "cause of action" is what entitles a litigant to "invoke the power of the court" in order "to enforce the right at issue." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Unless courts are to revert and return to code pleading or find jurisdiction and laws rigidly guided solely by statutory actions similar to civilian code jurisdictions rather than our traditional common law, this means that whether the litigant can obtain the relief sought depends on the legal right asserted, which can "mean one thing for one purpose and something different for another." *Id.* at 237-39.

(Cont'd)

F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

In the context of ATCA cases, the focus of this inquiry is not who may enforce a federal statutory right, instead the focus of the Court's inquiry is the rights of litigants under the "law of nations." There are different criteria for determining whether a cause of action is enforceable in the federal courts. For example, "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis*, 442 U.S. at 241 (emphasis in original). Just as it is a fundamentally different kind of analysis as to who may enforce a right protected by the Constitution than who may enforce a statutory right, it is equally different who may enforce a right protected by the "law of nations" as opposed to a statutory right. These rights are simply of a different kind.[3] Furthermore, because of the existing jurisprudence under ATCA and Congress's subsequent action in enacting the TVPA, this Court has explained its inquiry here is limited to "whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982).

Through America joining the ranks of nations of the world and ATCA, Congress delegated to the federal courts the authority to determine when the law of nations provides a right that is enforceable in the federal courts, just as though the federal courts were a court of general jurisdiction deciding an ordinary tort claim of negligence. As explained by the Eleventh Circuit, the "[ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira*, 72 F.3d at 848. Of course, this does not mean that Congress cannot take that power away from the federal judiciary, or further refine it or elaborate on it, as it has in the TVPA. But, what it does mean is that in the absence of any additional Congressional action, whether a litigant asserts a right that is enforceable under the law of nations is, by virtue of the ATCA and federal common law, for the federal courts to determine.

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3. Though there are other reasons articulated in Respondent's brief, this fact alone distinguishes this case from *Sandoval* and other cases decided by this Court where the litigant sought to enforce a statutory right.

1. The law of nations

Professor Louis Henkin aptly summarizes the status of the law of nations when he writes:

> International law is not merely law binding on the United States internationally but is also incorporated into United States law. It is "self-executing" and is applied by courts in the United States without any need for it to be enacted or implemented by Congress. Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as "federal common law" and has been lumped with authentic federal common law — the law made by federal judges under their constitutional power or under authority delegated by Congress.

Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984). The notion that the law of nations is like the general common law was well accepted and understood by the Framers and this Court's precedent. Indeed, this Court explained that courts ascertain what the law of nations is or requires "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) at 160-61. What the Framers generally referred to as the "law of nations" is now more commonly called international law.[4] Today, the "law of nations" is comprised of two legal concepts: customary international law and a subset of customary international law, called *jus cogens*. A *jus cogens* norm is one "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman de Blake v. Republic of Argentina*,

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4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 41 (Introductory Note to pt. I, ch. 2) (1987).

965 F.2d 699, 714 (9th Cir. 1992). Accordingly, *jus cogens* norms "enjoy the highest status within international law." *Id*. at 715.

2. The Framers understood intended that the rights of individuals secured under the law of nations would be enforceable in the federal courts

In the seminal decision of *The Paquette Habana*, this Court explained:

> ***International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination***. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added). And, based exclusively upon the law of nations and ATCA's predecessor statute, this Court not only found a legal cause stated when the U.S. naval forces seized Spanish fishing vessels during the Spanish-American War, it ordered the United States government to pay damages to aliens for a violation of the law of nations.

The decision in *The Paquette Habana* is consistent with and indicative of the Framers' understanding of the law of nations and the role of the federal courts in construing international common law cases brought by aliens. As Professor Stewart Jay has documented in *The Status of the Law of Nations in Early American Law*, the Framers viewed the law of nations as part of the common law of every civilized society, and which became part of America's common law upon America becoming a nation. 42 VAND. L. REV. 819, 823-28 (1989); *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations. . . .") Indeed, in 1815, Chief Justice Marshall declared that "the Court is bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

The reason the law of nations became part of "the law of the land" was, in essence, to help keep America at peace in the world, which was a fundamental part of the design in enacting the legislation. *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 A.J.I.L. 461 (1989). Perhaps the most influential international law writer to the Framers was Emmerich de Vattel. This Court has referred to him as an authoritative source of what the law of nations meant at the time.[5] In 3 E. de Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, § 350, at 230-31 (Carnegie ed. trans. Fenwick 1916) (1758 ed.), Vattel referred specifically to the "denial of justice" to aliens in foreign lands as a justification for wars of reprisal launched by the alien's home nation. Accordingly, Alexander Hamilton wrote in THE FEDERALIST NO. 80:

> As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, ***it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned***.

