No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM 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 CHEVRON CORPORATION, DOLE FOOD COMPANY, DOW CHEMICAL COMPANY, FORD MOTOR COMPANY, GLAXOSMITHKLINE PLC, AND THE PROCTER & GAMBLE COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JACK GOLDSMITH
Counsel of Record
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-8159
goldsmith@pobox.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE* [1]

This Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), ruled that federal courts can recognize international law-based causes of action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, only if the international law in question is accepted by the nations of the world and defined with the specificity that was characteristic of the few international law-based actions that influenced the framers of the ATS. *Sosa* emphasized that its demanding acceptance and definition tests, combined with related prudential concerns, counseled "great caution in adapting the law of nations to private rights." *Id.* at 728. The lower courts have ignored this guidance, and have instead construed *Sosa* as a license to expand civil liability under the ATS, especially with regard to corporate activity outside the United States.

Amici Curiae are corporations from different industrial sectors that through their affiliates do extensive business around the globe. *Amici* unequivocally condemn human rights abuses, and are committed to conducting global commercial affairs in a lawful and responsible manner that is respectful of all persons where they do business. More broadly, *Amici* support international human rights law, which imposes extensive obligations on nations to respect human rights, and which contemplates individual responsibility in various fora for international crimes. *Amici* are opposed, however, to the unwarranted ex-

[1] Written consents from both parties to the filing of *amicus curiae* briefs in support of either party are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae* or their counsel contributed money to the preparation or submission of this brief.

tension of the ATS to civil causes of actions against corporations for alleged human rights abuses outside the United States. While this case involves an ATS suit against a non-U.S. corporation, the burden of ATS suits falls on all businesses with substantial contacts to the U.S., especially U.S. corporations that are always amenable to suit in the United States. *Amici* have a direct interest in the proper interpretation of the ATS, and thus in the disposition of this case.

SUMMARY OF ARGUMENT

Congress enacted the ATS to ensure that the United States could satisfy its international law obligations, and the growth of the ATS in the last three decades as a novel vehicle for human rights litigation purports to fulfill this aspiration to vindicate international law. Far from vindicating international law, however, contemporary ATS causes of action are widely viewed to violate it. Respected jurists on the International Court of Justice, foreign courts such as the British House of Lords, and the governments of our closest allies have all maintained that ATS human rights litigation is contrary to international law.

These authorities are correct. Under international law, a nation's sovereignty over activities within its territory is presumptively absolute, subject to exceptions by national consent. Nations have consented to a foreign prosecution for certain "universal jurisdiction" crimes committed in their territories even though the foreign nation lacks any connection to the underlying behavior. They have not, however, consented to allow a foreign court to entertain civil causes of action on the basis of universal jurisdiction, as is done in ATS cases. Universal civil jurisdiction

is a different and greater intrusion on territorial sovereignty than universal criminal jurisdiction, for it is broadly enforceable by individuals rather than by the government alone, which exercises political discretion in enforcement.

The extension of universal civil jurisdiction to the extraterritorial activities of corporations in ATS cases would exacerbate this international law problem. Such liability would exceed state consent not only in permitting civil actions in addition to criminal actions, but also in imposing liability on corporations when nations have consented in the relevant international laws to liability at most for individuals.

The inconsistency of corporate ATS lawsuits with international law exposes the emptiness of the assumption that such lawsuits vindicate international law. It also demonstrates why the causes of action in this case do not come close to satisfying *Sosa*. Causes of action widely viewed to be contrary to international law cannot "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725. The international law objections to corporate ATS causes of action also trigger the "reasons for judicial caution" in developing ATS causes of action that *Sosa* identified. And they implicate the canon of construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). If this Court takes international law seriously, it must rule for Respondents.

ARGUMENT

Petitioners bring causes of action under the ATS against a non-U.S. corporation for alleged international human rights law violations that occurred outside the United States.[2] The main issue before this Court is whether such causes of action are consistent with *Sosa*. The Court must first determine that the causes of action are supported by well-accepted and adequately defined international norms. *Sosa*, 542 U.S. at 725, 732. If they are, the Court must additionally assess whether their recognition by courts is consistent with *Sosa*'s reasons for judicial restraint, an assessment that requires consideration of the "practical consequences" that would flow from recognizing the cause of action. *Id.* at 732-33. To assist the Court in understanding why Petitioners' claims do not come close to meeting these tests, *Amici* will place them in their broader international law context and show that far from being supported by international law, they are widely viewed to be contrary to it.

