No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF FOR PROFESSORS OF INTERNATIONAL LAW, FOREIGN RELATIONS LAW AND FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are professors who teach international law, foreign relations law, and/or federal jurisdiction at law schools, and have written and taught on the legal issues concerning the scope and application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *Amici* have a professional interest in the interpretation of the ATS, the historical and legal context of that statute, the limited role of the federal courts in creating rights of action based on international law norms, and the proper understanding of customary international law, all of which are implicated in this case.

SUMMARY OF ARGUMENT

The ATS was enacted to accomplish a specific and limited purpose. As detailed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and confirmed by a review of the legal and historical backdrop against which it was enacted, the ATS had the intensely practical goal of addressing a narrow category of tortious wrongs against aliens, typically occurring within the United States, that if left unredressed, threatened the security and international relations of the United States. Specifically, the ATS was designed to address only private violations of the law of nations for which the U.S. had a duty to provide redress and which—if not redressed—would

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[1] Both Petitioners and Respondents have filed letters with the Clerk consenting to the submission of all amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

constitute affronts to other nations that could result in diplomatic conflict or war. As this Court further recognized in *Sosa*, this 1789 provision was not intended to apply to other violations of the law of nations that did not implicate these concerns.

The type of claim that Petitioners allege in this case—an action against private corporations for allegedly aiding and abetting a foreign government's violations of the rights of its own citizens and residents within its own territory—involves no international obligation of the United States and thus implicates none of the purposes of the ATS. Indeed, for U.S. courts to presume to adjudicate the legality of the domestic conduct of a foreign sovereign would invite, rather than avert, the international conflict the ATS was enacted to prevent. Under these circumstances, and in light of the exceedingly high hurdle *Sosa* sets for judicial recognition of causes of action based on post-1789 "paradigms," 542 U.S. at 732, there is no basis for creating the extraterritorial ATS federal common law cause of action Petitioners propose.

In addition, the corporate liability Petitioners seek to impose for aiding Nigeria's alleged domestic human rights abuses also fails *Sosa*'s independent requirement that any proposed basis of liability under the ATS have "acceptance among civilized nations" comparable to the consensus acceptance of the Eighteenth Century "paradigms" discussed in *Sosa*. *Id.* As multiple examples demonstrate, including international war crimes tribunals and the Rome Statute of the International Criminal Court, no such consensus exists in international law with respect to corporate liability for international wrongs.

ARGUMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court provided two principles to guide whether U.S. courts should recognize pursuant to the ATS a federal common law tort action based on international law norms other than the "18th-century paradigms," *id.* at 725, specifically identified in Blackstone's *Commentaries* and likely to have informed passage of this statute—assaults on ambassadors, infringement of safe-conduct assurances, and piracy.

First, delineating a general approach, the *Sosa* Court emphasized that recognition of an ATS-based cause of action—a form of judicial lawmaking which the Court likened to creating implied rights of action and other new bodies of federal common law—must be exercised, "if at all, with great caution." *Id.* at 728. Second, addressing the case at hand, the Court articulated a specific principle ruling out claims for violations "with less definite content and acceptance among civilized nations than the historical paradigms familiar" in 1789. *Id.* at 732.

Both of these principles require rejection, rather than recognition, of Petitioners' proposed cause of action in this case. First, the ATS was enacted to address a particular class of cases in which the United States was obligated to provide a remedy—and as to which failure to provide that remedy was an affront to a foreign sovereign threatening relations between this new nation and that sovereign. *See Sosa*, 542 U.S. at 715. Petitioners' ATS claims, by contrast, rest on a modern branch of international law—prescribing limits on foreign sovereigns' conduct in their own territory toward their own

citizens and residents—that is entirely unrelated to the interests and concerns the ATS was enacted to address. Consistent with the "great caution" in this sphere mandated by *Sosa*, there is no basis for creating an ATS-based cause of action to address claims of this sort against *any* defendant—let alone for extending such a cause of action to private corporations. Second, the proposed corporate liability for the foreign state's conduct fails the "definite content and acceptance" requirement of *Sosa*.

I. CONGRESS ENACTED THE ATS TO ADDRESS TORT CLAIMS BY ALIENS, TYPICALLY ARISING WITHIN THE UNITED STATES, THAT THE UNITED STATES WAS OBLIGATED TO REDRESS AND WHICH, IF LEFT UNREDRESSED, MIGHT GIVE OTHER COUNTRIES "JUST CAUSE" FOR WAR

As *Sosa* recounts, Congress enacted the ATS as a means of accomplishing a specific practical goal: averting the "serious consequences in international affairs" that could ensue if the United States did not ensure that tortious wrongs against foreign subjects, typically occurring within the United States, were "adequately redressed." 542 U.S. at 715. The ATS was therefore aimed only at the "narrow set of violations of the law of nations," *id.*, that triggered such state-to-state concerns as a result of the United States' international law obligation to provide a means of redress.