THE FEDERALIST NO. 80 (A. Hamilton) (emphasis added). Thus, the Constitutional Convention unanimously resolved "[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 M. Farrand, THE RECORDS OF THE CONSTITUTIONAL CONVENTION 39 (1911). And, John Jay, writing in THE FEDERALIST NO. 3, extolled "[t]he wisdom of the Convention" for committing questions concerning "treaties and articles of treaties, as well as the laws of nations," to the federal courts.

Consequently, the federal courts assist in keeping this country at peace by enforcing the law of nations, whenever the law of nations controls the legal question presented. As federal common law, the law is, like other common laws, found by consulting "the works of jurists" across the globe. This is not "divining" in an anti-democratic manner what the law is;

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5. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).

as a common law process, it is "trustworthy evidence of what the law really is." *The Paquette Habana*, 175 U.S. at 700. The law of nations also protects the rights of individuals; it was not simply the law governing nation-to-nation conduct. 4 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 66-71 (American ed., Worcester, Mass. 1790). Consequently, even contemporary academics who oppose *Amici*'s position here admit "there would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at the time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002).

From the beginning of this nation, both state and federal courts have treated international law as incorporated into American law and applied it to cases without anything more to guide them than the original ATCA. *See* Henkin, *supra*, 82 MICH. L. REV. at 1557. Indeed, even before *The Paquette Habana*, this Court explained:

> International law . . . [is] governed by what has been appropriately called the law of nations; . . . [and includes] questions arising under what is usually called ***private international law*** . . . and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation – ***is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination***.

Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasis added). And though this Court recognized that statutes and/or treaties provide courts with the "most certain guide . . . for the decision of such questions," when "there is no written law upon the subject . . . ***the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is***, whenever it becomes necessary to do so, in order ***to determine the rights***

of parties to suits regularly brought before them." *Id*. (emphasis added). Indeed, it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), and "decide on the rights of individuals." *Id.* at 170. And, the law of nations, at least as applied to individuals asserting their substantive rights, remains an area in which no affirmative legislative act is required to "authorize" its application in U.S. courts. Henkin, *supra*, 82 MICH. L. REV. AT 1561 ("International law is . . . 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.") Thus, it is the duty of federal courts to find and ascertain the rights of the parties under the law of nations and decide those cases and controversies presented.[6] The only way to make sense of this history is to reject Petitioner's assertion that something more is needed from Congress.

This historic understanding of the ATCA is confirmed in an opinion of former Attorney General William Bradford, published in 1795, addressing a situation where American citizens trading off Sierra Leone allegedly joined a French fleet in attacking and plundering British property during the then ongoing Franco-British war:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of

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6. *See also Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815)

> The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states. . . . This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

> hostility have a ***remedy*** by a ***civil*** suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (July 6, 1795) (emphasis on remedy supplied). The injured aliens to which Attorney General Bradford refers had no explicit statutory right to sue in tort other than the ATCA, but Attorney General Bradford nonetheless concluded that the aliens' injury in violation of the law of nations would be actionable in federal district court. There is no hint in the opinion that Congress needed to provide additional legislation to implement ATCA or make claims alleging a violation of the law of nations actionable. Indeed, in *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D. S. Car. 1795), one contemporaneous federal court confirmed General Bradford's position. Petitioner's position that something more is needed from Congress is erroneous.

3. Construing and enforcing rights under the law of nations is a task assigned to the federal courts absent explicit statutory directive to the contrary

Today, law of nations style tort suits are regarded as a matter of federal common law. Although this Court has at times pronounced the federal common law dead, this Court in 1981, unanimously recognized "the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' . . . These instances are 'few and restricted,' . . . [but include] those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . including international disputes implicating . . . our foreign relations." *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (citations omitted); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 508 n.4 (1988) (same). Even before 1981, the job of construing international law occupied "an existence in the federal courts independent of acts of Congress." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980).

Most legal commentators point to the Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), as the seminal decision, at least post-*Erie*, that concluded that

international law, as incorporated into U.S. domestic law, is federal common law rather than state common law, and that it is binding as a rule of decision on applicable statutes such as ATCA. *E.g.*, Henken, *supra*, 82 MICH. L. REV. AT 1560-61. Accordingly, because what is at issue here is federal common law, the content and substance of the law is prescribed by the courts, at least "absent explicit statutory directive otherwise." *Boyle*, 487 U.S. at 504. This understanding of the law of nations has been broadly applied and is well accepted in judicial decisions today.

