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 OF THE COCA-COLA COMPANY AND ARCHER DANIELS MIDLAND COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae The Coca-Cola Company is a United States-based corporation with substantial overseas operations. It has been sued in multiple actions in the United States courts under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in connection with various aspects of its overseas operations. *Amicus Curiae* Archer Daniels Midland Company is a United States-based corporation whose affiliates do business overseas. It has been sued in one ATS action relating to the activities of an affiliate in West Africa. *Amici* have a strong interest in clarifying the law on the extent to which corporations are deemed to possess international law rights and obligations.

SUMMARY OF ARGUMENT

Amici offer three specific points for the Court's consideration in evaluating the corporate liability issue presented in this case.

First, in reviewing the Second Circuit's conclusion that there is no consensus among nations regarding the extension of international human rights norms to artificial entities such as corporations, it is important to consider one important set of reasons *why* this issue remains controversial in the international community—in addition to reasons that have been documented elsewhere. *See infra* at 7, n.2. The lack of consensus on the issue stems in part from a reluctance within the international community to

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing.

elevate artificial entities such as corporations to the status of international "persons" or "subjects"—a status that might be viewed not only as imposing international law obligations upon such entities, but also as implying a grant of some power for them to comply with those obligations by taking actions within the territory of the host nation to enforce those new obligations. Such a proposed elevation of the corporation's role has the potential to infringe on the territorial and political sovereignty of the host nation. Many nations—especially smaller and politically weaker nations—are wary of any change in law that would deputize multinational corporations with the obligation, and hence, implicitly, the authority, to police compliance with supposed international law obligations within the host nations in which they operate. A related concern is that elevating multinational corporations to the status of international "persons" or "subjects" might imply certain political rights, including the right to participate in the process of making international law—a role that is viewed as undermining the sovereign prerogative of nations.

These concerns have not arisen in the same way in the narrow range of categories where individuals have been found capable of violating international law. Most such categories involve individuals acting under color of state law or engaging in certain types of acts that, by their nature, are deemed outside the realm of any one nation, such as piracy or terrorism. They therefore do not present the same state sovereignty concerns as has the issue of international law status for corporate entities.

It also is critical to note that, although corporations are not "subjects" of international law, they still play an important role in improving global human rights conditions. Multinational corporations have become increasingly engaged in productive collective activities with nations, non-governmental organizations and other constituencies to shape and advance international law to improve global social and environmental conditions. That effort will continue even if corporations are not deemed "subjects" of international law.

Second, it is *not* the case, as Petitioners and some of their *amici* assert, that corporate liability under the ATS is governed by domestic law in the sense that the United States courts, having identified an international law norm, may simply shape a cause of action that determines what categories of defendants are covered by that norm—or, as one *amicus* bluntly puts it, to act as the "agent[s] of the United States" for purposes of creating any appropriate causes of action. Br. of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support of Petitioners at 3. As an initial matter, as Respondents have shown, the issue of *who* may be liable is not one of "remedy" to be decided under domestic law at all; rather, it relates to the scope of substantive liability for the claimed international norm. *See* Respondents' Br. at 17-26. But even if that were not the case—or if the "agent[s] of the United States" argument could be read to mean that courts may go beyond the requirements of international law in implementing a domestic cause of action—the argument is flawed. Although the argument has roots in the traditional international law structure, under which international law defines

certain norms but leaves it to individual nations to incorporate them into their domestic laws, the flaw in its application here is how it translates into our own tripartite system of government. Even when international law *mandates* that nations enforce the norm domestically, that domestic implementation is effected through the lawmaking body within each nation—normally, each country's legislature. Within our Nation's tripartite system of government, Congress is the legislative body charged with effecting that implementation, as expressed in its power to "define and punish . . . Offences against the Law of Nations." U.S. Const., Art. I, § 8, Cl. 10. Thus, as this Court recognized in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727-28 (2004), where international law calls for domestic implementation, normally it is Congress that is called upon to perform that role.