In this case, Petitioners seek to impose corporate aiding-and-abetting liability for a modern category of international law violations, relating to a foreign government's obligations to its own citizens or residents within its own territory. Though reflecting

an important innovation of modern international law, these foreign-state-to-citizen concerns are difficult to bring under the text of the ATS[2] and, moreover, implicate none of the purposes of this statute. Indeed, not only would recognizing ATS corporate aiding-and-abetting liability for a foreign state's conduct within its own territory fail to advance the purposes of the ATS, it would actively undermine the very objectives Congress sought to accomplish in passing the ATS in 1789. At that time, the very assertion of U.S. jurisdiction over such conduct would itself have violated the law of nations and produced diplomatic conflict. And even today, for American courts to consider suits "claim[ing] a limit on the power of foreign governments over their own citizens" necessarily "raise[s] risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 727-28.[3]

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[2] As Judge Rogers has written: "If we assume that Congress wanted to protect the international relations of the federal government, it was sensible to extend federal court jurisdiction only to individual actions which might result in international responsibility on the part of the United States. The words of the statute, 'committed in violation of the law of nations or a treaty *of the United States,'* suggest this limit. Clearly Congress was concerned with the international law obligations of the United States and not of other countries." John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 55 (1988) (emphasis in original).

[3] The government of Nigeria formally objected to the Attorney General of the United States about an American court adjudicating the present case, J.A. 129-31, and similar objections have been lodged in other ATS cases.

A. *Sosa* Left Open Whether and to What Extent the ATS Applies Extraterritorially and to Modern International Law Extending Beyond the State-to-State Concerns of 1789

Although Petitioners frame the issue in this case as whether corporations are "exclu[ded]" from otherwise-established liability under the ATS, Pet. Br. at 18, this Court has never decided that claims like those alleged in this case—based on the conduct of a foreign sovereign toward its own citizens and residents and occurring within its own territory—are cognizable under the ATS. Indeed, this Court has yet to hold that any modern international law principle is actionable pursuant to the ATS, and has gone no further than to say in *dicta* that it would not "close the door" to the future recognition of a yet-to-be-identified "narrow class of international norms." 542 U.S. at 729.

In particular, *Sosa* held only that the international law norms at issue in that case failed to satisfy the requirement of "definite content and acceptance among civilized nations" comparable to "the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. It did *not* hold that satisfying the "definite content and acceptance" requirements would be sufficient to state a cognizable ATS claim. To the contrary, the Court expressly contemplated additional limits on the statute's reach: "This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action." 542 U.S. at 733 n.21; *see also id.* at 732 ("Whatever

the ultimate criteria for accepting a cause of action [under the ATS] . . . .").

Further, this Court emphasized, recognition of any new category of ATS claims beyond the three situations identified by Blackstone as falling within the state-to-state concerns of the law of nations—assaults on ambassadors, violations of safe conduct assurances and piracy—would be subject to a heavy burden of justification analogous to the constraints on creating implied rights of action or new federal common law. *Id.* at 725-28.

B. The ATS Was Designed to Address the Subset of Law of Nations Violations That "Threatened Serious Consequences" for the Diplomacy or Security of the United States.

As *Sosa* makes clear, the ATS was not designed to address all violations of the law of nations that might be committed against an alien. It was only the "narrow set of violations . . . threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS." *Id.* at 715. Other law of nations violations that were recognized in the Eighteenth Century—such as violations of the "law merchant" and related legal rules—were not within the contemplation of the ATS. *Id.*

This focus on "serious consequences in international affairs" is readily understandable in light of the legal and political realities of the late Eighteenth Century. Under the prevailing understanding of the law of nations, the commission of the paradigmatic violations discussed in *Sosa*—such as offenses against ambassadors or infringement of safe conducts, *see* 542 U.S. at 715—

was a diplomatic affront to the foreigner's sovereign that obligated the offending nation as a whole to provide proper redress. The failure to provide such redress could result in diplomatic conflict or even "rise to an issue of war." *Sosa*, 542 U.S. at 715 (citing Emmerich de Vattel, *The Law of Nations*, bk. IV, at 463-64 (J. Chitty ed. 1883) (1758)).

For example, Blackstone emphasized that private infringements of safe-conducts were a cause of international conflict, writing that such offenses

> are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: *and such offences may, according to the writers upon the law of nations, be a just ground of a national war*; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community.