> Applying this authority in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, Justice O'Connor found "the principles governing this case are common to both international law and federal common law." Similarly, in a string of decisions determining the legal status of submerged offshore areas, the Court has applied customary international law rules to guide its interpretation of federal statutory and treaty provisions. Moreover, both the Supreme Court and the lower federal courts have regularly looked to customary international law rules when applying the felicitously named "*Charming Betsy*" principle, a canon of statutory construction that directs that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." Finally, in addition to their numerous rulings under the Alien Tort Claims Act (ATCA), lower federal courts have determined customary international rules to be federal common law with regard to such diverse matters as expropriation, treaty interpretation, extradition, official immunity, and treatment of prisoners and detainees.

Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1836-38 (1998) (citations omitted).

Here, however, the Court is not operating in an area of Congressional silence. To the contrary, Congress has ratified *Filartiga* and confirmed that the ATCA, standing alone, permits

aliens to sue for violations of the law of nations. Moreover, to the extent the Executive Branch's opinion is relevant to the Court's interpretation of Congressional intent or its ratification – a legal proposition that *Amici* doubt – the Executive Branch has also endorsed *Filartiga*'s approach.

4. By enacting the TVPA, Congress codified the holding of *Filartiga* and confirmed that ATCA provides aliens with a federal judicial forum to enforce federal common law rights found embodied in the law of nations

For over 200 years, the ATCA (and its predecessor statute) has been applied consistently with the interpretation that it establishes federal jurisdiction and a cause of action for serious violations of international law, including several cases in the last quarter century brought for particularly egregious violations of well-defined individual human rights, such as war crimes, genocide, and crimes against humanity. The seminal decision of the modern ATCA era is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the Second Circuit held that two Paraguayans could bring an ATCA claim against a former Paraguayan police inspector for the torture and death of one of their family members. In so doing, the court confirmed its power to adjudicate human rights abuse claims committed abroad, holding that ATCA, "as part of an articulated scheme of federal control over external affairs," provides for "jurisdiction over suits by aliens where principles of international law are it issue. The constitutional basis for the [ATCA] is the law of nations, which has always been part of the federal common law." *Id.* at 885. And, as has been well documented, "[a]dherents to *Filartiga*'s legal principles included other federal courts, the Executive Branch, the American Law Institute, and the American Bar Association. In the legal academy, *Filartiga* met with a similarly warm reception. A body of scholarship emerged approving of *Filartiga*'s modern application of the ATCA." Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 466 (1997) (citations omitted).

Throughout the next several years before Congress enacted the TVPA, *Filartiga* was adopted and followed by every court that considered these issues, except *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Shortly after *Tel-Oren* expressed reticence toward adopting and embracing *Filartiga*, Congress responded by enacting the TVPA. Congress notes that the TVPA was prompted, in large measure, by Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and his failure to follow *Filartiga*.[7] In particular, Senator Specter, the TVPA's main sponsor, explained that although he viewed the TVPA as largely superfluous, it was needed to correct any possibility that other courts might adopt Judge Bork's reasoning or otherwise come to understand that Congress was not explicitly approving of *Filartiga*, stating: "One might think . . . it would be unnecessary to have legislation on such a subject, because torture is such a heinous offense, such a heinous crime, that the courts would have jurisdiction without a formal legislative measure. This is necessary because of litigated cases in the field, most particularly [*Tel-Oren*]."[8] In particular, Judge Bork took issue with the Second Circuit's assumption in *Filartiga* that the ATCA both granted jurisdiction and created a cause of action, stating: "[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal." 726 F.2d at 801.

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7. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84.

8. These were Senator Specter's first words by way of introduction of the bill to the 102nd Congress. 137 Cong. Rec. S1378 (daily ed. Jan. 31, 1991). *See, e.g.*, Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration & Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36 (1990) [hereinafter "Senate TVPA Hearings"], at 36 (describing TVPA as "simply an extension and 'clarification'" of *Filartiga*); Senate TVPA Hearings, *supra*, at 65 (Statement of Sen. Specter) ("Well, that is why the legislation is really brought. The *Tel-Oren* case . . . and this bill will lay it all to rest."); H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 86-87 [hereinafter "House Report"]; *see also* Rachael E. Schwartz, *"And Tommorrow?" The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 284 (1994) ("[W]hile giving Judge Bork the expression of legislative intent upon which he had insisted, Congress also admonished him that he was wrong to require it in the first place.")

In enacting the TVPA, however, Congress disagreed with Judge Bork and explained very clearly its understanding of the ATCA, endorsed and lauded the *Filartiga* line of cases, and enacted the legislation to sustain, rather than curtail, judicial enforcement of individual rights under law of nations. Indeed, given the well-established principles and pre-existing common-law adjudications under ATCA, the Court should reject a different interpretation of the ATCA absent Congressional action to the contrary. *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Moreover, and contrary to Petitioner's and the corporate *amici*'s contentions, the TVPA does not function as a limit on the ATCA but, instead, as a subsequent statement of federal policy, it serves to illuminate the Framers' intent, Congress's intent and understanding, and controls the construction of the earlier enacted statute. *Food and Drug Administration v. Brown & Wilkinson*, 529 U.S. 120, 140-141 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). Under *Filartiga*, the ATCA permits aliens to bring tort claims alleging violations of the law of nations to the federal courts. And, as noted above, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the Court's inquiry is limited to "whether Congress intended to preserve the pre-existing remedy." *Curran*, 456 U.S. at 378-79.