The judicial role, by contrast, is much narrower. As this Court explained in *Sosa*, only norms that are so universally agreed upon and well defined that they already are understood to give rise to international law obligations may be imported into domestic federal common law and enforced by the courts. 542 U.S. at 727. Federal common law does not simply import abstract norms and then allow the courts to make new causes of action but rather imports only those "with a potential for personal liability at the time," *id*. at 724, meaning norms that already are understood to obligate each nation to provide a civil remedy—such that (1) the United States would be viewed as remiss in not recognizing a remedy in our courts; and (2) courts can enforce them without engaging in the essentially legislative task of "defin[ing]" the law of nations as translated into our

domestic law, or breaking innovative new ground in the area of private international law rights of action before such claims are recognized by other nations. Although international law allows nations to go beyond international law obligations to create and define new domestic causes of action and remedies for emerging international law norms, our domestic separation of powers principles dictate that any such innovative lawmaking power be exercised by Congress, not by the courts.

Third, and closely related to the point about Congressional primacy in the area of implementing international law, is the significance of Congress's most prominent action in this area since the passage of the ATS and the related international law statutes that accompanied it—namely, the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"). *Sosa* made clear that, in evaluating proposed international law norms for potential enforcement through federal common law, courts must look to relevant Congressional guidance in the form of related or analogous legislation. Here, the TVPA is directly analogous, in that it codifies two specific causes of action that had been recognized as international law norms. Critically, the text of the TVPA accomplishes this result by creating a direct cause of action *only* by an "individual" against another "individual," and not against artificial entities such as corporations—an issue currently presented to the Court in *Mohamad* v. *Palestinian Authority*, No. 11-88. It simply cannot be said that declining to extend international law norms would violate United States policy when Congress itself made the very same choice with respect to the only two international law crimes for which it chose in the TVPA to create a domestic remedy.

ARGUMENT

I. The Lack of Consensus for Extending International Law Status to Corporations Stems in Part from Concerns That Doing So Will Compromise the Sovereignty of Nations

Numerous sources, including the Second Circuit's panel opinion below, have documented the lack of consensus among nations for an extension of international law status to corporations. *See* Pet. App. at A14, A67; *see also Doe* v. *Nestlé, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), *appeal pending*, No. 10-56739 (CA9). As these sources and others have documented, international law precedents for subjecting artificial entities such as corporations to the strictures of international law are virtually nonexistent—to the point where the dominant theme in favor of such liability is that courts must look to domestic law, not international law, to decide *who* is covered by international norms (a point addressed in Section II, below). Indeed, of all the relevant international law sources from which ATS plaintiffs have tried to draw their substantive human rights norms—including the Nuremberg trials, the ad hoc tribunals for the former Yugoslavia and Rwanda, and the Rome Statute—not a single one of these sources extends the international law obligations expressed therein to corporations, nor is there any other evidence of a consensus among nations that such an extension would be appropriate.

The issue that *amici* will address here is *why* this is the case. Some of the reasons stem from disagreements over whether corporations can form

criminal intent or what forms of artificial entities are even recognized—issues that have been described elsewhere.[2] But in addition to these disagreements, there has been a longstanding reluctance within the international community to elevate corporations to the level of "subjects" of international law, such that they would be directly bound by international law principles. As detailed below, recognition of an international law duty on the part of corporations to police compliance by a host nation within that country—often through liability for aiding and abetting such violations—is seen as implying the *power* to enforce that obligation. Such a power potentially could undermine the host nation's sovereign prerogatives—particularly its domestic enforcement and police power. Many nations, especially smaller nations, resist this result and oppose the elevation of multinational corporations to the status of international law "subjects."

A. Recognizing Corporations as "Subjects" of International Law Is Perceived to Compromise State Sovereignty

"An international person is one who possesses legal personality in international law, meaning one who is a subject of international law so as itself to enjoy rights, duties or powers established in international law." 1 *Oppenheim's International Law* § 33, at 119 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed.

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[2] *See*, *e.g.*, Respondents' Br. at 27 n.15; Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va. J. Int'l L. 353 (2010); *Nestlé*, 748 F. Supp. 2d at 1140 & n.69. *Amici* will not retrace these points in this brief.

1992). Once a group or entity is deemed an "international person" or a "subject" of international law, it normally acquires not only international law obligations, but the power and rights historically associated with nations. *See* Ian Brownlie, *Principles of Public International Law* 57-58 (7th ed. 2008) (a "subject" of international law is an "entity capable of possessing" both "rights and duties and having the capacity to maintain its rights by bringing international claims") (citing Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11)); *see also* Chris N. Okeke, *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity* 19 (1974) (essential attributes of a "subject" of international law include both rights and duties akin to those accorded to sovereigns); Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, in *New Political Entities in Public and Private International Law: With Special Reference to the Palestine Entity* 139, 139 (1999) ("When an entity is a legal personality in the context of international law, it is a subject of international law. Thereby it has capacity (a) to enter into legal relations; and (b) to have legal rights and duties.").