I. THE ATS AS CONSTRUED BY PETITIONERS AND MANY LOWER COURTS IS CONTRARY TO INTERNATIONAL LAW

The ATS confers on federal courts original jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.[3] When

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[2] The allegations before the Second Circuit were that Respondents aided and abetted the Nigerian government in crimes against humanity, torture, arbitrary arrest and detention, and extrajudicial killing. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners 2-4 ("U.S. Br.").

[3] There are two primary forms of international law. The first, a treaty, is an express agreement among nations governed by

enacted in 1789, the ATS represented a "commitment to enforce the law of nations," especially with regard to international law violations that otherwise "threaten[ed] serious consequences in international affairs." *Sosa*, 542 U.S. at 715-16. The decision that gave birth to the ATS as the fount of modern human rights litigation premised its holding on the United States's obligation "to observe and construe the accepted norms of international law . . . ." *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980). Since *Filartiga*, federal courts and U.S. scholars have invoked the sanctity of U.S. international law obligations as the basis for the expansion of the ATS—first to foreign government officials, then to private individuals, and finally, as presented in this case, to corporations.

Outside the United States, however, ATS litigation is not seen as a vindication of international law. Rather, it is seen as an instance of American international law exceptionalism. *See, e.g.*, Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 Int'l & Comp. L.Q. 57, 76 (2011) ("Although the ATS is often celebrated by US lawyers

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international law. *See* 1 Restatement (Third) of Foreign Relations Law of the United States pt. I, ch. 1, intro. note at 18 (1987) ("Restatement (Third)"); Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, T.S. No. 58 (1980). The second, customary international law, "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102(2). Consistent with usage at the Founding, *see* Restatement (Third), at pt. I, ch. 2, intro. note at 41, *Sosa* interpreted the term "law of nations" in the statute to refer to customary international law. *See Sosa*, 542 U.S. at 733 n.21, 735, 736 & n.27, 737-38.

as a domestic mechanism for enforcing international law, non-US lawyers frequently view it as a US peculiarity . . . ."). No other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection. And many respected authorities throughout the international legal system—authorities deeply committed to human rights—view ATS litigation to be contrary to international law.

A. Respected International Jurists, Foreign Courts, and Foreign Governments View ATS Human Rights Litigation to be Contrary to International Law

The International Court of Justice ("ICJ") is "'the principal judicial organ of the United Nations.'" *Medellin v. Texas*, 552 U.S. 491, 499 (2008) (quoting United Nations Charter, art. 92, 59 Stat. 1051, T.S. No. 993 (1945)). In *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment, 2002 I.C.J. 3 (Feb. 14), the ICJ ruled that Belgium violated international law when it asserted criminal jurisdiction *in abstentia* over the foreign minister of the Democratic Republic of the Congo for alleged war crimes and crimes against humanity committed in his country. In a widely noted separate opinion in the case, three prominent ICJ judges (from the United States, Great Britain, and the Netherlands) commented on the "very broad form of extraterritorial jurisdiction" in "civil matters" exercised under the ATS.

The judges explained that "the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-

nationals overseas." They then opined: "While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of states generally." *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Joint Separate Op., 2002 I.C.J. 63, 77 ¶ 48 (Feb. 14) (separate opinion of Judges Higgins, Kooijmans, and Buergenthal). At oral argument in a more recent ICJ case, the counsel for the Federal Republic of Germany, Professor Andrea Gattini of the University of Padua, noted that these three judges were "eminent advocates of human rights and particularly sensitive to the development of the instruments for their international protection." He then cited their opinion in support of his conclusion that "the concept of universal civil jurisdiction" embodied in the ATS was not in "conformity with international law . . . ." *Jurisdictional Immunities of the State* (*Ger. v. It.)*, Public Sitting, Verbatim Record, at 47, ¶¶ 36-37 (Sept. 12, 2011, 10 a.m.), http://www.icj-cij.org/docket/files/143/16677.pdf.

The British House of Lords embraced a similar position in a case that declined, on immunity grounds, to exercise jurisdiction over a civil suit against a foreign state and its officials for alleged torture committed in the territory of the foreign state. *Jones v. Ministry of Interior of Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. (H.L.) 270, *petition for review pending*, *Jones v. United Kingdom*, App. Nos. 34356/06 & 40528/06 (E. Ct. H.R. Sept. 18, 2009). Relying on the opinion of the three ICJ judges in the ICJ *Arrest Warrant* case, the Law Lords stated that ATS cases do not "express principles widely shared and observed among other nations" and characterized the ATS cases as "contrary to customary international law." *Id.* ¶¶ 20, 99; *see also id.* ¶ 98

("current international law" does not accept the civil tort jurisdiction exercised in ATS cases).