The legislative history of the TVPA irrefutably proves that Congress did more than intend to preserve the pre-existing remedy. For example, the House Report for the TVPA begins:

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA]. Section 1350 has other important uses and should not be replaced.

House Report, at 3. Indeed, Representative Yatron, the principal sponsor of the House Bill and Chair of the subcommittee, began the House hearings by explaining:

> ***International human rights violators visiting or residing in the United States have formerly been held liable to money damages under the Alien Tort***

> ***Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it.*** Federal courts should not allow congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.

The Torture Victim Protection Act: Hearing on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs, 100 Cong., 2d Sess. 1 (1988) (statement of Rep. Yatron) (emphasis added). The House Report concluded:

> Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. ***That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law***. [emphasis added]

Similarly, the Senate considered ATCA claims part of the federal common law, and also interpreted ATCA as providing for a federal common law basis to enforce rights under the law of nations and provide a remedy to aliens in the appropriate cases explaining:

> While the legislation specifically provides Federal districts [sic] courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues – such as interpretations of international law – that are matters of Federal common law and within the particular expertise of Federal courts.

S. Rep. No. 102-249, at n.6 (1991). Indeed, as far as the Senate was concerned, the TVPA clarified what was already there and expanded ATCA claims to U.S. citizens. *See* 137 Cong. Rec. S1378 (daily ed. Jan. 31, 1991) (statement of Sen.

Specter) ("This bill closes a gap in the law. Under court decisions, aliens have the right to sue their torturers under the Alien Tort Claims Act, but not U.S. citizens. This bill would extend protection to U.S. citizens while retaining the current law's protection of aliens."); *see also* 135 Cong. Rec. 22716 (1989) (statement of Sen. Leach) (describing the clarifying intent of TVPA to ensure continuation of ATCA's judicial successes).

Not surprisingly, every Circuit Court of Appeals that has examined the impact of the TVPA on the ATCA has reached the same conclusion: the TVPA codified the holding in *Filartiga*. *E.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.10 (2d Cir. 2000) ("[T]he text of the [ATCA] seems to reach claims for international human rights abuses occurring abroad. We reached the conclusion that such claims are properly brought under the Act in *Filartiga* . . . ; Congress ratified our conclusion by passing the Torture Victim Protection Act"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filartiga* line of cases: The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed in 'violation of the law of nations'"); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) ("Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens"); *Hilao*, 25 F.3d at 1475 ("Our reading of the plain text of § 1350 is confirmed by the Torture Victim Protection Act of 1991, codified at this section" (citation omitted)).[9]

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9. *See also Sarei*, 221 F. Supp. 2d at 1133 n.96 ("The TVPA codified the *Filartiga* decision"); *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 380 (E.D. La. 1997) ("The legislative history of the TVPA and recent case law stand for the . . . proposition that the TVPA codifies and expands the remedies available under § 1350"); *Barrueto v. Larios*, 205 F. Supp. 2d 1325, (Cont'd)

Congress through enacting the TVPA, "in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, ***expresses a policy favoring*** receptivity by our courts to such suits" and has "communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business."
Wiwa, 226 F.3d at 105-106 (emphasis added). Given the passage of time, judicial interpretation, and Congress's express acquiescence and adoption of *Filartiga*, there is no doubt that aliens have the right to relief for ATCA claims. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

5. The Executive Branch has also endorsed *Filartiga*

Congress's express policy of favoring federal courts receptivity to ATCA claims is shared by the Executive. Indeed, upon signing the TVPA into law, President Bush specifically endorsed U.S. receptivity to such tort actions. *See* Statement of President Bush upon signing HR 2092 (TVPA) 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 16, 1992). This was not the first time that the Executive expressed its approval for *Filartiga* or for permitting aliens to assert such claims under ATCA. Historically — indeed before the TVPA was ever enacted — the State Department strongly supported prudent adjudication of human rights claims brought in United States courts under the ATCA. In *Filartiga*, the Justice and State Departments together explained:

> Such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.

(Cont'd)
1333 (S.D. Fla. 2002) (explaining through the TVPA and ATCA, Congress "clearly indicated its intent to provide federal courts as a forum to bring to justice individuals who contribute directly to human rights abuses").

Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 603 (1980) (citations omitted) [hereafter U.S. Memorandum in *Filartiga*]. The Legal Adviser of the State Department went further:

> The . . . international law of human rights . . . endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. . . . ***As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain cases directly enforceable in domestic courts***.

Id. at 602-03. (emphasis added).

The express ratification of *Filartiga* by Congress and the Executive's endorsement of the same should be the end of the matter here. Indeed, in the area of federal common law rights, judicial interpretation and enforcement of such rights are necessary to the smooth functioning of the federal government and here, both political branches approve of *Filartiga*. Further, this Court has steadfastly adhered to the proposition that it may infer Congress's consent from its knowledge of and acquiescence in lawmaking by federal judges. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981).[10] If Congress wished to, it could have changed the law as found by *Filartiga* or after any one of the numerous international law cases adjudicated under ATCA. However, to date, Congress has not indicated any desire to do so. To the contrary, Congress has expressly ratified the decision in *Filartiga* that provides a judicial forum to enforce the substantive rights under the law of nations and provides a remedy in the appropriate case. To the extent that any court might now reject such ratification and delegation by the political branch constitutionally entrusted to make such determinations, it does so in disregard of Congressional will and the Framers' design who gave the federal courts this

10. *See also id.* (noting federal common law applies "in the absence of an applicable Act of Congress," and is no longer needed "when Congress addresses a question previously governed by a decision [that] rested on federal common law").

authority in part to help protect this country from legitimate acts of warfare.

Consider for a moment what might have happened if a sizeable number of British subjects were brutally murdered, tortured, or otherwise subjected to violations of the law of nations in the early history of this country and yet ATCA did not provide these aliens or their legal representatives with a legal avenue to redress such wrongs. The Framers believed war might ensue, as Vattel referred specifically to the "denial of justice" to aliens in foreign lands as a justification for wars of reprisal launched by the alien's home nation. In response to such concerns, Alexander Hamilton wrote in THE FEDERALIST NO. 80. "it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."

> As so often happens, the hornbook rule - international law, as applied in the United States, must be federal law - makes obvious sense. Every schoolchild knows that the failures of the Articles of Confederation led to the framing of the Constitution, which established national governmental institutions to articulate uniform positions on such uniquely federal matters as foreign affairs and international law. Even as the new Constitution withheld foreign affairs powers from the states, it authorized a national institution, Congress, "to define and punish . . . Offences against the Law of Nations." But Congress's authority to construe the law of nations was never exclusive. The early Supreme Court spent much of its time deciding cases under the law of nations. International law came to occupy "an existence in the federal courts independent of acts of Congress." By 1981, the Supreme Court had come unanimously to "recognize the need and authority in some limited areas to formulate what has come to be known as 'federal common law'" in cases in which "a federal rule of decision is 'necessary to protect uniquely federal interests,'" including "international disputes implicating . . . our relations with foreign nations."

Koh, *supra*, 111 HARV. L. REV. at 1825-26 (citations omitted). In addition to overturning hornbook law, the effect of accepting Petitioner's arguments would leave the law of nations determinations to state court, which would mean that international law is not federal law at all, in which case the federal courts could not authoritatively pronounce what it is. Such an absurd result is contrary to *Sabbitino*, 376 U.S. at 425, and would return this country to the intolerable days of the Articles of Confederation.

III. ATCA Litigation Does Not Unduly Interfere With Foreign Affairs Or Commerce

Despite Congress's ratification and approval of *Filartiga* which allows aliens to assert international law claims in U.S. courts, under ATCA and the Executive's frequent endorsement of the same, certain *amici* contend or suggest that ATCA is solely jurisdictional and that the *Filartiga* line of cases, including the *en banc* decision of the Court of Appeals at issue here, is fundamentally flawed. *Amici* will devote the remaining sections of this brief to rebutting several of the policy arguments common to the business and corporate *amicus* briefs submitted.

A. Economic Impacts and Potential Impacts on Foreign Relations Are Improper Considerations

Regardless of the veracity of the contention that ATCA litigation "wreaks economic damage and undermines the nation's foreign policies," accepting such policy arguments as a reason to find (or not find) that the federal courts are the appropriate forum for aliens to enforce their substantive international law rights is improper. Indeed, these concerns, though appropriate considerations for the political branches, do not and cannot guide the Court in determining whether a cause or claim exists or whether a claim may be brought under the law of nations; they are political issues that only the political branches are constitutionally empowered to weigh and respond to. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001), *aff'd on unrelated issue*, 538 U.S. 468 (2003).