One of the critical attributes that attends status as a "subject" of international law is the power to carry out any international law obligations that may be imposed. Historically, the law of nations applied solely to nations. *See* Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 Am. J. Int'l L. 533, 536 (1956). Under this "classic" model, only states possess legal personality—thus, only states have powers and

obligations under international law; the primary rules of international law are solely addressed to states; and only states incur legal responsibility for breaching them. Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 Colum. J. Transnat'l L. 927, 932-33 (2005). International law thus imposes obligations upon states—including duties to establish mechanisms for ensuring compliance with international law strictures by their nationals or others within their territories—and the states implement those mechanisms domestically through their legislative or executive powers. In other words, a nation may undertake or be obliged to enforce international norms within its territory, and may do so within its own governmental structure and without threat to its own sovereignty.

Extension of international law status to other constituencies long has been controversial within the community of nations because it threatens to alter this balance. A prevalent concern is that extending international law status, including obligations, to such entities might necessarily imply imbuing them with political rights normally reserved for nations—such as rights to participate in shaping treaties and other international law instruments. *See*, *e.g.*, Sigmund Timberg, *International Combines and National Sovereigns: A Study in Conflict of Laws and Mechanisms*, 95 U. Pa. L. Rev. 575, 611 (1947) ("In addition to imposing obligations, norms, and negative restrictions on corporations, the grant of a charter could also serve to confer on the [multinational corporation] legal standing and specific positive rights under international law"); *see also* Emeka Duruigbo, *Corporate Accountability and Liability for*

International Human Rights Abuses: Recent Changes and Recurring Challenges, 6 Nw. U. J. Int'l Hum. Rts. 222, 276 (2008) (a logical component of legal personality for corporations is the "endowment of substantive rights and procedural capacity to bring claims before international organs"; in other words, "there is a 'rights' element to the equation"); Patrick Macklem, *Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction*, 7 Int'l L. Forum Du Droit Int'l 281, 288 (2005) ("[W]ith international corporate obligations come international corporate rights."); Lori F. Damrosch, et al., *International Law: Cases and Materials* 421 (4th ed. 2001) (if corporations are "generally subject to obligations" of international law, then, like states, they also would "enjoy rights under international law").

These concerns have fueled a reluctance within the international community to extend international law status to corporations—precisely because such an extension has the potential to undermine the sovereign prerogative of nations in the international arena, and in particular because it might be seen as shifting the global balance against "nation-states" and in favor of multinational corporations in ways that states "consider to be undesirable." *See* Jonathan I. Charney, *Transnational Corporations and Developing Public International La*w, 1983 Duke L.J. 748, 753, 773. Indeed, "[a]s regards transnational enterprises," states "have almost universally agreed that their status should not be upgraded." Donna E. Arzt & Igor I. Lukashuk, *Participants in International Legal Relations*, *reprinted in International Law: Classic and Contemporary Readings* 155, 167-68 (Charlotte Ku &

Paul F. Diehl, eds. 1998); *see also* Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 Colum. L. Rev. 1147, 1159 (1962) (describing concern over "any strengthening of the role of the private corporation in public or 'quasi-public' international legal processes").

Not surprisingly, concerns about state sovereignty are even more acute when the perceived threat is to a nation's sovereign power within its own territory. Whereas under the "classic" model of international law, control over domestic compliance with international legal duties would rest exclusively with states, the imposition of international legal obligations directly on corporations has been viewed as "disempower[ing] states by removing the power they currently enjoy to control their citizens' compliance with international law." Vázquez, 43 Colum. J. Transnat'l L. at 958.

