

No. 16-15179

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

JOAN JARA, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF VÍCTOR JARA, AMANDA JARA TURNER, in her individual capacity, and MANUELA BUNSTER, in her individual capacity,
Plaintiffs-Appellants,

v.

PEDRO PABLO BARRIENTOS NUÑEZ,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

**MOTION OF THE LEGAL AFFAIRS DIRECTORATE OF THE
REPUBLIC OF CHILE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLANTS JOAN JARA *ET AL.*,
SUPPORTING REVERSAL OF THE DISTRICT COURT'S DISMISSAL
OF CLAIMS UNDER THE ALIEN TORT STATUTE**

Claudio Troncoso Repetto
Directorate of Legal Affairs
Ministry of Foreign Affairs
The Republic of Chile
Teatinos N°180,
Santiago, Chile

Christina G. Hioureas
Counsel of Record
Benjamin K. Guthrie
Melissa A. Stewart
FOLEY HOAG LLP
1540 Broadway, 23rd Floor
New York, NY 10036
(646) 927-5507
chioureas@foleyhoag.com
Counsel for Amicus Curiae

Jara v. Barrientos, No. 16-15179

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

As specified in Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Eleventh Circuit Rules, *Amicus Curiae* the Legal Affairs Directorate of Ministry of Foreign Affairs of the Republic of Chile, through undersigned counsel, submits that the following parties have an interest in the outcome of this case:

1. Baez, Jose (The Baez Law Firm, Counsel for Defendant/Appellee)
2. Barrientos Núñez, Pedro Pablo (Defendant/Appellee)
3. Beckett, Mark D. (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)
4. Belsher, Amy (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)
5. Bhargava, Michael (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)
6. Bunster, Manuela (Plaintiff/Appellant)
7. Calderon, Luis (The Baez Law Firm, Counsel for Defendant/Appellee)
8. Dalton, Honorable Roy B. (United States District Court for the Middle District of Florida, Trial Judge)
9. Dellinger, Richard (Lowdes, Drosdick, Doster, Kantor & Reed, Counsel for Plaintiffs/Appellants)
10. Estate of Victor Jara (Plaintiff/Appellant)
11. Guthrie, Benjamin K. (Foley Hoag LLP, Counsel for *Amicus Curiae*)

12. Hioureas, Christina G. (Foley Hoag LLP, Counsel of Record for *Amicus Curiae*)
13. Jara, Joan (Plaintiff/Appellant)
14. Jara, Amanda (Plaintiff/Appellant)
15. Landers, Sean (The Baez Law Firm, Counsel for Defendant/Appellee)
16. McLaughlin, Daniel (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
17. Roberts, L. Kathleen (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
18. Sarkarati, Nushin (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
19. Stewart, Melissa A. (Foley Hoag LLP, Counsel for *Amicus Curiae*)
20. Troncoso Repetto, Claudio (Director of Legal Affairs, Ministry of Foreign Affairs, *Amicus Curiae*)
21. Urrutia, Christian (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Counsel for *Amicus Curiae* hereby certify that *Amicus Curiae* is not a corporation.

**MOTION OF AMICUS CURIAE THE LEGAL AFFAIRS DIRECTORATE,
MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF CHILE FOR
LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

The present case addresses liability for human rights violations committed in the Republic of Chile (“Chile”) during the 1973 *coup d’état* by which a military regime headed by General Augusto Pinochet assumed power. Since the end of that regime, Chile has endeavored to promote accountability for human rights violations carried out during and after the *coup*, and remedies for their victims. This case, therefore, relates to subject matter of great importance to Chile.

More specifically, Chile is currently seeking the extradition of Lieutenant Pedro Pablo Barrientos Núñez (“Lt. Barrientos”) from the United States to Chile so that he may stand criminal trial for the detention, torture, and killing of Víctor Jara. The exercise of civil jurisdiction by a U.S. court in this case is consistent with Chile’s domestic criminal efforts. As detailed in the accompanying brief, Chile has formally requested the extradition of Lt. Barrientos from the U.S. to Chile so that he may stand trial in Chile. This extradition request remains pending.

By the Legal Affairs Directorate of the Ministry of Foreign Affairs filing this motion and the accompanying brief, and in expressing that it has no objection to the exercise of civil jurisdiction over Plaintiffs-Appellants’ claims under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), Chile does not in any way waive its jurisdiction over Lt. Barrientos in the currently pending criminal actions filed

against him in Chile. Further, neither the Republic of Chile, the Ministry of Foreign Affairs, nor any other agency or instrumentality of the Republic of Chile in any way waives its sovereign immunity; Chile's immunity from the jurisdiction of U.S. courts remains unaltered. Finally, the submission of this motion and brief does not modify Chile's pending request for the extradition of Lt. Barrientos to Chile, or waive any of its rights with respect to that request.

Amicus Curiae, the Legal Affairs Directorate of the Ministry of Foreign Affairs of the Republic of Chile, respectfully seeks leave to file the accompanying brief in support of Plaintiffs-Appellants, pursuant to Fed. R. App. P. 29 and 11th Cir. R. 29-1 and 29-2. *Amicus Curiae* timely submits its brief within seven days of the filing of the Opening Brief of Plaintiffs-Appellants, the party it supports.

The accompanying *amicus curiae* brief addresses issues relevant to the Court's resolution of this case that can only be fully addressed by the Legal Affairs Directorate of the Ministry of Foreign Affairs. In particular, the accompanying brief will show that exercising jurisdiction over Plaintiffs-Appellants' claims brought under the ATS will not create friction in Chile's relationship with the United States. The absence of negative ramifications to foreign relations is relevant to this Court's determination of whether the District Court properly dismissed those claims. The District Court relied particularly on the presumption against extraterritorial application of United States law, *see* Order on Defendant's

Motion to Dismiss, Dk. 93 pp. 8–9, which is premised substantially upon avoiding foreign policy tension or friction between U.S. and foreign law. *See Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1664 (2013); *Doe v. Drummond Co.*, 782 F.3d 576, 595 (11th Cir. 2015). The brief will show that such concerns are not implicated in this case, for multiple reasons.