Additionally, because the law of nations is federal common law, Congress and the Executive have ample opportunity to respond to judicial actions that they may deem

improper. Thus, absent such a response by the political branches in the exercise of their constitutional powers, it would be premature to jettison the *Filartiga* line of cases and ignore Congress's acquiescence to those decisions as Petitioner requests.[11] Indeed, "[o]ne of the beauties of [federal common law]," wrote Judge Friendly, "is that it permits overworked federal legislators . . . so easily to transfer part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic lawmaking function — with Congress always able to set matters right if they go too far." Friendly, *In Praise of Erie — And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 419 (1964). Rather than informing the courts that *Filartiga* (or any of the other ATCA cases) went too far, however, Congress instead ratified the decision.

Furthermore, there is little empirical support for *amici*'s contentions. First, the economic policy of the United States, as expressed in public statements and statutes, equally supports ATCA claims. For example, section 502B of the Foreign Assistance Act of 1961 declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." 22 U.S.C. § 2304(a)(1). Also, just a few years ago, the State Department, together with the United Kingdom, established the *Voluntary Principles on Security and Human Rights*, United States Department of State, Dec. 19, 2000, which provides guidelines for companies in the resource extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms." *Voluntary Principles*, at 1. The Secretary of State has noted that these principles "demonstrat[e] that the best-run [mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs

11. *Basic*, 485 U.S. at 231 ("Judicial interpretation and application, *legislative acquiescence*, and the passage of time have removed any doubt that a private cause of action exists . . .").

and standards ***there is no necessary conflict between profit and principle***."[12]

Second, and more importantly, the Executive Branch knows how to inform a specific court when it feels that issues regarding foreign relations warrant judicial abstention in a particular case.[13] This fact militates against considering the generalized foreign affairs impacts and presumed parade of horribles that the corporate *amici* present. Indeed, all international law cases involving any alien inherently impact foreign relations. However, the fear of impacting foreign relations does not, by itself, counsel overturning over two hundred years of precedent and removing from the courts the ability to decide actions involving the enforcement of rights under the law of nations.[14] Abraham D. Sofaer, the former Legal Adviser to the State Department and federal judge explains:

> Any litigation that involves, directly or indirectly, a foreign government has the potential for affecting the relations of the United States with that country. We do not, however, regard a ***bare*** potential for affecting U.S. foreign relations as sufficient, in and of itself, to warrant dismissal. Cases could arise which present an unacceptable risk that adjudication would embarrass the Executive Branch in its conduct of U.S. foreign

12. Remarks of Secretary of State Madeleine K. Albright, Press Briefing, December 20, 2000, Washington, D.C., http://secretary.state.gov/www/statements/2000/001220.html. (emphasis added).

13. *See, e.g., Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum etc.*, 577 F.2d 1196, 1204 (5th Cir. 1978) ("It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here."); *767 Third Avenue Associates v. Consulate General (Yugo)*, 218 F.3d 152, 157 (2d Cir. 2000) (arguing that matters of state succession are nonjusticiable political questions and stating "it is the fundamental position of the United States . . . that . . . [Yugoslavia] has ceased to exist and that no state represents its continuation"); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001) (requesting dismissal of action on "any valid legal ground" as contrary to U.S. interest).

14. In fact, courts routinely decide cases that have a substantial impact on foreign affairs. *E.g., Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221 (1986); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

> relations, ***leading the Executive to suggest the desirability of judicial abstention***.[15]

The United States further explained to this Court, "***in the absence of a representation to the contrary," advocating for a dismissal of the action, "courts may properly assume that no unacceptable interference with U.S. foreign relations will occur***." *Id.* (emphasis added);[16] *see also* U.S. Brief in *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (where the Legal Adviser wrote:

> The . . . Concern [over] potential interference with ongoing claims negotiations or other foreign relations does not, in our view, warrant automatic abstention by the court on act of state grounds. As Legal Adviser Monroe Leigh wrote the Solicitor General concerning foreign expropriations in 1975,
>
> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. . . .
>
> ***When***, as in this case, ***there is a controlling legal standard*** for compensation, we believe that ***the presumption should be that adjudication would not be inconsistent with foreign policy interests*** . . .") (emphasis added).

Petitioner and the corporate *amici* apparently disregard the until recent uniform expressions of the United States to the federal courts concerning ATCA which explained that the role of the judiciary is to accept ATCA cases and adjudicate the claims presented because the failure to do so is presumed to adversely impact foreign affairs.

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15. Brief For The United States as *Amicus Curiae* Supporting Respondent, *W.S. Kirkpatrick & Co., Inc., et al., Petitioners v. Environmental Tectonics Corporation, International*, No. 87-2066, 1987 U.S. Briefs Lexis 2066, Appendix (1989) (emphasis added).

16. *Amici* have conducted an exhaustive search. On March 14, 2002, before becoming involved in this action, they received in response to a Freedom of Information Act request copies of all Statements of Interest filed by the United States in ATCA cases to date, and *Amici* have been unable to locate a single contrary statement from the State Department concerning this point.