A tangible manifestation of this concern is illustrated by claims that have been raised in litigation under the ATS. In several such cases, plaintiffs have premised liability on the theory that the defendants failed to take steps to ensure that host governments and local residents and entities in countries where they do business were complying with alleged international law norms. In some cases, plaintiffs have charged corporations with "aiding and abetting" violations of international law allegedly committed by police or military forces called upon to address a security situation affecting the corporation.[3] In the agricultural and retail realms,

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[3] *See, e.g.*, *Aldana* v. *Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (CA11 2005), *aff'g* 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (claims of torture, cruel, inhuman and degrading treatment or

defendants have been sued on theories of "aiding and abetting" private suppliers who allegedly violate international labor conventions. *See*, *e.g.*, *Nestlé*, 748 F. Supp. 2d at 1065-66. Imposing such obligations on corporations necessarily would require—and thus empower—those entities to "exercise control over such sovereigns or otherwise suffer the consequences." Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. Davis J. Int'l L. & Pol'y 119, 134 (2007).[4] The concern has been

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punishment, arbitrary detention and crimes against humanity arising from abduction of union officials by paramilitaries at a banana plantation operated by Bandegua, a wholly owned subsidiary of Del Monte, in Morales, Guatemala); *Wiwa* v. *Royal Dutch Petroleum Co*., 226 F.3d 88, 101 (CA2 2000) (claims by political activists alleging imprisonment, torture and execution by the Nigerian government allegedly at the instigation of Royal Dutch Petroleum Company, Shell Transport and Trading Company and their wholly owned subsidiary Shell Petroleum Development Company of Nigeria); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 40-41 (CADC 2011) (claims by villagers of extrajudicial killing, torture and crimes against humanity arising from actions of the Indonesian military that was securing the area around ExxonMobil's natural gas facility in Aceh, Indonesia); *Doe I* v. *Unocal Corp*., 395 F.3d 932 (CA9 2002), *vacated*, 395 F.3d 978 (CA9 2003) (claims by villagers alleging international law violations by Myanmar military who were securing the area in Myanmar in which a gas pipeline in which Unocal was an indirect investor was being constructed).

[4] *Amici* do not intend to suggest that corporations can or should have the power to control local governments or other constituencies within a host country—much less that they should be held liable as though they had such power. Rather, *amici* merely seek to describe a concern that appears to have fueled the lack of consensus on elevating corporations to the status of "subjects" of international law.

that requiring corporations to monitor and prevent abuses by police or military forces or private parties within the host nation would "fail[] to recognize national sovereignty and the state's ultimate responsibility for actions occurring within its borders." *Id*. It "would designate transnational corporations as the guarantors of the human rights credentials of their sovereign hosts," thereby diminishing the state's own sovereign authority to control its military and police forces. *Id*.

The alternatives to allowing a corporation some measure of power to enforce any international law obligations imposed upon it are also seen as intrusive of state sovereign interests, although in different ways. First, the corporation could be allowed to avoid liability by importing its own security forces. This option would compromise the prerogative of the host nation to control all exercises of police power within its territory, and likely would not be allowed by the host nation. Second, the corporation could simply forego doing business in the host nation—an option that deprives the host nation of the economic benefit of the corporation's presence, and also undermines the sovereign's prerogative to choose to allow the corporation to be present, subject to the nation's own local laws.

For all of these reasons, states are "widely believed to be reluctant to share their privileged position with, or yield some of their sovereign powers to, corporations at the international level." Duruigbo, 6 Nw. U. J. Int'l Hum. Rts. at 272. This concern is seen to be especially acute among socialist countries and politically weaker countries. As one scholar described this phenomenon:

> Socialist countries are politically opposed to [multinational corporations] and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control—of course, to the extent that this is possible.

Antonio Cassese, *International Law in a Divided World* 103 (1986); *see also* Arzt & Lukashuk, *supra*, at 168-69, 173 (noting that "almost all relevant parties have opposed international personality for transnational corporations" and that "most states, developing countries in particular, are likely to view such a development as over-empowering" corporations).

In sum, the imposition of direct international legal obligations on private corporations is seen to "represent a significant disempowering of states," and as such, would be a "fundamental change that states are likely to resist strongly." Vázquez, 43 Colum. J. Transnat'l L. at 950. These perceived concerns over the impact on state sovereignty make understandable the lack of international consensus behind making corporations "subjects" of international law—and confirm the correctness of the Second Circuit's conclusion on this point.