First, the brief will establish that the Ministry of Foreign Affairs has no objection to the exercise of civil jurisdiction by this Court over the claims brought under the ATS. Chile has sought accountability for human rights violations committed during and after the 1973 *coup d'état* through truth and reconciliation commissions, criminal investigations and prosecutions, extradition of perpetrators residing outside of Chile, and reparations for victims and their families. The exercise of civil jurisdiction by this Court for claims of crimes against humanity, extrajudicial killing, torture, cruel treatment, and arbitrary detention under the ATS would be consistent with Chile's efforts. The brief will show that resolution of the claims in U.S. court is currently the only means of achieving this objective, because Lt. Barrientos's presence in the U.S. prevents claims filed against him in Chile from advancing as trials *in absentia* are not permitted under Chilean law.

Second, the brief will detail that the Court's exercise of civil jurisdiction would not implicate foreign policy concerns because it would not be inconsistent with either Chilean or international law, as the conduct on which these claims are

founded was unlawful under Chilean law at all relevant times. It will also show that the offenses alleged—crimes against humanity; extrajudicial killing; torture; arbitrary detention; and cruel, inhuman or degrading treatment—constitute violations of the law of nations. Finally, the brief will explain that the exercise of civil jurisdiction in this case would be permissible as a matter of international law under the principle of nationality, as Lt. Barrientos has acquired U.S. citizenship.

CONCLUSION

WHEREFORE, *Amicus Curiae* respectfully requests that the Court grant this motion for leave to file the accompanying brief of *Amicus Curiae*.

Respectfully submitted,

LEGAL AFFAIRS DIRECTORATE
MINISTRY OF FOREIGN
AFFAIRS, REPUBLIC OF CHILE

By its attorneys,

/s/ Christina G. Hioureas

Christina G. Hioureas

Counsel of Record

Benjamin K. Guthrie

Melissa A. Stewart

FOLEY HOAG LLP

1540 Broadway, 23rd Floor

New York, NY 10036

(646) 927-5507

chioureas@foleyhoag.com

Counsel for Amicus Curiae

Dated: November 30, 2016

PROOF OF SERVICE

I, Christina Hioureas, certify that on November 30, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system and, because all parties of record or their counsel are registered as ECF filers, they will be served by the CM/ECF system which will send notice of the filing to:

Attorneys for Plaintiffs-Appellants:

Richard S. Delliger
Lowndes Drosdick Doster Kantor & Reed, PA
215 North Eola Drive
Orlando, FL 32801
(407) 843-4600

Mark D. Beckett
Christian Urrutia
Amy Belsher
Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019

L. Kathleen Roberts
Daniel McLaughlin
Center for Justice and Accountability
1 Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444

Attorneys for Defendant-Appellee:

Luis F. Calderon
Jose A. Baez
The Baez Law Firm
23 S. Osceola Ave.

Orlando, FL 32801
Tel: (407) 705-2626
Fax: (407) 705-2625

I further certify that on November 30, 2016, I filed the original and 6 copies of the Brief of *Amicus Curiae* Legal Affairs Directorate of the Ministry of Foreign Affairs of the Republic of Chile by causing the same to be dispatched to a third-party commercial carrier for overnight delivery to the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit at 56 Forsyth Street, N.W., Atlanta, GA 30303.

/s/ Christina G. Hioureas
Christina G. Hioureas

No. 16-15179

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

JOAN JARA, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF VÍCTOR JARA, AMANDA JARA TURNER, in her individual capacity, and MANUELA BUNSTER, in her individual capacity,
Plaintiffs-Appellants,

v.

PEDRO PABLO BARRIENTOS NUÑEZ,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

**BRIEF OF *AMICUS CURIAE* DIRECTORATE OF LEGAL AFFAIRS OF
THE MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF CHILE
IN SUPPORT OF PLAINTIFFS-APPELLANTS JOAN JARA *ET AL.*,
SUPPORTING REVERSAL OF THE DISTRICT COURT'S DISMISSAL
OF CLAIMS UNDER THE ALIEN TORT STATUTE**

Claudio Troncoso Repetto
Directorate of Legal Affairs
Ministry of Foreign Affairs of
The Republic of Chile
Teatinos N°180,
Santiago, Chile

Christina G. Hioureas
Counsel of Record
Benjamin K. Guthrie
Melissa A. Stewart
FOLEY HOAG LLP
1540 Broadway, 23rd Floor
New York, NY 10036
(646) 927-5507
chioureas@foleyhoag.com
Counsel for Amicus Curiae

Jara v. Barrientos, No. 16-15179

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

As specified in Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Eleventh Circuit Rules, *Amicus Curiae* the Legal Affairs Directorate of Ministry of Foreign Affairs of the Republic of Chile, through undersigned counsel, submits that the following parties have an interest in the outcome of this case:

1. Baez, Jose (The Baez Law Firm, Counsel for Defendant/Appellee)
2. Barrientos Núñez, Pedro Pablo (Defendant/Appellee)
3. Beckett, Mark D. (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)
4. Belsher, Amy (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)
5. Bhargava, Michael (Counsel for Plaintiffs/Appellants)
6. Bunster, Manuela (Plaintiff/Appellant)
7. Calderon, Luis (The Baez Law Firm, Counsel for Defendant/Appellee)
8. Dalton, Honorable Roy B. (United States District Court for the Middle District of Florida, Trial Judge)
9. Dellinger, Richard (Lowdes, Drosdick, Doster, Kantor & Reed, Counsel for Plaintiffs/Appellants)
10. Estate of Victor Jara (Plaintiff/Appellant)
11. Guthrie, Benjamin K. (Foley Hoag LLP, Counsel for *Amicus Curiae*)
12. Hioureas, Christina G. (Foley Hoag LLP, Counsel of Record for *Amicus Curiae*)

13. Jara, Joan (Plaintiff/Appellant)
14. Jara, Amanda (Plaintiff/Appellant)
15. Landers, Sean (The Baez Law Firm, Counsel for Defendant/Appellee)
16. McLaughlin, Daniel (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
17. Roberts, L. Kathleen (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
18. Sarkarati, Nushin (Center for Justice & Accountability, Counsel for Plaintiffs/Appellants)
19. Stewart, Melissa A. (Foley Hoag LLP, Counsel for *Amicus Curiae*)
20. Troncoso Repetto, Claudio (Director of Legal Affairs, Ministry of Foreign Affairs, *Amicus Curiae*)
21. Urrutia, Christian (Chadbourne & Parke, Counsel for Plaintiffs/Appellants)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Counsel for *Amicus Curiae* hereby certify that *Amicus Curiae* is not a corporation.