> Before entertaining a suit alleging a violation of human rights, a court must first conclude that there is ***a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection***. . . . When these conditions have been satisfied there is little danger that judicial enforcement will impair our foreign policy efforts. ***To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights***.

U.S. Memorandum in *Filartiga*, 19 I.L.M. at 604 (emphasis added).

Additionally, corporate *amici*'s are mistaken when they contend that ATCA somehow prevents the Executive from resolving claims or imposes laws rejected by the U.S. on its citizens or the government. First, a rule of international law cannot and will not become part of the federal common law if the U.S. rejects it during its process of formation.[17] Instead, the only rules of law that are actionable are those that have garnered a consensus in the international community that the right is protected by the law of nations, which is, as explained above, part of the law of the land. Moreover, nothing in the ATCA or the cases brought under the act prohibit or limit the Executive's power in conducting foreign affairs, or his authority to resolve or settle international disputes, at least where Congress has acquiesced. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

Furthermore, ATCA cases do not attempt to define or allocate power over the conduct of U.S. foreign affairs. Instead, such tort suits adjudicate the liability of the litigants, which is the standard fare for the judiciary. Thus, the suggestions that ATCA suits might also violate the doctrine of separation of powers or constitute nonjusticiable political questions are mistaken. In fact, in *Ramirez de Arellano v. Weinberger*, an *en banc* panel of the Court of Appeals for the D.C. Circuit held

17. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.

that the adjudication of whether the military may run operations on private property in a foreign country that had not yet been appropriated did not present a nonjusticiable political question despite the United States arguing that it did, and the district court finding that the suit presented a direct challenge to the propriety of the U.S. military presence in Central America. 745 F.2d 1500, 1512 (D.C. Cir. 1984), *vacated on other grounds* 471 U.S. 1113 (1985); *see also Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983) (Scalia, J.)

> To be sure, because this case involves land in Central America, and because United States military activities in that region are currently the subject of national interest and debate, the issue is presented in a more politically charged context. That may make it, in a sense, a political case – but as the Court noted in *Baker v. Carr* . . . 'the doctrine . . . is one of "political questions," not one of "political cases."').

In the context of separation of powers, *amici*'s arguments concerning the potential impacts on foreign affairs closely parallel the arguments pressed by President Clinton and the United States in *Clinton v. Jones*, which the Court unanimously rejected. The government argued that adjudication of the case posed "serious risks for the institution of the Presidency" as it would undermine and detract from performance of his official duties, including the incredible responsibilities of foreign affairs. 520 U.S. 681, 689, 697 (1997). Though the Court accepted the that Executive's responsibilities and duties were singularly important to the country, the Court nevertheless rejected the argument that the additional burdens imposed by litigation violated separation of powers: "The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution." *Id.* at 703.

Similarly, the exercise of traditional Article III powers over a lawsuit under ATCA might burden the Executive or interfere with foreign relations. However, such burdens do not establish

a violation of the Constitution under the doctrine of separation of powers, especially if the ATCA claim is asserted against a private corporation or individual and not against a foreign government. Indeed, in *Verlinden B.V. v. Central Bank of Nigeria*, this Court recognized that it was proper for federal courts to determine whether a remedy was available against foreign sovereigns provided that the suit complied with Congress's delegation through the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601 *et seq.*, knowing that these suit will make foreign relations more difficult or burdensome. 461 U.S. 480, 492-97 (1983). It follows *a fortiori* that because

> the Judiciary may severely burden the Executive Branch by reviewing the legality of [a foreign sovereign's] conduct . . .that the federal courts have power to determine the legality of [a private company's] conduct. The burden on the [Executive] . . . that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of [a foreign sovereign's] actions.

Clinton v. Jones, 520 U.S. at 705.

Finally, this Court should bear in mind that "all three branches of the federal government have a say in deciding whether international human rights cases will proceed to final judgment," that judges need not apply "overbroad" rules or laws, that they can and frequently do use comity, *forum non conveniens* and other abstention doctrines to rid the courts of those ATCA cases deemed inappropriate. The Executive Branch may, and frequently does, appear before the courts to urge particular outcomes in human rights cases. And Congress can always modify the act if it disapproves of the direction. Koh, *supra*, 111 HARV. L. REV. at 1860-61. To date, however, Congress has only approved of lower court decisions under ATCA, indeed, ratified them. There is no reason for this Court to change the direction.

B. There Is No Evidence of a Litigation Explosion or Abusive or Frivolous Lawsuits being Pursued under ATCA; The Corporate *Amici*'s Contentions are of No Moment and Show a Profound Distrust for the Operation of the Common Law

Contrary to the corporate *amici*'s contentions, there has not been a litigation explosion in ATCA cases. Instead, as Chief Judge Walker of the Second Circuit has explained: "It is safe to say that, quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a miniscule part of what we do." Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 SLU L.J. 539, 539 (1997).