B. Acceptance of Corporations as International Law "Subjects" Does Not Follow from the Fact that Some International Law Norms Have Been Deemed to Bind Individuals

That individual persons may be criminally liable under international law in some circumstances—a longstanding exception to the "classic" model—is not inconsistent with the concerns about according international law status to corporations. Over time, and particularly in the context of the Nuremberg trials, international norms were recognized to authorize criminal liability under some circumstances for individuals exercising state power, and, in some narrow instances, to non-state individuals. *See* Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial*, *reprinted in* 20 Temp. L.Q. 338, 342 (1946); *see also Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 792 (CADC 1984) (Edwards, J.) (individuals have been subjects of international law where the "states are the actors," and the individuals are "officials acting under color of state law."). These extensions of international law into the area of personal responsibility are not viewed as potentially undermining national sovereign interests in the same way as are proposals to extend international law status to corporate entities. Many of the precedents for individual liability involve cases where the individual, in some fashion, was exercising sovereign power, including powers triggered by the laws of war; these cases can be viewed as an extension of sovereign responsibility under even the "classic" international law model. Jackson, 20 Temp. L.Q. at 342. And the few categories of non-state individual

liability arise largely in contexts where no state's sovereignty is implicated, such as piracy and terrorism, or where the imposition of liability for a given offense is a function of the United States' own sovereign obligations for events occurring within its territory, such as where an offense on an ambassador is involved. These categories of individual liability can be reconciled with the "classic" model of international law and do not raise the same sovereignty-based concerns as are presented by proposals to accord international law status to multinational corporations.

C. Corporations Retain a Vital and Expanding Role in Working with Nations and Other Constituencies to Improve Global Human Rights Conditions

That multinational corporations are not "subjects" of international law does not diminish their important role in improving human rights conditions in countries where they operate or worldwide. Corporations have come to play a vital role in helping to shape and advance international law, as well as in working with nations, non-governmental organizations, labor groups, and each other to improve and clarify the substance of international law and to enhance implementation and enforcement by nations. Multinational corporations today work closely with states and civil society to address important global challenges, including sustainable development, labor standards, climate change, energy conservation, and the management of resources. Many corporations have integrated these social and environmental concerns into their business

operations and their interactions with international law stakeholders.

These efforts—expressed through collective action at the international level, as well as through the development and promulgation of internal and industry Codes of Conduct that promote voluntary efforts to improve human rights conditions in host nations—have been widely applauded throughout the international community. *See*, *e.g.,* Holly Cullen, *The Role of International Law in the Elimination of Child Labor* 225-51 (Koninklijke 2007); *Nestlé*, 748 F. Supp. 2d at 1139 n.67; *see generally* Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 Colum. J. Transnat'l L. 389, 413-24 (2005); Barbara A. Boczar, *Avenues for Direct Participation of Transnational Corporations in International Environmental Negotiations*, 3 N.Y.U. Envtl. L.J. 1, 7 (1994) (noting that "many TNCs, international trade and business organizations … have initiated discussion and action on global environmental issues").

The workings of the International Labour Organization ("ILO") illustrate how corporations participate in improving international standards, without becoming "subjects" of international law or assuming international legal rights and obligations. The ILO is a specialized agency of the United Nations that is responsible for drafting and overseeing treaties governing international labor standards, referred to as ILO Conventions. It operates under a tripartite system in which the Conference delegation from each state party is comprised of two government representatives, a labor representative, and an employer representative. *See* Article 3(1) of the

Constitution of the International Labour Organization, 62 Stat. 3485, TIAS No. 1868, 15 U.N.T.S. 35; Charney, 1983 Duke L.J. at 778 n.74.

Although the ILO Conventions address important international issues involving corporate conduct and human rights, and involve extensive corporate engagement with labor, non-governmental organizations, and Member nations, the Conventions are consistent in binding only nations, which undertake to promulgate and enforce local labor codes, but not imposing any international law obligations directly on non-state entities such as corporate employers. *See*, *e.g.*, Cullen, *supra*, at 225. The ILO standards thus exist to guide and influence governments in the formulation of national law and practice. *See A Response by the International Organisation of Employers to the Human Rights Watch Report—"A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations,"* A Special Edition of the International Labour and Social Policy Review 5 (May 2011). They do not create obligations that directly apply to employers, but rather establish a framework for the development of domestic laws. *Id.*; *see also* Macklem, 7 Int'l L. Forum Du Droit Int'l at 282 ("International labour standards promulgated by the ILO obligate states to ensure that corporations operating within their jurisdiction respect the rights of workers, but they do not hold corporations directly accountable.").[5]

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[5] *See also* Convention No. 138, Concerning Minimum Age for Employment, art. 1, June 26, 1973; Convention No. 182, Concerning the Prohibition and Immediate Action for the

This structure is consistent with the traditional theory of public international law, in which international law binds nations. Charney, 1983 Duke L.J. at 752-53. Member nations comply by enacting and enforcing domestic laws reflecting the international labor standards of the ILO, and corporations and unions commit to respect and comply with those local laws.[6] In addition, although corporate employers are not directly bound by the Conventions, they are important participants in their development. This structure allows corporations to be productive participants with other players on the international stage, while being sensitive to the sovereignty concerns that would be raised by empowering private entities to exercise international law enforcement authority while operating within a host nation.