TABLE OF CONTENTS

STATEMENT OF AMICUS CURIAE’S IDENTITY, INTEREST IN THE
CASE, AND AUTHORITY TO FILE1

RULE 29(c)(5) STATEMENT OF AMICUS CURIAE INDEPENDENCE3

STATEMENT OF THE ISSUES.....3

SUMMARY OF THE ARGUMENT4

ARGUMENT5

 I. The Ministry Of Foreign Affairs Of The Republic Of Chile Does
 Not Object To The Exercise Of Jurisdiction Under The Alien Tort
 Statute In The Present Case.....7

 II. The Ministry Of Foreign Affairs Does Not Oppose The Exercise
 of Jurisdiction By The U.S. Court In This Case Because Lt.
 Barrientos’s Presence In The U.S. Prevents The Completion of
 Legal Proceedings Against Him In Chile.....11

 III. Exercising Jurisdiction In The Present Case Would Be Consistent
 With Both Chilean And International Law.14

 A. Lieutenant Barrientos’s Alleged Conduct Violated Chilean
 Law.....14

 B. Lieutenant Barrientos’s Alleged Conduct Violated the Law
 of Nations.15

 C. A State’s Exercise of Extraterritorial Jurisdiction Over the
 Conduct of its Own Nationals is a Widely Accepted
 Principle of Jurisdiction Under International Law.20

CONCLUSION22

TABLE OF CITATIONS

Cases

Almog v. Arab Bank, PLC,
471 F. Supp. 2d 257 (E.D.N.Y. 2007).....17

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005)..... 16, 17, 18

De Sanchez v. Banco Central de Nicar.,
770 F.2d 1385 (5th Cir. 1985).....19

Doe v. Drummond Co.,
782 F.3d 576 (11th Cir. 2015).....6

Doe v. Saravia,
348 F. Supp. 2d 1112 (E.D. Cal. 2004).....17

Garcia v. Chapman,
911 F. Supp. 2d 1222 (S.D. Fla. Nov. 28, 2012)..... 16, 19

In re Chiquita Brands Int’l, Inc.,
792 F. Supp. 2d 1301 (S.D. Fla. June 3, 2011) 16, 18

**Kiobel v. Royal Dutch Petro. Co.*,
133 S. Ct. 1659 (2013) 6, 7, 22

Krishanthi v. Rajaratnam,
Civil Action No. 09-CVB-05395 (DMC-JAD), 2010 U.S. Dist. LEXIS 88788
(D.N.J. Aug. 26, 2010)17

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002)17

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
226 F.R.D. 456 (S.D.N.Y. 2005).....17

Romero v. Drummond Co.,
552 F.3d 1303 (11th Cir. 2008)..... 16, 18

Sarei v. Rio Tinto,
671 F.3d 736 (9th Cir. 2011) (vacated on other grounds, 133 S. Ct. 1995).....17

Siderman de Blake v. Republic of Arg.,
965 F.2d 699 (9th Cir. 1992)15

Sinaltrainal v. Coca-Cola Co.,
578 F.3d 1252 (11th Cir. 2009)18

*Societe Nationale Industrielle Aerospatiale v. United States District Court for the
Southern District of Iowa*,
482 U.S. 522 (1987)7

**Sosa v. Alvarez-Machain*,
542 U.S. 692 (2004) 16, 19

Statutes

*Alien Tort Statute, 28 U.S.C. § 1350 passim

Torture Victim Protection Act of 1991, § *a*, Pub L. No. 102-256, 106 Stat. 73
(1992) (codified at 28 U.S.C. § 1350) 6, 11

Chilean Cases

Corte de Apelaciones (C. Apel.) (courts of appeals), 26 diciembre 2012,
“Indictment of Pablo Pedro Barrientos Núñez” Rol de la causa: 108.496-MG
[Case No.: 108.496-MG]12

Corte Suprema [Supreme Court], 17 noviembre 2004, “Sandoval, Miguel Ángel,”
Rol de la causa: 517-0410

Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 marzo 2007, “Rojas
Fuentes, Manuel Tomás,” Rol de la causa: 3125-0410

Corte Suprema de Justicia [Supreme Court], 30 enero 2013, “Extradición de Pedro
Pablo Barrientos Núñez,” Rol de la causa: 486-201313

Corte Suprema de Justicia [Supreme Court], 31 agosto 2016, “Requerido: Pedro
Pablo Barrientos Núñez (Amplificación de la Extradición),” Rol de la causa:
27193-201513

Other Authorities

American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 99 (1969), 1144 U.N.T.S. 123.....19

Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (No. 10-1491)21

Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (No. 10-1491)21

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 11317, 19

G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)..18, 19

International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M 368 (1967), 1976 U.N.T.S. 171 18, 19

PROGRAMA DE DERECHOS HUMANOS DEL MINISTERIO DEL INTERIOR Y SEGURIDAD PÚBLICA, BALANCE 2015, <http://www.ddhh.gov.cl/estadisticas/>.10

*RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (AM. LAW INST. 1987).. 19, 20

Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 317

S.S. “Lotus” (Fr. v. Turk.),
Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7)..... 20, 21

UNITED STATES INSTITUTE OF PEACE, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Oct. 4, 2002)8

Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M 679 (1969), 1155 U.N.T.S. 332..... 15, 16

**STATEMENT OF AMICUS CURIAE'S IDENTITY, INTEREST IN THE
CASE, AND AUTHORITY TO FILE**

Amicus Curiae, the Legal Affairs Directorate of the Ministry of Foreign Affairs of the Republic of Chile (“Chile”), respectfully submits this brief pursuant to Fed. R. App. P. 29 and Eleventh Cir. R. 29 in support of Plaintiffs-Appellants. A motion for leave to file this brief is filed herewith.