More recently, the British government opposed a Bill that would have established an ATS-style "extra-territorial [civil] jurisdiction" in cases of torture. *See* Memorandum Submitted by the Ministry of Justice to the Joint Committee on Human Rights, Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims, Twenty-fourth Report of Sess. 2008-2009, HL Paper 153, HC 553, Aug. 11, 2009, at Ev 40. The government argued that the Bill "would place the UK in breach of our obligations under international law." *Id.* *See also id.* (noting that the "exercise of such extra-territorial jurisdiction, even where States and State officials are not involved, remains a difficult and highly controversial area"). The Bill was not enacted. *See* Paul David Mora, *The Legality of Civil Jurisdiction over Torture under the Universal Principle*, 52 Ger. Y.B. Int'l L. 367, 395 (2009).

Amicus briefs submitted by friendly governments over the years have criticized the assertion of extra-territorial civil jurisdiction over alleged human rights abuses outside the United States as contrary to international law. In *Sosa* itself, for example, Australia, Switzerland, and the United Kingdom stated that "[a]bsent the recognition of universal jurisdiction for a particular matter (*e.g.*, piracy), there is no basis in international law for the creation of an *explicit* U.S. civil cause of action involving disputes among aliens, wherever domiciled, based on foreign activities that have no effects within the United States." They added that "[t]here is even less reason to assume that Congress would have created an *implied* cause of action that would [have been] inconsistent

with the developments in customary international law." Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner 7, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

Similarly, foreign governments have also charged that the post-*Sosa* proliferation of corporate ATS lawsuits is contrary to international law. Most recently, in an *amicus* brief in support of the petition for a writ of certiorari in *Rio Tinto PLC v. Sarei*, No. 11-649, the governments of Australia and Great Britain maintained that "international law has never recognized universal civil jurisdiction," and argued that "the ATS as applied in accordance with international law does not permit U.S. courts to exercise extraterritorial civil jurisdiction to adjudicate claims with little or no connection to the United States." Motion for Leave to File Brief as *Amicus Curiae* and Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioners on Certain Questions in Their Petition for a Writ of Certiorari 5, 15, *Rio Tinto PLC v. Sarei*, No. 11-649. *See also* Brief of *Amicus Curiae* the Government of Canada in Support of Dismissal of the Underlying Action 10, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016-cv) (ATS jurisdiction "would . . . be contrary to fundamental principles of customary international law"), *cert. denied*, 131 S. Ct. 79 (2010); Letter to Secretary of State from British Ambassador, on behalf of the Government of the United Kingdom, with Concurrence of the Government of Germany, Jan. 30, 2008, *in* Brief *Amicus Curiae* of the United States in

Support of Petitioners App. B, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 ("the present litigation treats the Alien Tort Statue [sic] as a broad charter to extend United States jurisdiction beyond the limits well established and widely recognised under customary international law"); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (citing other examples).

B. Fundamental Principles of International Law and the Provisions of Relevant Treaties Demonstrate that the ATS Causes of Actions Are Contrary to International Law

The conclusion that ATS lawsuits are contrary to international law follows directly from fundamental principles of international law long embraced by the United States. In *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812), Chief Justice Marshall explained:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

These principles underlie international law restrictions on a nation's prescriptive jurisdiction, which is

"the authority of a state to make its law applicable to persons or activities." Restatement (Third) pt. IV, intro. note at 231. They limit the prescriptive jurisdiction of one nation to regulate activity within another nation unless there is a basis for such extraterritorial regulation grounded in the consent of nations. Respect for limitations on prescriptive jurisdiction "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

The consensual practice of nations today recognizes several bases of prescriptive jurisdiction. *See* Restatement (Third) §§ 402-404. All but one require a nexus between the activity or persons regulated and the regulating nation. The exception, and the basis of prescriptive jurisdiction relevant in this case, is universal jurisdiction. In some post-World War II international criminal treaties, nations consented to universal jurisdiction for *criminal prosecutions* for a few well-defined breaches of international law, even in the absence of a link between the regulating nation and the regulated extraterritorial activity. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5-8, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Torture Convention"); *cf.* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("Genocide Convention") (establishing international crime of genocide but not by its terms authorizing universal jurisdiction). These international criminal treaties are a primary basis for ATS civil causes of action. Without their underpinning, the remaining sources

typically relied on in ATS cases—such as U.N. General Assembly Declarations and non-self-executing treaties—could not plausibly suffice to support causes of action related to the international criminal law treaties' subject matter. *Cf. Sosa*, 542 U.S. at 734-38 (rejecting the adequacy of these and related sources).