Elimination of the Worst Forms of Child Labour, arts. 6 & 7(1), June 17, 1999.

[6] This is not to say that ILO standards are so definite, concrete, and universally accepted among nations that they would constitute binding international norms under the ATS—a conclusion that certainly could not be drawn with respect to those ILO documents that have not been ratified by the United States. *See Sosa*, 542 U.S. at 735 (U.N. covenant did "not itself create obligations enforceable in the federal courts" where it is "not self-executing"); *John Roe I* v. *Bridgestone Corp*., 492 F. Supp. 2d 988, 1015 (S.D. Ind. 2007) ("It would be odd indeed if a United States court were to treat as universal and binding in other nations an international [ILO] convention that the United States government has declined to ratify itself."). As Respondents demonstrate, *Sosa* requires that the international law inquiry be conducted on a *norm-by-norm* basis. *See* Respondents' Br. at 24-26.

II. Under Domestic Separation of Powers Principles, Congress, Not the Courts, Must Exercise Any Innovative Lawmaking Authority in Creating Domestic Remedies Arising from International Law

Petitioners and several of their *amici* argue that domestic law governs whether there should be a cause of action against corporations for international human rights norms—essentially, that domestic law may decide "who" is subject to particular international law norms, even though international law defines "what" conduct is covered by those norms. For example, the *amicus* brief filed in support of Petitioners by the U.N. High Commissioner for Human Rights, contends that "international law necessarily relies on domestic legal mechanisms to ensure the effective protection of human rights;" that international law thus "obligates States to provide an effective remedy for victims of human rights violations;" and that "[f]rom the perspective of international law, action by a State's highest court is equivalent to action by the State's legislative or executive organs: all are equally acts of the state." Br. of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support of Petitioners at 3-4. In the High Commissioner's view, "when this Court decides this case, the Court is acting as an agent of the United States to execute—or refuse to execute—the nation's international legal obligation to promote human rights." *Id.* at 3. Petitioners and the United States offer a similar

view[7]—as did Judge Leval in his concurring opinion below, Pet. App. A87, and the D.C. Circuit panel majority in *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 41-43 (CADC 2011).

Even if international law did leave it to individual nations to decide what classes of defendants are covered by a recognized international law norm—which it does not, *see Sosa*, 542 U.S. at 732 & n.20[8]—

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[7] Petitioners offer a variation on this argument, contending that in "implementing" international law into our domestic law, the First Congress elected judicially created "common law tort remedies to enforce the law of nations." Petitioners' Br. at 37. The United States offers a third version—that international law should inform "a *court*'s decision whether to recognize, and how to define, a federal common law cause of action to enforce a law-of-nations violation of the sort deemed potentially actionable under *Sosa*." Br. for the United States as *Amicus Curiae* Supporting Petitioners at 27-28 (emphasis added).

[8] Even apart from *Sosa*'s footnote 20, Petitioners' choice of law argument is flawed. *Sosa* describes a narrow class of norms that may be recognized through a judicially created cause of action without Congressional guidance, requiring that they be agreed upon with a high level of definiteness, certainty, and universality among civilized nations—that is, that they already be fully formed as a matter of international law. 542 U.S. at 732. A logical and necessary part of whether conduct violates such a fully formed international law norm is whether the norm even extends to the particular type or category of defendant at issue—that is, in international law parlance, whether that defendant is a "subject of" the international law norm in question. *See Oppenheim's International Law*, *supra*, at 120 ("The concept of international person is . . . derived from international law."); *The Nurnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Trib. 1946) ("[I]nternational law imposes duties and liabilities upon individuals as well as upon states."). Petitioners mischaracterize this inquiry as one of remedy, Petitioners' Br. at 37, but the scope of liability is always a substantive issue. *See*

that still would not mean, as Petitioners' *amici* argue, that United States *courts* may act as the "agent[s]" of the United States to shape domestic law causes of action to implement any international norm by deciding who may be covered.