The Legal Affairs Directorate is the department responsible for providing legal advice to the authorities of the Ministry of Foreign Affairs of the Republic of Chile, as well as the Embassies and Missions of Chile abroad. In this capacity, it is responsible for the preparation of reports in matters of public and private international law, as well as Chilean law. The Directorate is also responsible for facilitating international legal cooperation and the legislative implementation of laws relating to international treaties ratified by Chile. Additionally, it is responsible for advising the Permanent Mission of the Republic of Chile to the United Nations on matters relating to the Sixth Committee (Legal Affairs) to the General Assembly of the U.N. The Director, who has the rank of Ambassador, and Deputy Director of Legal Affairs report directly to the Undersecretary of Foreign Affairs, who in turn, reports to the Minister of Foreign Affairs.

This case relates to alleged human rights violations committed during the 1973 *coup d'état* in Chile by which a military regime headed by General Augusto Pinochet assumed power. Since that regime was removed in 1990, Chile has

endeavored to address the human rights violations committed during that period of history and, therefore, has created many institutions to promote justice and truth. These include the National Commission for Truth and Reconciliation (Rettig Commission) established in 1990 to investigate human rights violations, and the Valech Commission, established in 2003 to document additional abuses, including torture.¹ They also include the National Corporation for Reparation and Reconciliation, created in 1992 to provide reparations to victims and their families, and the National Institute of Human Rights, created in 2009 to protect and promote human rights in Chile.² Chile has investigated and prosecuted many of the abuses committed during the Pinochet regime.

This case thus implicates Chile's interest in pursuing justice with respect to human rights abuses through fair and full legal proceedings, with the aim of establishing the responsibility of alleged perpetrators and securing meaningful

¹ Supreme Decree No. 355, Apr. 25, 1990, DIARIO OFICIAL [D.O.] (creating the Commission of Truth and Reconciliation); Decree No. 1,040, Sept. 26, 2003, DIARIO OFICIAL [D.O.] (creating the National Commission on Political Imprisonment and Torture, for the clarification of the truth about the human rights violations in Chile).

² Law No. 19,123, Feb. 8, 1992, DIARIO OFICIAL [D.O.] (creating the National Corporation for Reparations and Reconciliation, establishing a compensatory pension and providing other benefits for indicated people); Law No. 20,405, December 10, 2009, DIARIO OFICIAL [D.O.] (establishing the National Human Rights Institute).

remedies for victims and their families. Defendant Lieutenant Pedro Pablo Barrientos Núñez's ("Lt. Barrientos") presence in the U.S. has prevented Chile from being able to pursue these interests through criminal prosecution in Chile for the reasons detailed in this submission.

This submission does not in any way constitute a waiver of Chile's jurisdiction over Lt. Barrientos, nor does it in any way imply that the Republic of Chile or any of its agencies or instrumentalities is subject to the jurisdiction of U.S. courts; Chile's sovereign immunity remains unaltered.

RULE 29(c)(5) STATEMENT OF AMICUS CURIAE INDEPENDENCE

No party's counsel authored this brief, in whole or in part.³ No party's counsel contributed money intended to fund preparing or submitting the brief. Further, no person—other than *amicus curiae* or its counsel—contributed money intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Whether the District Court erred in dismissing Plaintiffs' Alien Tort Statute (28 U.S.C. § 1350) ("ATS") claims by concluding that the presumption against extraterritoriality was not displaced where the defendant is a United States citizen who has continuously resided in the United States for over 26 years and is using

³ Christina G. Hioureas, counsel for *Amicus Curiae*, withdrew as counsel for Plaintiffs in the proceedings below on April 25, 2016 upon leaving the law firm Chadbourne & Park LLP.

the United States as a “safe harbor” to avoid legal accountability in his native country for allegations of crimes against humanity, extra-judicial killing, torture, cruel, inhuman and degrading treatment, and arbitrary detention.

SUMMARY OF THE ARGUMENT

The Legal Affairs Directorate of the Ministry of Foreign Affairs of the Republic of Chile has no objection to the exercise of civil jurisdiction under the Alien Tort Statute in the case against Lt. Barrientos. Exercising jurisdiction in the present case would not, therefore, create foreign policy tensions.

To the contrary, the Court’s exercise of jurisdiction over Lt. Barrientos would advance Chile’s aim to achieve redress for victims of human rights abuses that occurred during the Pinochet regime. This is because although Chile has requested the extradition of Lt. Barrientos from the United States to Chile, to date this request has not been granted. Since trials *in absentia* are prohibited under Chilean law, the criminal charges before a Chilean court remain stayed. The U.S. court action, therefore, serves as the only means by which Lt. Barrientos can be held accountable pending his extradition to Chile to stand criminal trial. The exercise of jurisdiction will not create a conflict of laws as the allegations are violations of both the law of nations and Chilean law. Furthermore, the exercise of jurisdiction by the United States over one of its nationals for conduct occurring outside of its territory is wholly in compliance with international law.

By the Ministry of Foreign Affairs filing this brief and expressing its position regarding the exercise of civil jurisdiction over Plaintiffs-Appellants' claims under the ATS, Chile does not in any way waive its jurisdiction over Lt. Barrientos. Neither the Republic of Chile, the Ministry of Foreign Affairs, nor any other agency or instrumentality of the Republic of Chile in any way waives its sovereign immunity; Chile's immunity from the jurisdiction of U.S. courts remains unaltered. Finally, the submission of the motion and brief does not modify Chile's pending request for the extradition of Lt. Barrientos to Chile, or waive any of its rights with respect to that request.

ARGUMENT

The Ministry of Foreign Affairs has no objection to the exercise of jurisdiction by a U.S. court over the specific claims brought by the family and estate of Víctor Jara under the ATS against Defendant, that is: crimes against humanity, extrajudicial killing, torture, cruel treatment, and arbitrary detention. The action brought by the Plaintiffs is important to Chile's substantial interest in ensuring that the victims of human rights violations committed under the Pinochet regime have access to pursuing accountability for the perpetrators of those acts.