4 William Blackstone, *Commentaries on the Laws of England* (photo. reprint 1983) (1769), at 68-69 (emphasis added).

Likewise, Emmerich de Vattel, perhaps the Founders' leading authority on the law of nations,[4] emphasized each nation's responsibility for redressing mistreatment of foreigners. Once a sovereign admits foreigners, Vattel wrote, "he

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[4] Vattel's treatise and Blackstone's *Commentaries* were the first two books purchased by the United States Senate. *See* 2 Journal of the Senate of the United States of America 44 (Washington, Gales & Seaton 1820) (Mar. 10, 1794).

engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him." Vattel, bk. II, § 104 at 154. This responsibility extended even to injuries privately inflicted on foreigners, because the nation "ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less to give open, audacious offence to foreign powers." *Id.* at bk. II, § 76 at 145.

Importantly, this state responsibility included the after-the-fact obligation to provide a civil or criminal remedy. "The sovereign who refuses to cause a reparation to be made for the damage caused by his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it." *Id.* at bk II, § 77 at 145. And the failure to satisfy this obligation could have severe consequences, including war, such that "the safety of the state, and that of human society, requires this attention from every sovereign"—that it not "suffer the citizens to do an injury to the subjects of another state." *Id.* at bk II, § 72 at 144.[5]

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[5] *See also* Blackstone, 4 *Commentaries* *67–68 ("But where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government, under which they live to animadvert upon them with becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first, to demand satisfaction and justice to be done on the offender by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and *draws upon his community the calamities of foreign war.*") (emphasis supplied).

In the United States, these responsibilities under the law of nations contributed powerfully to the perceived need for a stronger national government than existed under the Articles of Confederation, and, ultimately, to the enactment of the ATS. The period prior to the adoption of the Constitution saw repeated instances in which actions by American states violated law of nations rules, highlighting the flaws of the existing system of government. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *reprinted in* 9 *The Papers of James Madison* 345, 349 (Robert A. Rutland, et al, eds., 1975).

After one notable 1787 incident, for example, the Dutch minister plenipotentiary protested the entry of a New York City constable into the minister's residence with an arrest warrant for a "domestic." John Jay, the American minister of foreign affairs, asked the Mayor of New York to act on the "Aggression," noting that it was not the first such incident the Dutch minister had experienced. Jay reported to Congress that "the federal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." 34 *Journals of the Continental Congress*, 1774-1789, at 111 (Gaillard Hunt ed., 1912).

As recounted in *Sosa*, "the Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" 542 U.S. at 716 (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). Recognizing the importance of remedying violations of safe conducts, the rights of ambassadors, and

treaties—and its own impotence to provide the necessary remedies—Congress passed a resolution imploring the states to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States [a form of safe-conduct violation], . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress* 1136–1137 (G. Hunt ed. 1912). This resolution, a precursor to the ATS, confirms that "a private remedy was thought necessary for diplomatic offenses under the law of nations," *Sosa*, 542 U.S. at 724.

The decentralized system under the Articles of Confederation proved incapable of preventing "disputes with other nations" stemming from continued violations of treaties and the law of nations. James Madison warned in 1787 that

> The Treaty of peace [with England]—the treaty with France—the treaty with Holland have each been violated. . . . The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects. As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst.[sic] those disputes with other nations, which being among the greatest of public calamities, it ought to be

> least in the power of any part of the Community to bring on the whole.

Madison, *Vices of the Political System of the United States*, *supra*, at 349.

The call for a stronger national government in the Constitution was in part a response to concern about such violations, and the potentially severe consequences of leaving them unredressed. James Madison questioned William Paterson at the Constitutional Convention as to whether the so-called New Jersey Plan for unicameral national governance would provide for the means to prevent violations of the law of nations "which if not prevented must involve [the nation] in the calamities of foreign wars." 1 The Records of the Federal Convention of 1787, at 247 (M. Farrand ed. 1911). Madison further expounded that "[a] rupture with other powers is among the greatest of national calamities . . . [and so it] ought therefore to be effectually provided that no part of the nation shall have it in its power to bring them on the whole." *Id.*

To similar effect, Edmund Randolph noted at the Convention that one of the principal defects of the Articles of Confederation was its inability to prevent infractions of the law of nations, raising the concern "that particular states might by their conduct provoke war without control." *Id.* at 27.[6] And John

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[6] In the same vein, Randolph further critiqued the Confederation, arguing: "If a State acts against a foreign power contrary to the law of nations or violates a treaty, [the confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war." 1 The Records of the Federal Convention of 1787, at 33.