Generally, when international law creates a norm, and even when it *mandates* that nations enforce the norm domestically, the domestic implementation is effected through the lawmaking body within each nation—normally, each country's legislature. *See, e.g.,* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. Int'l Crim. Just. 86, 88 (2003) (states typically respond to complementarity "by adopting implementing legislation" to permit domestic punishment of international law crimes); Convention on the Prevention and Punishment of the Crime of Genocide, art. V, Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045 ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").[9]

Respondents' Br. at 17-26; *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 213 (2005) ("'The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.'" (quoting D. Dobbs, *The Law of Remedies* § 1.2, p.3 (1973))).

[9] In fact, the U.N. High Commissioner for Human Rights concedes that "[a]ll major international human rights treaties require States to take the necessary steps—*consistent with their*

Within our Nation's tripartite system of government, Congress is the legislative body charged with effecting that implementation, as expressed in its power to "define and punish . . . Offences against the Law of Nations." U.S. Const., Art. I, § 8, Cl. 10. Thus, as this Court recognized in *Sosa*, where international law calls for domestic implementation, normally it is Congress that is called upon to perform that role. 542 U.S. at 527. Although it may be true, as the United States argues, that historically the courts of the various nations were involved in shaping international law, *see* Br. for United States at 31, the Constitution establishes Congress as our Nation's lawmaking body for "new norms of international law." 542 U.S. at 727-28. This is particularly so in the post-*Erie* framework, in which the lawmaking function at the federal level has shifted significantly toward the legislative branch—a point that figured prominently in *Sosa*'s five reasons for caution in "adapting the law of nations to private rights." *Id*. at 725-28.

By contrast, the role of courts under the framework described in *Sosa* is significantly narrower: absent Congressional action, courts may recognize common law actions only for the narrow class of norms that *already* are recognized at international law with such a high level of definiteness, certainty, and universality among nations such that the United States would be viewed as remiss in *not* recognizing

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domestic legal systems and with the provisions of that specific treaty—to adopt the measures necessary to give effect to the rights recognized in the particular treaty." Br. of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support of Petitioners at 36 (emphasis added).

such claims and providing civil redress. *See id.* at 728. Indeed, the ATS was enacted to fulfill our nation's obligations under international law because "a private remedy was thought necessary for diplomatic offenses under the law of nations." *Id.* at 724. The Court concluded from this history that the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations *with a potential for personal liability at the time*"—*i.e.*, those with the same international law expectation of civil redress that applied to diplomatic offenses. *Id.* (emphasis added); *see also id*. at 715 (intended scope included violations "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs").

Under this framework, in determining the existence of an actionable norm, courts must consider not only whether international law universally condemns a practice, but also whether the underlying norm is one for which nations would expect one another to provide a civil remedy. *Id*. at 724; *see also Mora* v. *New York*, 524 F.3d 183, 208-09 (CA2 2008) (refusing to recognize ATS claim for official detention of a foreign suspect in violation of the Vienna Convention, where "none of the States-parties to the Convention, '[w]ith one possible exception,' recognize such a tort in their domestic law" and thus "it cannot be said that the tort proposed has 'attained the status of a binding customary norm'"); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 883, 887 (CA2 1980) (finding universal accord for international norm against official torture where international law explicitly provides that all nations must afford torture victim "'redress and

compensation'"; noting that ATS was meant not to extend "new rights to aliens," but rather to allow courts to adjudicate "rights already recognized by international law").

This reading of *Sosa* is consistent with the very structure of international law that Petitioners have tried to invoke—under which, as noted above, nations typically implement norms by code or legislation. As Petitioners themselves describe this process, "many States have passed domestic statutes imposing corporate criminal liability in implementing their international obligations under the Rome Statute." Pet. App. at A49. And indeed, nations are free to enact and have enacted domestic laws that go beyond norms recognized under international law. *See* Respondents' Br. at 22 n.9. But although no one would doubt Congress's power to enact legislation in this area, Congress has enacted no law establishing criminal or civil corporate liability for any international norm. Regardless of the possible merit of creating such liability, any international law-defining or advancing role the United States may choose to adopt as a nation must come from *Congress*, not from the Judiciary.[10]

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[10] The Seventh Circuit has surmised that a norm of corporate liability could exist even if corporations never have been punished under international law, reasoning that "[t]here is always a first time for litigation to enforce a norm." *Flomo* v. *Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017 (CA7 2011). That may be true of norms in the abstract, norms as they are created in other legal systems, and norms as they are implemented in the United States by *Congress*; but as *Sosa* makes clear, it is not true of the proper function of the federal Judiciary under the ATS. *See* 542 U.S. at 725-28.