The difficulty under international law is that nations in these treaties consented to universal jurisdiction for criminal liability, *but not civil liability*, for the specified conduct. Under international law, consent to universal jurisdiction for the prosecution of certain extraterritorial crimes does not entail consent to a related universal jurisdiction for civil causes of action. As a result, the background international law principle of territorial sovereignty, and the attendant limit on prescriptive jurisdiction, remain in place with regard to civil actions.[4]

Advocates of ATS litigation try to overcome the prescriptive-jurisdiction obstacle by inventing a new exception to the territoriality principle: universal civil jurisdiction. But as the House of Lords made plain, "current international law" simply does not recognize a universal civil jurisdiction akin to universal criminal jurisdiction. *Jones v. Saudi Arabia*, 26 UKHL ¶ 98. *See also Zhang v. Zemin*, [2010] 243 FLR 299 ¶ 120-21 (Austl.) (citing "considerable body of authority denying existence of [universal civil] jurisdiction, despite the recognition of the prohibition of torture as *jus cogens*"); *but see Ferrini v. Fed.*

[4] Nothing in international law precludes civil jurisdiction over causes of action for piracy occurring on the high seas. *See* Restatement (Third) § 404 cmt. b. But this unremarkable proposition does not support the extension of universal civil jurisdiction to regulate activities on a foreign nation's sovereign territory without its consent.

Republic of Ger. (It. Ct. Cass.) (Mar. 11, 2004), ¶ 9 (recognizing universal civil jurisdiction), *reprinted in* 128 I.L.R. 659 (It. Ct. Cass. 2004), decision declared unlawful on international law state immunity grounds, *Jurisdictional Immunities of the State* (*Ger. v. It.*), Judgment (3 February 2012), at http://www.icj-cij.org/docket/files/143/16883.pdf.[5]

The conclusion that nations have not consented to universal civil jurisdiction is confirmed by the one international criminal treaty that addresses civil suits. Articles 5 and 8 of the Torture Convention require nations that find within their territory a person accused of torture to prosecute or extradite him to a nation that has jurisdiction over the person. Article 14 further provides that a state will ensure compensation for victims of torture, but unlike the Convention's provisions for universal criminal jurisdiction, it provides no guidance about its operation and no suggestion of extraterritorial application. *Compare* Torture Convention arts. 4-8 *with* art. 14; *see Jones v. Saudi Arabia*, 26 UKHL ¶ 25.

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[5] Some civil law countries permit victims of crimes to recover monetary compensation in connection with the criminal prosecution of a wrongdoer. *See Sosa*, 542 U.S. at 762-763 (Breyer, J., concurring). Such recoveries, where available, are limited by various substantive, procedural, and practical considerations. *See* J.A. Jolowicz, *Procedural Questions*, *in* 11 International Encyclopedia of Comparative Law, §§ 13-5 to 13-40, at 5-15 (André Tunc ed., 1986). Moreover, some countries do not permit criminal actions against corporations. For these reasons, even if nations' consent to universal criminal jurisdiction could be construed as theoretical consent to adjunct monetary compensation schemes in that context, it would not constitute consent to the very different and significantly broader plaintiff-controlled universal civil jurisdiction against corporations.

Consistent with these distinctions, the United States in ratifying the treaty declared that "article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at App. A, 37 (1990). No state objected to the U.S. understanding. *See Jones v. Saudi Arabia*, 26 UKHL ¶ 57. Courts around the globe have drawn on these principles to conclude that the Torture Convention creates universal jurisdiction for criminal prosecutions against perpetrators of torture, but only territorial jurisdiction for civil litigation. *See Al-Adsani v. United Kingdom*, 34 Eur. Ct. H.R. 11 ¶ 40 (2001); *Jones v. Saudi Arabia*, 26 UKHL ¶ 25; *Fang v. Jiang*, [2007] NZAR 420 (HC) ¶ 64 (N.Z.); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675 ¶ 81 (Can.).[6]

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[6] The Committee Against Torture established by the Torture Convention to receive and comment on national reports concerning implementation of the Convention, *see* Torture Convention, arts. 17-19, originally acquiesced in the territorial interpretation of the civil provision in the Convention but later implied that nations should create civil jurisdiction for all victims of torture. *See* Paul David Mora, *The Legality of Civil Jurisdiction over Torture under the Universal Principle*, 52 Ger. Y.B. Int'l L. 367, 374-76 (2009). In this connection, the House of Lords noted that the Committee's latter position was "no more than a recommendation" and had "no value" as international law. *Jones v. Saudi Arabia*, 26 UKHL ¶¶ 23, 57.