Jay explained in The Federalist No. 3: "It is of high importance to the peace of America that she observe the laws of nations . . . , and to me it appears evident that this will be more perfectly and punctually done by one National Government than it could be either by thirteen separate States, or by three or four distinct confederacies." The Federalist No. 3, at 20 (John Jay).[7]

In short, the Founders recognized that provoking foreign powers by failing to provide redress for conduct within the United States that violated the law of nations posed real dangers to the young republic. They further recognized that such provocation could come from actions or omissions of state courts as well as other branches of government. The Founders dealt with this problem through a number of mechanisms, both constitutional and statutory. As Alexander Hamilton wrote in The Federalist 80:

> The Union will undoubtedly be answerable to foreign Powers for the conduct of its members.

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[7] *See also* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 263 (Kaminski, et al., eds. 1988) (public letter of Edmund Randolph, Oct. 10, 1787) ("[In] the constitution and laws of the several states . . . the law of nations is unprovided with sanctions in many cases which deeply affect public dignity and public justice," and as the Congress lacked power "to remedy these defects," it might be "doomed to be plunged into war, from its wretched impotency to check offences against this law."); *cf.* The Federalist, No. 42, at 233 (James Madison) (noting as a deficiency in the Articles of Confederation that they "contain no provision for the cases of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations").

> And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. *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. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

The Federalist No. 80, at 435 (Alexander Hamilton) (emphasis added); *see also* The Federalist, No. 3, at 21 (John Jay) ("The wisdom of . . . committing such [law of nations] questions to the jurisdiction and judgment of courts appointed by and responsible only to one National Government, cannot be too much commended.").

Against this background of concern over the need to ensure this country's compliance with its obligations under the law of nations, Congress enacted the ATS—as part of the first Judiciary Act in 1789—"to grant federal jurisdiction over cases in which an individual has committed a tortious act against an alien "which, if unredressed, would result in international legal responsibility on the part of the United States." John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 47 (1988); *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is evidence . . . that the intent of [the ATS] was to assure aliens access to federal courts to vindicate any

incident which, if mishandled by a state court, might blossom into an international crisis.").

In addition to the ATS, the Judiciary Act of 1789 addressed foreign relations concerns in several of its other provisions, including by giving this Court original jurisdiction over cases by or against ambassadors and other public ministers; giving district courts original jurisdiction over admiralty and maritime cases; and giving circuit courts original jurisdiction over alien diversity cases in which the amount in controversy exceeded $500. Judiciary Act of 1789 §§ 13, 9, 11, 1 Stat. at 78-80. The Crimes Act of 1790 subsequently made it a crime to violate "any safe-conduct or passport duly obtained and issued under the authority of the United States" or to "assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister." Crimes Act of 1790 § 28, 1 Stat. at 118.

This history fully confirms *Sosa*'s determination that the ATS reflects Congress' intensely practical purpose of remedying the subset of law of nations and treaty violations that "if not adequately redressed could rise to an issue of war." 542 U.S. at 715; *see also id.* at 724 (referring to the precursor 1781 resolution as addressing "diplomatic offenses under the law of nations"). The ATS provided the remedy the United States was obligated to provide in such cases so as to satisfy the nation's international obligations and avoid diplomatic crisis or war.

C. Recognizing an ATS Claim Based on the Actions of a Foreign Sovereign Towards Its Own Citizens and Residents In Its Own Territory Would Run Counter To, Rather Than Advance, the Purpose of the ATS

Neither the text nor any of the purposes of the ATS supports providing a forum for claims relating to a foreign government's treatment of its own citizens or residents in its own territory. Unlike the paradigm offenses addressed in *Sosa*, a foreign government's conduct in its own territory towards its own citizens and residents may violate human rights precepts of modern international law, but it does not create an obligation for the United States to provide a remedy; nor would the failure to provide such a remedy constitute a diplomatic affront against another nation. To the contrary, the far greater risk of adverse foreign-affairs consequences to the United States arises from U.S. actions providing a forum that presumes to pass judgment on a foreign sovereign's actions towards its own citizens and residents in its own territory.

This risk would have been even greater under the law of nations at the time of the ATS' enactment, because it would have been well understood that the United States had no authority to interfere in the internal affairs of other nations. The founding generation's understanding of the obligations of nations made clear that "[i]t is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another." Vattel, bk. II, § 54, at 154-55. As Chief Justice John Jay wrote in

Henfield's Case, "[i]t is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction." 11 F.Cas. 1099, 1103 (C.C.D. P. 1793) (No. 6,360).