The District Court dismissed Plaintiffs' claims brought under the ATS while

granting those brought under the Torture Victim Protection Act (“TVPA”),⁴ relying on the presumption against extraterritorial application of U.S. law developed in *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013) and subsequent Eleventh Circuit jurisprudence. In *Kiobel*, the Supreme Court held that the presumption against extraterritoriality may only be displaced where the events “touch and concern” the United States with sufficient force so as to displace this presumption.⁵ This test is also intended to avoid foreign policy conflicts with the States in which the events may relate.⁶

The Ministry of Foreign Affairs of the Republic of Chile does not oppose the resolution of these civil claims in a U.S. court and does not waive its jurisdiction over Lt. Barrientos in the currently pending criminal actions filed against him in Chile. Therefore, exercising jurisdiction over Defendant in this case does not implicate, from Chile’s perspective, any of the “foreign policy concerns that the presumption against extraterritorial application is intended to reduce”⁷ Nor would it create “unintended clashes between [U.S.] laws and those of other nations

⁴ Torture Victim Protection Act of 1991, § *a*, Pub L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

⁵ *Kiobel*, 133 S. Ct. at 1669.

⁶ *Id.* at 1664.

⁷ *Doe v. Drummond Co.*, 782 F.3d 576, 595 (11th Cir. 2015).

. . .” because the offenses Lt. Barrientos is alleged to have committed were unlawful under both Chilean and international law.⁸

On the contrary, international comity weighs in favor of exercising jurisdiction in this case. “Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interest of other sovereign states.”⁹ The Ministry of Foreign Affairs of the Republic of Chile recognizes the importance of pursuing accountability for the perpetrators of crimes committed under the Pinochet regime, and redress for the victims of those crimes. Lt. Barrientos’ presence in the United States prevents those interests from being fulfilled through court action in Chile.

I. The Ministry Of Foreign Affairs Of The Republic Of Chile Does Not Object To The Exercise Of Jurisdiction Under The Alien Tort Statute In The Present Case.

The crimes at issue in this case—the detention, torture, and extrajudicial killing of Víctor Jara—were committed in the context of the 1973 *coup d’état* through which a military junta headed by General Augusto Pinochet assumed power. During and after the *coup d’état*, many civilians perceived to possess views opposed to the regime were detained, tortured, killed, and/or disappeared.

⁸ *Kiobel*, 133 S. Ct. at 1664 (internal citations omitted) .

⁹ *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987).

The gravity and broader social significance of these crimes, both individually and collectively, makes addressing them a matter of great national importance to Chile. Chile has done so by pursuing efforts to investigate and acknowledge these crimes, provide reparations for victims and their families, and prosecute perpetrators of human rights violations. These efforts are ongoing.

In 1990, shortly after the end of the military regime, Chile established a National Commission for Truth and Reconciliation, on the basis of its conviction that “the moral conscience of the nation demands that the truth about the grave violations of human rights committed in our country between September 11, 1973 and March 11, 1990 be brought to light.”¹⁰ The mandate of this Commission was to gather information regarding those abuses, identify victims, and make recommendations regarding reparations.¹¹ The Commission’s work culminated in a public report, intended to create a public record of what had occurred and to provide a foundation for reconciliation and healing.¹²

¹⁰ Supreme Decree No. 355, *supra* note 1, pmb., cl. 1. The official Spanish text reads: “*Que la conciencia moral de la Nación requiere el esclarecimiento de la verdad sobre las graves violaciones a los derechos humanos cometidas en el país entre el 11 de septiembre de 1973 y el 11 de marzo de 1990[.]*”

¹¹ *Id.* arts. 1, 4.

¹² For an English translation of the Commission’s full report, see UNITED STATES INSTITUTE OF PEACE, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Oct. 4, 2002), http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf.

Subsequent commissions, formed in 2003 and 2010, have continued this work, addressing crimes that fell outside the scope of the first commission, and have included victims who were not identified previously.¹³ Chile, thereafter, created institutions to provide reparations to victims and their families.¹⁴

Chile has also pursued accountability for perpetrators of human rights violations through criminal investigations and prosecutions. Such actions were largely unavailable under the Pinochet regime, as it failed to pursue investigations and passed an Amnesty Law in 1978 to shield perpetrators from liability.¹⁵

However, since the restoration of democratic government, legal remedies have become a prominent feature of Chile's efforts to address human rights violations. Investigations have been initiated and restarted as more evidence comes to light. Moreover, Chilean courts have weakened the application of the Amnesty Law, finding it inapplicable under domestic law or incapable of being

¹³ Decree No. 1.040 *supra* note 1; Decree No. 43, Feb. 5, 2010, DIARIO OFICIAL [D.O.] (establishing the Advisory Commission on the Classification of Disappeared Detainees, Victims of Political Executions and Victims of Political Imprisonment and Torture between Sept. 11, 1973 and Mar. 10, 1990).

¹⁴ *See, e.g.*, Law No. 19.123 *supra* note 2; Law No. 19.980, Nov. 9, 2004, DIARIO OFICIAL [D.O.] (amending Law No. 19.123, law of reparations, by expanding or establishing benefits for indicated people).

¹⁵ Decree Law No. 2.191, Apr. 18, 1978, DIARIO OFICIAL [D.O.].

enforced due to its conflict with international human rights and humanitarian law.¹⁶ To date over 1,300 individuals have been charged with or convicted of human rights abuses.¹⁷

All of these efforts reflect Chile's strong interest in holding accountable perpetrators of human rights abuses and providing remedies for victims and their families. In light of this interest, the Directorate of Legal Affairs of the Ministry of Foreign Affairs of the Republic of Chile has no objection to allowing Plaintiffs' claims brought under the ATS in this case to proceed, without waiving its jurisdiction to pursue criminal charges against Lt. Barrientos should he ultimately be extradited to Chile. The exercise of jurisdiction over those claims by a U.S. court will further advance Chile's efforts to pursue transitional justice.