Subsequent to ratifying the Torture Convention, the United States enacted the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note ("TVPA"), which departs from the Convention in allowing victims of torture to bring a civil suit against individual offenders in disregard of the territoriality principle. Congress of course may choose to enact clear legislation that conflicts with international law, though courts seek to find an

Some lower courts in the United States have argued that since ATS causes of action enforce international rather than domestic norms, they do not intrude on the sovereignty of foreign nations. *See, e.g.*, *Sarei v. Rio Tinto PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 U.S. App. LEXIS 21515, at *13 (9th Cir. Oct. 25, 2011). As the international law objections to ATS litigation make plain, this argument is mistaken. ATS causes of action are discretionary federal common law causes of action that have no counterpart anywhere in the world and have not been agreed to by other nations. When U.S. courts entertain ATS civil suits for alleged human rights abuses committed outside the United States, therefore, they apply a globally unique, judge-made U.S. law to regulate activities on foreign soil contrary to the consent of nations.[7]

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interpretation that avoids such conflicts if possible. *See Whitney v. Robertson*, 124 U.S. 190 (1888); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The TVPA contains important limitations, including a requirement to exhaust remedies at the place of conduct, a statute of limitations, and a scope limitation to individuals. 28 U.S.C. § 1350 note, sec. 2. These constraints on litigation ameliorate some of the difficulties the statute might present under international law rules of prescriptive jurisdiction. In any event, the enactment of the TVPA does not affect the relevant international law in question or its applicability to the ATS.

[7] The doctrine of transitory torts, *see* Pet. Br. 24 n.15, is inapposite. A transitory tort is a tort cause of action that vests outside the jurisdiction under foreign law and is enforceable anywhere on terms determined by foreign law. It does not permit a state or nation to apply local tort law to foreign activities to which it has no connection. *See* David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 Stan. J. Int'l L. 121, 138 n.108 (2010).

The unilateral imposition of civil liability under the ATS for activity in another country constitutes a significant intrusion on state sovereignty beyond the limited criminal jurisdiction to which nations consented. Civil actions are broadly enforceable by individuals rather than by the government, which exercises political discretion in enforcement. As one scholar explained:

> Whereas the government is responsible in the criminal context for considering the foreign policy costs of exercising universal jurisdiction, private plaintiffs in civil cases have no such responsibility and, in any event, are unlikely to have the incentive or expertise to do so. Moreover, neither the private plaintiffs nor the courts that adjudicate these cases can be expected to accurately assess and balance the competing foreign policy concerns implicated by these lawsuits. Nor is there public accountability for such foreign policy decisions in the way that there is in the prosecutorial context.

Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 347 (footnote omitted). *Sosa* made precisely this point. 542 U.S. at 727 (noting that the "creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion").[8] ATS suits thus assert a remedy for

[8] Related practice in Europe illustrates the importance of public accountability in administering universal criminal jurisdiction. During the last decade private parties, many of whom were aliens, tried to enlist the universal jurisdiction criminal process in improper ways. In response, several European

extraterritorial activities to which nations did not consent, by parties bringing a form of action to which nations did not consent, resulting in much broader and very different forms of liability to which nations did not consent, all contrary to international law.[9]

C. The Extension of Universal Civil Jurisdiction to Corporations in ATS Cases Would Expand the ATS Further Beyond Recognized Boundaries of International Law

The Petitioners' requested extension of universal civil jurisdiction to corporations in ATS cases would exacerbate these international law difficulties. Not only has no nation consented to universal civil

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nations exercised executive discretion to dismiss many cases, and some nations narrowed the scope of universal jurisdiction or tightened political controls over the power to initiate a prosecution. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1 (2011).

[9] *Amici* acknowledge that under international law's nationality principle, a different exception to the presumption of territorial sovereignty, Congress could, consistent with international law, create a new civil cause of action that regulated only U.S. corporate activity abroad. But regulation on the basis of nationality is not what the ATS purports to do. Lower courts in ATS cases rely on international criminal and human rights treaties and related instruments as a basis for civil causes of action against U.S. and foreign corporations alike for their foreign activity. The absence of any indication that these instruments contemplate corporate liability for alleged human rights violations means that they cannot support civil causes of action for torts abroad against any firms, U.S. or foreign. Moreover, most ATS cases against U.S. corporations for extraterritorial activity are connected to the activities of foreign affiliates of U.S. firms. It is clearly unlawful under international law to assert ATS jurisdiction over such firms.

jurisdiction in contravention of the international law rules of prescriptive jurisdiction; no nation has consented to corporate liability of any kind for violations of international human rights or international criminal law.