To that end, "[i]t does not, then, belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, the nation alone is concerned in the business; and no other is called upon to oblige him to amend his conduct and follow more wise and equitable maxims." Vattel, bk. II, § 55, at 155. Accordingly, under the law of nations at the time the ATS was enacted, as then-Circuit Justice Story explained in his 1822 opinion in *United States v. The La Jeune Eugenie*, given the requirement of respecting the sovereignty of other nations, there could be no redress in this nation's courts for even obvious wrongs committed by another nation against its own citizens:

> No one has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and

> sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

2 Mason 409, 26 F. Cas. 832, 847-848 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.).

Not only was non-interference with another nation's sovereign right to self-governance honored as a matter of practice, but a failure to respect the other state's domain would itself have been viewed as a violation of the law of nations and, quite likely, a just cause for war or at least serious diplomatic consequences. *See* Vattel, bk. II, § 57, at 156 ("After having established the position that foreign nations have no right to interfere in the government of an independent state, it is not difficult to prove that the latter has a right to oppose such interference. . . . [A] sovereign has a right to treat those as enemies who attempt to interfere in his domestic affairs . . . .").

Accordingly, it would have been entirely clear in 1789 that the jurisdiction conferred by the ATS did not extend to claims arising from a foreign sovereign's conduct toward its own citizens or residents within its own territory.[8]

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[8] Given the prevailing law of nations jurisprudence informing the ATS' enactment, it is not surprising that Petitioners can marshal no support for their critical premise that Congress in the ATS sought to provide a forum for alien plaintiffs that the United States was not obligated to provide and whose provision as a means of scrutinizing a foreign state's

Even today, when international law is understood to include certain limits on the power of governments over their own citizens and residents, *see Sosa*, 542 U.S. at 727, allowing American courts to assert authority over such claims would "raise risks of adverse foreign policy consequences,"*id.* at 728, while serving none of the purposes of the ATS; *see also id.* at 761-62 (Breyer, J. concurring in part and in the judgment) (highlighting the "comity concerns" raised by American courts exercising "universal jurisdiction" over conduct occurring elsewhere).[9]

(continued…)

conduct would itself have embroiled the young nation in wholly avoidable international disputes.

[9] The more general question whether the ATS has any extraterritorial application at all need not be addressed in this case. For example, it is possible that the ATS applies to claims of piracy on the high seas, see *Sosa*, 542 US at 720 ("[I]ndividual actions arising out of prize captures and piracy may well have also been contemplated."), but jurisdiction over piracy was unexceptionable in 1789. *See, e.g.*, Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 152 (2009). That some form of application to piracy "may" have been contemplated, *Sosa*, 542 US at 720, provides no reason to think Congress contemplated extraterritorial application of the ATS to the domestic conduct of foreign sovereigns—which would have been uniformly regarded as no proper business of the United States. Indeed, it does not even mean that the ATS was intended to extend to any acts of piracy beyond those with a nexus to the United States. *Cf. United States v. Palmer*, 16 U.S. 610, 632 (1818) (criminal piracy statute should not be construed "to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government….").

D. The Actionability of Claims Based on A Foreign Sovereign's Conduct in Its Own Territory Affecting Its Own Citizens and Residents Is Directly Relevant to the Question Presented

The *amicus* brief of the United States recognizes that "whether or when a cause of action should be recognized based on U.S. common law based on acts occurring in a foreign country" is an "important" question that is "implicated by this case," but argues that this Court need not address it. Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 12-13. *Amici* respectfully disagree. The question whether liability for the alleged violations in this case extends to private corporations necessarily requires consideration of whether (and if so, why) ATS liability extends at all to this area of international law.

First, *Sosa* indicates that a private right of action under the ATS is analogous to implied rights of action and *Bivens* actions. *See* 542 U.S. at 727 (drawing express analogy to implied rights of action and citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), a *Bivens* case). In the implied-right-of-action context, this Court has emphasized that when addressing whether liability extends to additional parties, concerns about the creation of the underlying cause of action are always relevant. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion."). And, in the *Bivens* context, the Court (in *Malesko,* the very case cited in *Sosa*) addressed whether to recognize a claim for corporate

liability by revisiting the purposes of the *Bivens* remedy and analyzing whether those purposes would justify corporate liability. 534 U.S. at 521-22.