Furthermore, to the extent that frivolous lawsuits are brought, or that "thinly disguised political agendas" are pursued improperly, the Federal Rules of Civil Procedure fully equip the federal courts with ample measures to address such concerns on a case-by-case basis and in proportion to the impropriety found to have occurred.[18] Similarly, the corporate *amici*'s contentions about failing to join a sovereign government, is likewise easily handled by a joinder or interpleader motion, or a motion to dismiss for failure to join an indispensable party. The federal courts are also equipped to address problems with access to evidence and similar issues raised in the corporate *amici*'s brief through the doctrine of *forum non conveniens*. Thus, many of the corporate *amici*'s contentions are simply of no moment.

Moreover, it is simply untrue that victims of genocide, murder, and crimes against humanity typically pursue their cases against those who are deemed the "enemy of all mankind"[19] to chase a deep pocket to serve "only the interests of successful plaintiffs and their lawyers." *Amici* do not have empirical evidence to support this, however, they are unaware

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18. To date, *Amici* have not found a single reported ATCA case that has been brought in bad faith. Thus, the corporate *amici*'s contentions in this regard do not appear well-founded.

19. *Kadic*, 70 F.3d at 239.

of any ATCA plaintiff ever collecting full compensation for a single successful claim.[20] But, what they do have is their own personal experience. The Hungarian Jews, for example, limited their claims to $10,000. And, the Bougainvilleans came to the courts of America because the defendant could be found here and sued here. Moreover, their claims are not simply derivative claims; they include allegations of genocide and war crimes, among other things, directly against the defendant who is found in this country. And, their claims are supported by a PNG General and the current Prime Minister who explained in declarations that Rio Tinto was "the reason" for the military response against civilians and naval blockade that killed over 10,000 Bougainvilleans in the 1990s.

Whatever else can be said, it is in the interests of the United States to bring perpetrators of genocide, such as Rio Tinto, to justice. Indeed, the United States does not have any interest — even an economic one — in becoming a haven for those who are accused of being and are the "enemies of all mankind." Yet, that is precisely what would occur if defendants — including corporate ones — that are found in the U.S. are never haled into to court to stand trial for the private rights they violated. As explained above, ATCA is designed, at least in part, to protect the U.S. from becoming such a safe haven.

Moreover, as plainly expressed in the original ATCA, the Framers understood that tort suits between aliens fell within the individual states' general jurisdiction. Even before the American Revolution, civil actions in tort were routinely considered transitory, in that the tortfeasor's wrongful act created an obligation to pay damages, an obligation that followed him across national boundaries and was enforceable wherever he was found. *McKenna v. Fisk*, 42 U.S. 241, 248 (1843); *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904). Thus, what the ATCA did was provide federal courts with similar state-like general jurisdiction over transitory torts concerning violations of the law of nations. Adopting Petitioner's position would render the federal courts powerless to address these

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20. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368 (1991).

claims, and thereby abrogate the federal government's authority over issues impacting foreign affairs, which would then return this country to a day reminiscent of the Articles of Confederation that the Framers declared intolerable.

In the end, what troubles corporate *amici* the most is that the law of nations is federal common law rather than a detailed list of specific violations or a lengthy and complex codification of federal statutory rights. They are concerned about the uncertainty of the common law's application. However, this objection is nothing more than objecting to the common law process generally; a process that is fundamental to the American judicial system. Their concerns should be addressed to Congress, not the Court. Negligence cases, for example, do not subscribe to codifications or statutory delineation. Instead, the rule of law is kept clear and very simple; what is reasonable under the circumstances. Admittedly, what is reasonable changes and evolves over time and can be different from State to State. However, the fact that the law of nations is common law, and thus shares with our common law such a fundamental and inherent feature as uncertainty in its application is no reason to dispense with it entirely; the rule of law is clear and accepted by all civilized nations and does not change from nation to nation. Instead, it is precisely because the rule of law is clear that federal courts should enforce it in appropriate cases to help ensure that would be violators of these universal laws engage in reasonable conduct and abide by the law of nations; that body of international law that is part of the law of this land.

CONCLUSION

Congress enacted ATCA to provide aliens a federal forum to seek redress for torts alleging a violation of the law of nations without regard to whether those aliens were injured abroad or at the hands of U.S. nationals to make these tort actions "implicating foreign affairs cognizable in federal courts." *In re Estate of Marcos Human Rights Litig.*, 978 F.2d at 502-03. For the foregoing reasons, the Court should affirm the ruling below and confirm the general jurisdiction Congress bestowed upon the federal courts to decide these tort claims.

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