In none of the many post-World War II United Nations human rights treaties do nations agree to obligations on corporations. Consider one of the most important such treaties, the International Covenant on Civil and Political Rights ("ICCPR"), Mar. 23, 1976, 999 U.N.T.S. 171. The ICCPR is a primary basis for Petitioners' causes of action for arbitrary arrest and detention. *See* ICCPR, art. 9(1). *Sosa* cast doubt on this treaty as a source for an ATS cause of action because the United States declared it to be non-self-executing. 542 U.S. at 734-35. The treaty also suffers from an additional problem relevant in this case: it imposes obligations on nations to protect the rights of individuals, and imposes no obligations whatsoever on corporations. *See* ICCPR, art. 2. The same is true of other U.N. human rights treaties. *See* United Nations' Special Representative for Business and Human Rights, Report on Implementation of General Assembly Res. 60/251 of 15 March 2006 Entitled "Human Rights Council," U.N. Doc. A/HRC/4/35, ¶ 44 (Feb. 19, 2007) (concluding that U.N. human rights treaties and instruments do not "currently impose direct legal responsibilities on corporations").

Another prominent source of international law in ATS cases, and a primary basis for Petitioners' crimes against humanity cause of action, is international criminal tribunals. Such tribunals received the authority to prosecute only natural persons, not legal persons. *See* Rome Statute of the International

Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 ("Rome Statute") (extending jurisdiction to "natural persons"); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6, U.N. Doc. S/RES/827 (1993), *amended by* U.N. Doc. S/RES/1166 (1998) (same); Statute of the International Criminal Tribunal for Rwanda art. 5, U.N. Doc. S/RES/955 (1994) (same); Nuremberg Charter (Charter of the International Military Tribunal) art. 6, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 ("Nuremberg Charter") (providing jurisdiction over "persons who, . . . whether as individuals or as members of organizations, committed" specified crimes); Charter of the International Tribunal of the Far East art. 5, Jan. 19, 1946, TIAS No. 1589 (amended April 26, 1946) (providing jurisdiction over "war criminals who as individuals or as members of organizations" are charged with specified crimes).

The pattern in these tribunals reflects a deliberate choice. In the 1950s, a United Nations General Assembly Committee exploring the creation of an international criminal court expressly considered and rejected international criminal liability for corporations. Report of the Committee on International Criminal Jurisdiction, U.N. Doc. A/2136 (1952), at 10-11, ¶ 88. The Report explained that because of wide disagreements among nations on the suitability of corporations for criminal responsibility, "*the introduction* of such a responsibility in international law would be a matter of considerable controversy." *Id.* (emphasis added).[10] What was controversial in the

[10] This statement several years after the Nuremberg trials demonstrates, contrary to the Petitioners' suggestions, Pet. Br. 50, that Nuremberg did not establish a norm of international criminal liability for corporations. *See generally* Brief *Amici*

1950s remained so in the 1990s. At that time, the nations negotiating the International Criminal Court once again considered and rejected this form of liability. *See* Rome Statute, art. 25(1); Albin Eser, *Individual Criminal Responsibility*, 1 The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (Antonio Cassese et al. eds., 2002). In this instance as well, nations rejected corporate criminal liability because (among other reasons) many domestic legal systems did not provide for such liability. *See id.*

Finally, nations did not consent to liability for corporations in the treaties that create international crimes and obligate nations to implement them. None of these treaties indicates that this obligation extends to corporations, and they strongly suggest that the obligation is limited to individuals. For example, the international criminal treaty most relevant to Petitioners' cause of action for torture, the Torture Convention, mandates that a nation that finds an offender in its territory "shall take *him* into custody or take other legal measures to ensure *his* presence." Torture Convention, art. 6 (emphasis added). *See also* Genocide Convention, art. IV ("Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are *constitutionally responsible rulers, public officials or private individuals*") (emphasis added).

These suggestions are confirmed by the elaborate accommodations in treaties that do contemplate a duty on nations to impose criminal liability on corporations. In order to bridge disagreements on the

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Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Dec. 21, 2011) (similar conclusion).

availability and scope of criminal liability for corporations under domestic law, the OECD Bribery Convention expressly distinguishes "natural" and "legal" persons, and gives nations considerable flexibility in determining how, if at all, to punish legal persons. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 3(2), Dec. 18, 1997, 37 I.L.M. 1, 5 (1998). *See also* International Convention for the Suppression of the Financing of Terrorism art. 5, Dec. 9, 1999, 2178 U.N.T.S. 197 (providing similar flexibility for criminal liability related to a "legal entity"). A distinction between natural and legal persons, and flexibility in implementing criminal liability against the latter, would be necessary in any treaty that contemplates criminal liability for corporations. The absence of any such distinction or flexibility in the international criminal law treaties typically relied on in ATS cases confirms that they do not contemplate liability for corporations.