Second, at a minimum, the original purpose of the ATS is squarely relevant to whether the proposed corporate liability at issue here should be recognized. Petitioners themselves recognize the importance of the statute's purpose, arguing that corporate liability is necessary to fulfill the "remedial purpose" of the ATS "against any tortfeasor for violations of the law of nations." Brief for Petitioners 24. This misstates the purpose of the ATS, but highlights the importance of a proper understanding of Congress' purpose in enacting this statute. As *Sosa* recognized, far from having a generic "remedial purpose" applicable to all violations of the law of nations, the ATS was aimed at the particular category of violations that exposed the United States to "serious consequences in international affairs." 542 U.S. at 715. The inapplicability of that purpose here is necessarily relevant and important to the question before the Court.

II. IN ANY EVENT, CORPORATE LIABILITY FOR THE ALLEGED INTERNATIONAL LAW VIOLATIONS AT ISSUE HERE DOES NOT SATISFY SOSA'S REQUIREMENTS OF SPECIFICITY AND INTERNATIONAL CONSENSUS

Even if the scope of the ATS could be extended to actions arising from foreign sovereigns' treatment of their own citizens and residents within their own territory (which *amici* dispute), the corporate liability Petitioners seek to impose for aiding Nigeria's alleged human rights abuses of its citizens and residents

would fail *Sosa*'s requirement of "acceptance among civilized nations" comparable to the consensus acceptance of the Eighteenth Century "paradigms" discussed in *Sosa*. 542 U.S. at 732. No such consensus exists in international law with respect to corporate liability for international wrongs.

A. Corporate Liability is Subject to *Sosa*'s Requirement of International Law Consensus.

Petitioners' argument that a principle of corporate liability for modern international law violations may be borrowed from domestic law is contrary to *Sosa* and to the very language of the ATS. The text of the ATS requires that the defendant himself have violated international law, as it provides jurisdiction only over torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. If international law does not establish (without resort to domestic law) that a defendant corporation is responsible for a violation, plaintiffs' claims against the corporation simply are not claims for "tort[s] … committed in violation of the law of nations …."

Sosa confirms this principle. *Sosa* held that the ATS did not directly create a cause of action, 542 U.S. at 712-14, but that Congress in passing the ATS tacitly acknowledged federal courts' authority to recognize causes of action for "the modest number of international law violations with a potential for personal liability at the time," *id.* at 724, and potentially for a limited class of other violations. *Id.* at 725. Thus, because the jurisdiction conferred by the ATS is limited to "recogniz[ing]" established "claim[s] under the law of nations," *id.* at 725, an

"international law violation[]," *id.* at 724, by the particular defendant is a necessary element in that inquiry. Put differently, neither the ATS nor *Sosa* authorizes U.S. courts to create common law liability for conduct that does *not* violate international law.

Petitioners would have the Court confine its inquiry to whether the "norm" in isolation is *Sosa*-compliant under international law. The norm, however, does not stand alone under this statute. The ATS provides jurisdiction only over tortious conduct against aliens that violates the law of nations or U.S. treaties. In the context of torture, petitioners concede that the norm does not stand alone but can be violated only by state actors. The issue of corporate liability is simply another question of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued," no different in kind from the question of whether "the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. *See also id.* at 760 (Breyer, J. concurring) (under the Court's approach "to qualify for recognition under the ATS a norm of international law … must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue").

In short, the liability of a particular defendant is not a mere ancillary question whose answer may be borrowed from domestic law. Liability under the ATS requires a showing that the particular defendant being sued has violated well-established international law.

B. There is No Well-Established, Undisputed and Binding Rule of Liability for Private Corporations Under Customary International Law.

Notwithstanding Petitioners' efforts to portray corporate liability as widely accepted, the liability of private corporations is not well-established in customary international law and is, at best, the subject of theoretical discussion and speculation in academic literature.

Tellingly, there is no international practice of holding private corporations liable for foreign governments' violations of customary international law. Plaintiffs cite to no case where anything like the corporate liability sought here for alleged international wrongs has been imposed other than in U.S. courts. Even if isolated incidents may be found, there assuredly has been no consistent practice or consensus of the world's nations as required by *Sosa*. It is true that various international bodies have discussed the possibility of an international code of conduct for business activities.[10] The premise of these discussions, however, is that no such code presently exists. Petitioners ask this Court to anticipate the formation of international law in this area by seizing upon the ATS as authority for U.S. courts to develop their own international code of conduct and apply it,

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[10] See Intl. Comm. of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations* 3 n.7 (2010), *available at* http://www.icj.org/dwn/database/SouthAfrica-Access-to-Justice-2010.pdf (describing "controversy as to the existence of liability under international law").

inter alia, to non-U.S. corporations. Such a course is radically inconsistent with the caution this Court urged in *Sosa.* The absence of an international consensus on the question of corporate liability is apparent even from a review of Petitioners' own authorities.