III. The Only Relevant Congressional Guidance from the TVPA Precludes Corporate Liability

Presently before the Court in *Mohamad* is the question whether Congress's enactment of the TVPA—which imposes liability on "an individual" who commits torture or extrajudicial killing under color of foreign law—extends such liability to artificial entities such as corporations. *Amici* believe the TVPA is relevant to the present case for two reasons.

First, the passage of the TVPA illustrates the point in the preceding section that Congress is the appropriate body to incorporate international obligations into our domestic law. Prior to the passage of the TVPA, the United States signed the Convention Against Torture, which required each signatory state to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No 100-20 (1988), 1465 U.N.T.S. 85, art. 14. Congress implemented this directive by enacting a legislative civil damages remedy for torture victims. TVPA § 2(a)(1)-(2) (extending liability to "[a]n individual, who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing"). Thus, through the TVPA *Congress*—not the Judiciary—fulfilled the United States' undertaking to provide a civil remedy for torture victims. This is precisely the process for translating international law norms into U.S. law

that *Sosa* envisions: Congress acted as the lawmaking body responsible for creating and defining the scope of domestic legal remedies for violations of international law norms.

Second, in considering the "practical consequences" of imposing federal common law duties, *Sosa* directs courts to "look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. This is because Congress always may "shut the door" on aspects of the law of nations, "explicitly, or implicitly by treaties or statutes that occupy the field." *Id.* at 731. Moreover, as this Court has long recognized, it would be "anomalous" for a judicially crafted cause of action to sweep "beyond the bounds [Congress] delineated for comparable express causes of action." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994).

It is therefore highly significant that Congress chose *not* to recognize corporate liability in the TVPA—the most analogous area in which it has legislated. As one court has noted, the TVPA was enacted as an extension of the ATS and thus "provides a useful, congressionally-crafted template to guide" the Court's common-law powers under the ATS. *Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 832 (CA9 2008). The TVPA by its terms applies only to "individuals," not corporations. *See* 28 U.S.C. § 1350, note, § 2(a). The Dictionary Act defines "person" to include "*corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*" (1 U.S.C. § 1 (emphasis added)), which "implies that the words 'corporations' and 'individuals' refer to different things" (*United States*

v. *Middleton*, 231 F.3d 1207, 1211 (CA9 2000)). This Court has explained that although the term "person" ordinarily includes a corporation, the term "individual" refers only to a "single human being," unless there is "no plausible reason" for giving the term "individual" its ordinary meaning and doing so would produce an "absurd and unjust result which Congress could not have intended." *Clinton* v. *City of New York*, 524 U.S. 417, 428-29 & n.13 (1998). Assuming the Court agrees with the lower court decisions on this subject in deciding the *Mohamad* case,[11] that conclusion should bear significantly upon the proper interpretation of the ATS absent further Congressional action.

When Congress has provided relevant guidance, the Court must look to that guidance in determining the scope of liability under the ATS. *See Central Bank of Denver*, 511 U.S. at 180. In the TVPA, Congress declined expressly to impose corporate liability. Under *Sosa*, in fashioning a federal common law action under the ATS this Court should heed such "legislative guidance." 542 U.S. at 726.

Congress's policy choice reflected in the TVPA also negates the arguments of Petitioners and their *amici* that the Court must recognize corporate liability—despite the lack of an international consensus in favor of such liability—because not doing so would be inconsistent with United States policy. *See* Petitioners' Br. at 60-61. The TVPA shows that Congress concluded exactly the opposite. Because it

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[11] *See, e.g.*, *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116, 1126 (CA9 2010) ("We agree with the district court that Congress's use of the word 'individual' throughout the statute indicates that it did not intend for the TVPA to apply to corporations.").

would be "anomalous" for a judicially crafted cause of action to sweep "beyond the bounds [Congress] delineated for comparable express causes of action," *Central Bank of Denver*, 511 U.S. at 180, in considering the "practical consequences" of imposing a federal common law duty on private entities such as corporations under the ATS, this Court should lend great weight to Congress's decision not to recognize corporate liability in the TVPA.

CONCLUSION

For the reasons stated above and in the Respondents' brief, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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