In short, the extension of ATS causes of action to corporate defendants would require not only an unwarranted leap beyond state consent from universal criminal jurisdiction to universal civil jurisdiction. It would also require a second unwarranted leap beyond state consent from liability over individuals to liability over corporations, a leap that would compound the international law difficulties of the first.

II. THE INTERNATIONAL LAW OBJECTIONS TO ATS LAWSUITS ARE A CONCLUSIVE REASON UNDER *SOSA* NOT TO EXTEND ATS LIABILITY TO CORPORATIONS

This Court in *Sosa* did not consider international law objections to ATS liability. The Court simply

articulated its "acceptance" and "definition" tests and ruled that Alvarez's Complaint did not satisfy them. Along the way, the Court cast some doubt on the availability of ATS causes of action for violations of modern international human rights law when it rejected many of the international law sources relied on by lower courts in ATS cases. *See* 542 U.S. at 732-38 & n.27 (rejecting relevance of sources that did not impose international obligations, were not self-executing, were couched at too high a level of generality, or that involved slightly different norms). On the other hand, the Court cited lower court decisions that recognized ATS causes of action for human rights violations. *Id.* at 731-32. In the end, the Court was careful to leave unanswered the availability and ultimate scope of modern international human rights law causes of action in ATS cases. *See id.* at 728 (courts should undertake to craft remedies for modern international human rights laws "*if at all*, with great caution") (emphasis added).

Whatever human rights causes of actions against foreign officials (if any) the Court may ultimately recognize under the ATS, *Amici* urge the Court not to compound the international law difficulties with such actions by extending them to the corporate context—a context that, because of the scope of global corporate activity and the uncertain availability of state immunities, promises to swamp the relatively small number of public-official ATS cases that have been brought to date. The international law objections to corporate ATS lawsuits outlined above underscore two broad reasons why such causes of action do not come close to satisfying *Sosa*.

A. Human Rights Causes of Action Against Corporations Do Not Satisfy *Sosa*'s Acceptance and Definition Requirements

ATS causes of action are valid under *Sosa* only if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725. Causes of action widely viewed to be contrary to international law cannot meet this standard. As already noted, there is no affirmative indication in any international criminal or human rights law treaty, or in the jurisdiction of international criminal courts, that would suggest that the nations of the world have consented to corporate liability in these contexts, much less corporate liability on the basis of universal civil jurisdiction. The lack of international law support for the causes of action here is conclusive under *Sosa*, and explains why Petitioners make arguments that appear to run away from *Sosa*'s simple requirement of a tight fit between the ATS cause of action and international law.

Petitioners first argue that federal common law rather than international law should govern in this case. Pet. Br. 38-39. This argument is confused. *Sosa* makes clear that *all* ATS causes of action are products of federal common law. 542 U.S. at 732. The issue is whether federal common law causes of action under the ATS must be closely tied to international law, or can instead be unmoored from international law and crafted on the basis of unrelated domestic law sources. *Sosa*'s acceptance and definition tests are designed precisely to ensure that

federal common law causes of action under the ATS strictly conform to the international law norms they purport to effectuate.

Petitioners also maintain that "general principles of law" common to domestic legal systems support corporate liability. Pet. Br. 43-47. This argument is an implicit acknowledgment that treaties and customary international law—the primary sources of international law, and ones *Sosa* viewed as relevant to interpreting the ATS, *see supra* note 3—do not support corporate liability here. General principles of law are a "supplementary" or "secondary" source of international law that at most play an interstitial, gap-filling role in international legal interpretation. *See* Restatement (Third) § 102(4) & cmt. l. They are even more indeterminate than the customary international law that *Sosa* tried to cabin, and cannot by themselves support an ATS cause of action. As Judge Friendly once observed in construing the ATS:

> We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se."

ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)). In addition, Petitioners have not demonstrated, and cannot demonstrate, that nations with very different legal

systems take a common approach to liability for legal persons. *Cf. Sosa*, 542 at 737 n.27 (rejecting relevance of national constitutional consensus against arbitrary detention because "that consensus is at a high level of generality").

The Petitioners make a final, complex argument for corporate liability. They maintain that courts in ATS cases should first look to international law to determine whether the alleged acts in question violate international law, and then look to domestic federal common law sources to determine the remedy, including whether the remedy should extend civil liability to corporations. They add that in looking to international law, courts should ask only whether the international law applies to *private parties* without attention to the distinction between natural and legal persons. If it does, they maintain, the question of whether to extend civil liability to corporations in addition to persons is a question of federal common law discretion. *See* Pet. Br. 35-40.