For example, although the Nuremberg trials immediately after World War II spurred recognition of natural persons' liability for certain violations of international law, those trials did not impose liability on corporations, and no similar international consensus has emerged over the liability of private corporations for international wrongs. Many corporations and other businesses aided the war crimes committed by Nazi Germany and its allies. In a few cases, where the companies functioned as instrumentalities of the Nazi regime, as was the case with I.G. Farben, these companies were dissolved and their assets taken over as an exercise of military authority by the occupation forces. However, with respect to any determination of liability under customary international law, only individuals were brought to account.[11]

The Nuremberg adjudicative machinery was established by Article 6 of the Charter of the International Military Tribunal (Oct. 6, 1945), 81

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[11] "[T]he major legal significance of the (Nuremberg) judgments lies … in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003) (quoting Telford Taylor, Chief of Counsel for War Crimes, *Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials Under Council Law No. 10*, at 109 (Aug. 15, 1949; 1997 ed.) (emphasis in court opinion)).

U.N.T.S. 284 (1951), which provided that the Tribunal had the power "to try and punish persons who…, whether as individuals or members of organizations," committed certain crimes. *Id.* at 286 (Art. 6). Whether as unaffiliated individuals or as members of organizations, the accused were natural persons, not legal entities. Provision was made for declaring and proving that "the group or organization of which the individual was a member was a criminal organization." *Id.* at 290 (Art. 9). The effect, however, was not enterprise liability but to make membership in such an organization a punishable offense—a recognition of "the right to bring individuals to trial for membership [in the criminal organization]." *Id.* (Art. 10). Similarly, Control Council Law No. 10 speaks only of punishment of "persons," not entities; of "war criminals and other similar offenders, other than those dealt with by the International Military Tribunal"; and of "[t]he delivery … of persons for trial" (preamble, Articles II & V).

Even where a commercial organization was plainly involved in the commission of war crimes, as in the case of the business executives charged with supplying Zyklon B gas to Nazi concentration camps, the Nuremberg prosecutions were against the individual who owned the firm, his immediate deputy and the senior technical expert for the firm; the firm itself was the not the subject of the prosecution. *See In re Tesch and Others* (Zyklon B Case), excerpted in *Ann. Digest and Reports of Public International Law Cases, Year 1946* (H. Lauterpacht ed., 1951) (heading: "Subjects of the Law of War").

Petitioners' (and their *amici*'s) argument based upon the treatment of I.G. Farben (*see* Pet. Br. 50-52)

erroneously conflates the actions of the military occupation with the adjudication of criminal liability of CIL violators by the International Military Tribunal. Petitioners (and their *amici*) rely on Control Council Law No. 9, which makes clear the Control Council was seizing all of the asserts of I.G, Farben as an exercise of occupation military authority: "In order to insure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farben industrie knowingly and prominently engaged in building up and maintaining the German war potential, the Control Council enacts as follows: All plants, properties an assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie … are hereby seized by and legal title thereto is vested in the Control Council." (Preamble & Article I). To like effect is Control Council Law No. 57 (also relied upon by Petitioners), which provided for "Dissolution and Liquidation of Insurances Connected with the German Labour Front," a Nazi organization.

That Nuremberg did not extend liability to corporations is further reflected in the U.N. International Law Commission's 1950 commentary on the Nuremburg Tribunal, which noted the distinction between individual and entity responsibility:

> 99. The general rule … is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the [International Military] Tribunal were very definite on the question…. "That international law imposes duties and

> liabilities upon individuals, as well as upon States," said the judgment of the Tribunal, "has long been recognized." It added: "Crimes against international law are committed *by men, not by abstract entities*, and only by punishing individuals who commit such crimes can the provision of international law be enforced."

Vol. II, 1950 *Y.B. of the I.L.C. 374* (2005 repr.), quoting 1 *Trial of the Major War Criminals before the International Military Tribunal* 223 (1947) (emphasis supplied).

The existence of an international consensus on the responsibility of natural persons or states for certain violations of international law, and the absence of any similar consensus regarding the liability of private corporations (other than perhaps in the ruminations of academic commentators), continues to the present. Thus, the statutes of the ICTY and ICTR confer jurisdiction on these tribunals only to try individuals. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Art. 7(1), U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Art. 6(1), U.N. S/RES/955 (Nov. 8, 1994).