The Ministry of Foreign Affairs considers it important that Plaintiffs' claims

¹⁶ See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 marzo 2007, "Rojas Fuentes, Manuel Tomás," Rol de la causa: 3125-04 [Case No.: 3125-04] § 41 (rejecting application of the Amnesty Law to an instance of extrajudicial killing on the basis it would be inconsistent with the Constitution of Chile and with international law); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 17 noviembre 2004, "Sandoval, Miguel Ángel," Rol de la causa: 517-04 [Case No.: 517-04] §§ 36–37 (holding that disappearance is an ongoing crime not subject to the Amnesty Law).

¹⁷ The Yearbook of the Human Rights Program of the Ministry of the Interior and Public security, updated as of Dec. 1, 2015, indicates the existence of 1,373 former agents as defendants, indicted and convicted. PROGRAMA DE DERECHOS HUMANOS DEL MINISTERIO DEL INTERIOR Y SEGURIDAD PÚBLICA, BALANCE 2015, <http://www.ddhh.gov.cl/estadisticas/>.

under the ATS be allowed to proceed even though Lt. Barrientos has been held liable under the TVPA because some of the claims under the ATS fall outside of the scope of the TVPA. Plaintiffs have alleged several human rights abuses—namely crimes against humanity; arbitrary detention; and cruel, inhuman or degrading treatment or punishment—that are only cognizable under the ATS.¹⁸ Each of these acts is, nonetheless, within the ambit of the human rights violations that Chile has endeavored to address. Resolution of Lt. Barrientos’ responsibility for these alleged human rights abuses is, thus, important to Chile’s efforts to achieve justice for past human rights violations.

II. The Ministry Of Foreign Affairs Does Not Oppose The Exercise Of Jurisdiction By The U.S. Court In This Case Because Lt. Barrientos’s Presence In The U.S. Prevents The Completion of Legal Proceedings Against Him In Chile.

The exercise of jurisdiction over Plaintiff’s claims brought under the ATS is in fact the only way Lt. Barrientos may be tried for human rights violations at the current time because Chilean law prohibits trials *in absentia*.

On December 26, 2012, following criminal investigations which resulted in new information and Lt. Barrientos’ whereabouts, Lt. Barrientos was indicted in

¹⁸ See 2d Amd. Compl. ¶¶ 68–100. Compare the Torture Victim Protection Act of 1991, *supra* note 4, § 2 (codified at 28 U.S.C. § 1350 (1994)) (providing a cause of action for torture and extrajudicial killing), with the Alien Tort Statute, 28 U.S.C. § 1350 (vesting courts with jurisdiction over any “tort . . . committed in violation of the law of nations or a treaty of the United States”).

Chilean court for the torture and killing of Víctor Jara.¹⁹ At the time of the indictment, Lt. Barrientos was residing in Florida, where he continues to reside today. Under Chile's rules of criminal procedure, while an individual may be indicted *in absentia*, he or she may not be tried or convicted *in absentia* for the offenses of which Lt. Barrientos has been charged.²⁰ The rules provide for proceedings to be stayed while a defendant is not present.²¹

Up to this point, Lt. Barrientos' continued presence in the United States also prevents any civil proceeding in Chilean courts aimed at securing remedies for victims of alleged human rights violations. Under Chilean law, in cases where civil claims relate to criminal charges, civil and criminal liability are not determined independently. Criminal liability is determined first, and only then

¹⁹ Corte de Apelaciones (C. Apel.) (courts of appeals), 26 diciembre 2012, "Indictment of Pablo Pedro Barrientos Núñez" Rol de la causa: 108.496-MG [Case No.: 108.496-MG], https://www.cooperativa.cl/noticias/site/artic/20121228/asocfile/20121228113320/auto_procesamiento_victor_jara.pdf.

²⁰ CÓDIGO PROCESAL PENAL [Criminal Procedure Code] art. 93; CÓDIGO DE PROCEDIMIENTO PENAL [Code of Criminal Procedure] art. 59. The Criminal Procedure Code was promulgated in September 2000, and applies to proceedings opened after its entry into force, which varies between regions within Chile. The Code of Criminal Procedure continues to apply to prior proceedings.

²¹ CÓDIGO PROCESAL PENAL [Criminal Procedure Code] arts. 101, 252; CÓDIGO DE PROCEDIMIENTO PENAL [Code of Criminal Procedure] arts. 409, 595, 603.

may civil liability for the actions and the remedies be decided.²²

Chile has sought the extradition of Lt. Barrientos from the United States to Chile. The extradition request was approved by the Supreme Court of Chile on January 30, 2013 and delivered to the U.S. Department of State on October 8, 2013.²³ On August 31, 2016, the Supreme Court of Chile approved an expansion of the extradition request to cover additional charges.²⁴ The request is pending.

A U.S. court exercising jurisdiction over ATS claims against Lt. Barrientos is, thus, at present the only means of giving effect to Chile's interest in securing justice for alleged human rights violations. The Ministry of Foreign Affairs' non-opposition to that exercise of jurisdiction is in no way incompatible with its efforts to extradite Lt. Barrientos. The purpose of both is to ensure that allegations of

²² See CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] art. 167 (“*When the existence of a crime has to be the precise basis of a civil judgment or has a noticeable influence on it, the courts may suspend the pronouncement of the judgment until the end of the criminal proceedings, if there has been an indictment or a subpoena, according to the case.*”). The official Spanish text reads: “*Cuando la existencia de un delito haya de ser fundamento preciso de una sentencia civil o tenga en ella influencia notoria, podrán los tribunales suspender el pronunciamiento de ésta hasta la terminación del proceso criminal, si en éste se ha deducido acusación o formulado requerimiento, según el caso.*”

²³ Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 enero 2013, “Extradición de Pedro Pablo Barrientos Núñez,” Rol de la causa: 486-2013 [Case No.: 486-2013].

²⁴ Corte Suprema de Justicia [C.S.J.] [Supreme Court], 31 agosto 2016, “Requerido: Pedro Pablo Barrientos Núñez (Amplificación de la Extradición),” Rol de la causa: 27193-2015 [Case No.: 27193-2015].

grave human rights violations are heard and decided in a court of law.