Similarly, Article 25(1) of the Rome Statute establishing the ICC confirms the principle of "[i]ndividual criminal responsibility" as the limit of the ICC's authority: "The Court shall have jurisdiction over natural persons pursuant to this Statute." The decision to limit this new court's mandate reflected considerable disagreement among signatory states. We quote at length from a leading

observer of the ICC negotiation process to convey the extent of non-consensus on this issue:

> As far as the jurisdiction over natural persons is concerned, paragraph 1 [of Article 25] states the obvious. Already the International Military Tribunal found that international crimes are "committed by men not by abstract entities." However, *the decision whether to include "legal" or "juridical" persons within the jurisdiction of the court was controversial.* The French delegation argued strongly in favour of inclusion since it considered it to be important in terms of restitution and compensation orders for victims. . . . Despite this rather limited liability [of a subsequent draft], the proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, *there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems*.

Kai Ambos, Article 25, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 477-78 (2d ed. 2008) (emphasis added).

Given the continuous tradition from the post-war period to the present of limiting the responsibility of non-state actors for customary international law

offenses to natural individuals, the range of views attending the abortive inclusion of a limited form of corporate liability in the Rome Statute, the absence of "universally recognized common standards for corporate liability," and the absence of the very concept in "some major criminal law systems," the liability of corporate defendants cannot be considered a universally supported rule of sufficient specificity to satisfy the requirements of *Sosa*. While it is true that the discussion under the Rome Statute was limited to criminal liability, it is nonetheless the only significant state practice on the duties of corporations for international wrongs. As such, it is a highly probative source of guidance for determining whether under well-established international law principles, a "given norm" applies "to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n.20.

Furthermore, the dearth of international law precedents guiding when a corporate entity should be deemed liable for the acts of a corporate agent or actor provides an additional reason for not recognizing an implied cause of action under the ATS in this case. The process of implementing corporate liability under the ATS would inevitably require selective borrowings from U.S. domestic law to adjudicate what are ostensibly violations of international law.

The absence of settled international law on corporate liability for international wrongs is reflected in the debates during the drafting of the Rome Statute over whether to impose and how to implement rules of private corporate liability for international crimes. One widely-discussed draft of the Rome Statute included jurisdiction over juridical

entities, including private corporations. But it conditioned such liability on a simultaneous criminal conviction of a natural person "who was in a position of control" of the juridical entity and was acting on behalf of and with the explicit consent of the juridical person. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court*, *in* Liability of Multinational Corporations Under International Law 150-51 (M.T. Kamminga and S. Zia-Zarifi, eds, Kluwer Law International, 2000) (discussing Working Paper on Article 23, Paragraphs 5 and 6 of the Rome Statute). These requirements are far more onerous than U.S. domestic practice with respect to corporate criminal liability, but in the end, even this restrictive text was dropped by the Rome Statute negotiators due to an inability to satisfy all delegations' "queries about this innovative use of international criminal law." *Id.* at 157.

Courts considering ATS claims against private corporations have encountered a similar problem when considering plaintiffs' claims against the subsidiaries of certain defendants. In the *South Africa Apartheid Litigation*, for instance, plaintiffs sought to hold the parent companies liable on a theory of alter ego and agency. *See In re S. Africa Apartheid Litig.*, 617 F. Supp. 2d 228, 270 (S.D.N.Y. 2009). As the court in that case openly acknowledged, the utter lack of customary international law standards for "piercing the corporate veil" required the court to rely instead on federal common law. As the court noted, "the international law of agency has not developed precise standards to apply in the civil context." *Id.* at 271.

But the lack of "precise standards" under international law is exactly the type of situation that warrants dismissal of the entire cause of action. As discussed above, a cause of action under the ATS requires that the defendant's conduct amount to a violation under settled principles of *international* law. Resort to federal common law to determine the substantive scope of liability runs contrary to the ATS and to *Sosa*. The very necessity of such "gap filling" throws in sharp relief the innumerable practical obstacles of applying an "international law of agency" to an "international law of corporate liability" when no such law exists in the agreed upon practice of nations.[12] Even if those principles are capable of formulation in the abstract, federal courts will necessarily be required to develop and innovate new rules of international law to fill the gaps left by the paucity of international law precedent. Such a role for the federal courts, it goes without saying, is exactly opposite to *Sosa's* vision of the judicial role in ATS cases as "vigilant doorkeep[ers]." *Sosa*, 542 U.S. at 729.

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[12] *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 392-93 (2010).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 3, 2012

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[*] Affiliations are provided for identification purposes only.

Clause and the Limits of Universal Jurisdiction, 103 Nw. U. L. Rev. 149 (2009), *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111 (2004). He is also writing a book on piracy and international criminal law for Harvard University Press and is this year's winner of the Paul Bator award given by the Federalist Society to an outstanding academic under 40.

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