III. Exercising Jurisdiction In The Present Case Would Be Consistent With Both Chilean And International Law.

A. Lieutenant Barrientos's Alleged Conduct Violated Chilean Law.

The exercise of jurisdiction over Plaintiffs' claims brought under the ATS would not be in tension with Chilean law, because the acts Lt. Barrientos is alleged to have committed were unlawful under the laws of Chile. Extrajudicial killing was unlawful, as evidenced by the fact that Lt. Barrientos was indicted in Chile in 2012 for homicide that took place in 1973 under article 391 of the Criminal Code of Chile.²⁵ Torture was also expressly prohibited by the Constitution of Chile in force on September 11, 1973.²⁶ The Constitution also prohibited unlawful detention, providing, "No one may be detained except by order of a public official expressly empowered by law and upon being notified of said order in legal form, unless caught during commission of an offense, in which case, only for the sole

²⁵ See Indictment of Pedro Pablo Barrientos Núñez, *supra* note 19.

²⁶ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [Political Constitution of the Republic of Chile] art. 18, marzo 24, 1970 [Mar. 24, 1970], <https://www.leychile.cl/Navegar?idNorma=241091&idParte=0&idVersion>.

("Torture shall not be applied, nor in any case shall the penalty of confiscation of property be applied, without prejudice to the cases established by the law." The official Spanish text reads: "*No podrá aplicarse tormento, ni imponerse, en caso alguno, la pena de confiscación de bienes, sin perjuicio del comiso en los casos establecidos por las leyes.*")

purpose of being brought before a competent judge.”²⁷ Insofar as Plaintiff’s allegation that Lt. Barrientos committed crimes against humanity and cruel, inhuman and degrading treatment is based on the same acts that constitute extrajudicial killing and torture,²⁸ the underlying conduct was for the same reasons unlawful under Chilean law.

B. Lieutenant Barrientos’s Alleged Conduct Violated the Law of Nations.

Crimes against humanity, extrajudicial killing, and torture, alleged to have been committed by Lt. Barrientos, are violations of *jus cogens* norms. “[A] *jus cogens* norm, also known as a ‘peremptory norm’ of international law, ‘is a norm 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.’”²⁹

²⁷ *Id.* art. 13 (“No one may be detained if not by order of a public official expressly empowered by law and after such order is legally presented to him, unless he is caught in flagrante delicto and, in this case, for the sole purpose of being brought before a competent judge.”). The official Spanish text reads: “*Nadie puede ser detenido si no por orden de funcionario público expresamente facultado por la ley y después de que dicha orden le sea intimada en forma legal, a menos de ser sorprendido en delito flagrante y, en este caso, para el único objeto de ser conducido ante juez competente.*”).

²⁸ See 2d Amd. Compl. ¶ 98.

²⁹ *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 8 I.L.M. 679 (1969), 1155 U.N.T.S. 332).

Customary international law may be contrasted with *jus cogens* norms. “Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent”³⁰ The Supreme Court of the United States has recognized claims based on crimes of this sort “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”³¹

U.S. courts have recognized that crimes against humanity; extrajudicial killing; torture; cruel, inhuman and degrading treatment; and arbitrary detention may give rise to a cause of action under the ATS.³² Under the Rome Statute of the International Criminal Court, which U.S. courts commonly cite to define crimes

³⁰ *Id.* at 715.

³¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

³² See, e.g., *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008) (“extrajudicial killing . . . is actionable under the Alien Tort Statute if it is ‘committed in violation of the law of nations’”) (quoting 28 U.S.C. § 1350); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151–52 (11th Cir. 2005) (affirming judgment under the ATS for extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading treatment); *In re Chiquita Brands Int’l, Inc.*, 792 F. Supp. 2d 1301, 1324 (S.D. Fla. 2011) (“Torture and extrajudicial killings are recognized violations of the law of nations under ATS.”); *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1235 (S.D. Fla. 2012) (“prolonged arbitrary detentions and torture have both been recognized as violations of the law of nations cognizable under the ATS.”).

against humanity,³³ crimes against humanity consist of one of a set of specified acts—which include, *inter alia*, murder, torture, “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,” and “[p]ersecution against any identifiable group or collectivity on political . . . grounds”—when “committed as part of a widespread or systematic attack directed against any civilian population.”³⁴ Crimes against humanity, alleged to have occurred at Chile Stadium, belong to the narrow category of crimes that U.S. courts have found to constitute a violation of the ATS.³⁵

Torture is broadly accepted as a violation of the law of nations. The United Nations Convention against Torture (“Convention Against Torture”) has 160 State parties—including Chile and the United States—and is among the most widely accepted international human rights conventions. For ATS cases, the Eleventh

³³ See, e.g., *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 767 (9th Cir. 2011), vacated on other grounds, 133 S. Ct. 1995 (2013); *Krishanthi v. Rajaratnam*, Civil Action No. 09-CVB-05395 (DMC-JAD), 2010 U.S. Dist. LEXIS 88788, at *32–33 (D.N.J. Aug. 26, 2010); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 480–81 (S.D.N.Y. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1155 (E.D. Cal. 2004); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002).

³⁴ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 3.

³⁵ *Cabello*, 402 F.3d at 1151–52 (per curiam) (affirming the liability a former Chilean military officer under the ATS for, among other offenses, crimes against humanity, for the killing of a Chilean citizen in the aftermath of the 1973 *coup d’état*).

Circuit has adopted the definition of torture set out in the Convention Against Torture, which is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, on a person for the purposes of obtaining information or a confession, punishment, intimidation or coercion, or discrimination.”³⁶

Similarly, extrajudicial killing is broadly accepted as a violation of the law of nations. The Eleventh Circuit has defined extrajudicial-killing as “a deliberate killing not previously authorized by a regularly constituted court affording recognized judicial guarantees.”³⁷ The right to life is protected under article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights—to which Chile and the U.S. are parties. The International Covenant on Civil and Political Rights (“ICCPR”) also outlines that the right to life shall be protected by law and that no one shall be arbitrarily deprived of his life.³⁸ U.S. courts have found that claims alleging extrajudicial-killing are cognizable under ATS.³⁹

³⁶ *In re Chiquita Brands Int’l, Inc.*, 792 F. Supp. 2d at 1324 (citing *Villeda Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1252 (11th Cir. 2005)).

³⁷ *Id.* (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)).

³⁸ International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 6 I.L.M 368 (1967), 1976 U.N.T.S. 171.

³⁹ *Romero*, 552 F.3d at 1316 (holding that extrajudicial killing is actionable under the ATS); *Cabello*, 402 F.3d at 1151–52 (affirming a finding of liability under the ATS for, among other offenses, extrajudicial killing).

The prohibition against cruel, inhuman and degrading treatment is an accepted norm of customary international law, outlined in international and regional human rights instruments, and is recognized by U.S. courts as a norm of customary international law.⁴⁰ International instruments hold that “no one shall be subjected to . . . cruel, inhuman or degrading treatment or punishment.”⁴¹ Courts have also recognized that prolonged arbitrary detention is a violation of the law of nations and a cognizable claim under the ATS.⁴²

Crimes against humanity, extrajudicial killing, torture, cruel treatment, and arbitrary detention are all actionable under the ATS as they satisfy the requirement of a “norm of international character.” They are of a “definite” content, and accepted “‘among civilized nations [as] the historical paradigms’ of the 1790s.”⁴³

⁴⁰ *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing a “right not to be . . . subjected to cruel, inhuman or degrading punishment” as incorporated into international law).

⁴¹ International Covenant on Civil and Political Rights, *supra* note 38, art. 7; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 5 (Dec. 10, 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., arts. 1, 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113; American Convention on Human Rights art. 5, Nov. 22, 1969, 9 I.L.M. 99 (1969), 1144 U.N.T.S. 123 (entered into force July 18, 1978); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

⁴² *See Garcia*, 911 F. Supp. 2d at 1235.

⁴³ *Sosa*, 542 U.S. at 732.

C. A State's Exercise of Extraterritorial Jurisdiction Over the Conduct of its Own Nationals is a Widely Accepted Principle of Jurisdiction Under International Law.

Lt. Barrientos acquired U.S. citizenship and has continuously resided in the United States for over 26 years. It is permissible to exercise jurisdiction over him for conduct that occurred outside U.S. territory as it is reflective of the well-established principle of nationality as a basis for jurisdiction to prescribe under international law.⁴⁴ Under that principle, a State may regulate “the activities, interests, status or relations of its nationals outside as well as within its territory.”⁴⁵

Rules of jurisdiction are permissive under international law. States are not required to exercise jurisdiction to prescribe, even where it is permitted under international law. Under the *Lotus* principle, States are given a “wide measure of discretion which is only limited in certain cases by prohibitive rules”⁴⁶ As the Permanent Court of International Justice observed, “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its

⁴⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (AM. LAW INST. 1987).

⁴⁵ *Id.*

⁴⁶ *S.S. “Lotus”*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

sovereignty.”⁴⁷ There is no limit under international law on a State’s exercise of jurisdiction over the extraterritorial actions of a citizen of that State.

Chile is not the only sovereign government that has taken the position that the extraterritorial application of ATS jurisdiction to U.S. nationals is not improper. The Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland submitted an *Amici Curiae* brief in *Kiobel v. Royal Dutch Petroleum*, stating that “the principle of nationality of the defendant (or ‘active personality jurisdiction’) is a proper basis on which the U.S. may apply the ATS extraterritorially.”⁴⁸ In that case, the European Commission submitted an *Amicus Curiae* brief on behalf of the European Union, stating that “the ATS may be applied extraterritorially only when the requirements of nationality, the protective principle or universal jurisdiction are met.”⁴⁹

Failure to apply ATS jurisdiction to U.S. citizens for the reason that their conduct occurred prior to their acquisition of U.S. citizenship could encourage a view of the U.S. as a “safe harbor” for individuals who commit serious crimes

⁴⁷ *Id.*

⁴⁸ Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 14, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

⁴⁹ Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 11, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

abroad and subsequently acquire U.S. citizenship. As Justice Breyer has observed, the United States has a “distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.”⁵⁰

CONCLUSION

For all of the reasons detailed above, the Directorate of Legal Affairs of Ministry of Foreign Affairs of the Republic of Chile has no objection to the exercise of jurisdiction under the ATS to adjudicate the claims brought by the family and estate of Víctor Jara.

Respectfully submitted,

DIRECTORATE OF LEGAL
AFFAIRS OF MINISTRY OF
FOREIGN AFFAIRS, REPUBLIC
OF CHILE

By its attorneys,

/s/ Christina G. Hioureas

Christina G. Hioureas

Counsel of Record

Benjamin K. Guthrie

Melissa A. Stewart

FOLEY HOAG LLP

1540 Broadway, 23rd Floor

New York, NY 10036

(646) 927-5507

chioureas@foleyhoag.com

Dated: November 30, 2016

⁵⁰ *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation specified in Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Christina G. Hioureas
Christina G. Hioureas

PROOF OF SERVICE

I, Christina Hioureas, certify that on November 30, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system and, because all parties of record or their counsel are registered as ECF filers, they will be served by the CM/ECF system which will send notice of the filing to:

Attorneys for Plaintiffs-Appellants:

Richard S. Delliger
Lowndes Drosdick Doster Kantor & Reed, PA
215 North Eola Drive
Orlando, FL 32801
(407) 843-4600

Mark D. Beckett
Christian Urrutia
Amy Belsher
Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019

L. Kathleen Roberts
Daniel McLaughlin
Center for Justice and Accountability
1 Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444

Attorneys for Defendant-Appellee:

Luis F. Calderon
Jose A. Baez
The Baez Law Firm
23 S. Osceola Ave.
Orlando, FL 32801
Tel: (407) 705-2626
Fax: (407) 705-2625

I further certify that on November 30, 2016, I filed the original and 6 copies of the Brief of *Amicus Curiae* Directorate of Legal Affairs of the Ministry of Foreign Affairs of the Republic of Chile by causing the same to be dispatched to a third-party commercial carrier for overnight delivery to the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit at 56 Forsyth Street, N.W., Atlanta, GA 30303.

/s/ Christina G. Hioureas
Christina G. Hioureas