The first problem with this argument concerns its reliance on the principle that international law gives nations discretion how to implement international obligations. *See* Pet. Br. 36-37; *see also* U.S. Br. 18-19. This principle does not confer on federal courts unmoored federal common law discretion to determine the scope of domestic liability under the ATS.[11] Congress has already specified the relevant domestic

[11] The decision of this Court that Petitioners cite for the discretionary implementation principle, *see* Pet. Br. 36 n.27, invoked it to *narrow* judicial discretion to incorporate international law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964). The principle cannot be invoked to enhance judicial discretion to implement international law in the ATS context, especially after *Sosa*.

implementation scheme—the ATS itself—and *Sosa* held that causes of action under the ATS must conform strictly to the international law that supports it. *See* 542 U.S. at 734-38. Moreover, a nation's discretion to implement an international law obligation depends on the existence of such an obligation. The United States has no international law obligation with respect to the extraterritorial activities of a foreign corporation at issue in this case. Nor is the United States in danger of violating international law if its courts decline to entertain the causes of action here; that danger arises only if courts entertain these causes of action. When the Petitioners talk about the United States' discretion to implement an international law obligation, they are really arguing for judicial discretion to impose a novel form of domestic liability untied to any extant international law and viewed by many to violate it.

A second problem concerns the argument that the only relevance of international law in corporate ATS cases is whether it applies to and can be breached by private parties, without regard to the distinction between individuals and corporations. *See* Pet. Br. 36-37; Cert. Pet. App. A115-A116 (Leval, J., concurring). This is an entirely artificial requirement that misreads *Sosa*'s footnote 20 and has no basis in international law. The only way to determine whether a particular entity is governed by and has violated international law is to look at international law. And that means examining the precise definitions and qualifications—including qualifications about covered entities, scope of liability, and forms of implementation—that nations were careful to include in the international law.

Sometimes international law contemplates liability for individuals and corporations. *See, e.g.*, OECD

Bribery Convention, arts. 1-3; Convention for the Suppression of the Financing of Terrorism, arts. 2, 5. Other times international law contemplates liability for individuals but not corporations. *See, e.g.*, Rome Statute, art. 25; Genocide Convention, art. IV. International law does not, however, divide all international obligations into those that apply to state actors and those that apply to private actors, leaving it to domestic law to determine the precise scope of private liability.

To see the error in this argument, consider how it would apply to an international law that expressly imposed obligations on individuals and expressly excluded corporations from its scope. Under the Petitioners' view, a court should determine whether a corporation violated the international law without reference to the law's scope limitation, and then elide the international law scope limitation in determining whether to impose liability on the corporation under domestic federal common law. Such an analysis would clearly be unfaithful to the international law and contrary to *Sosa*.[12] And yet this example is precisely *this case*, for the relevant international laws in question impose obligations only on states or individ-

[12] The United States correctly notes that under *Sosa*, if the international law that supports the cause of action is "defined in part by the identity of the perpetrator, then the defendant must fall within that definition." U.S. Br. 20. Rather than looking closely to determine whether the international laws relevant to the causes of action in this case include corporations, however, the United States argues sweepingly that "corporations (or agents acting on their behalf) can violate the types of international law norms identified in *Sosa* to the same extent as natural persons." *Id.* at 21. A close examination of the international laws related to Petitioners' causes of action will show that they do not extend to corporations.

uals and not on corporations. Moreover, and fundamentally, to the extent that this Court has any doubts whatsoever about whether the relevant international norms are defined to apply to corporations or support corporate liability, *Sosa* requires those doubts to be resolved against an ATS cause of action. *See* 542 U.S. at 734-38.

B. Human Rights Causes of Action Against Corporations Run Afoul of *Sosa*'s Prudential Concerns and Related Separation of Powers Doctrines

This Court in *Sosa* understood that its recognition of a narrow judicial power to create federal common law causes of action under the ATS might lead to inappropriate policymaking by the judiciary. The Court offered "a series of reasons . . . for judicial caution" in crafting ATS causes of action, and it made clear that it approved of, at most, only a very few causes of action. 542 U.S. at 725-28. The lower courts have not attended to these admonitions. Instead, they have interpreted the ATS to become a vehicle for an expansive legal innovation—universal civil jurisdiction over corporations for alleged human rights violations—that finds no support in international law, is practiced by no other nation in the world, and indeed is widely viewed to be contrary to international law.

The decision whether to recognize such a novel cause of action is fraught with implications for international economic policy, international human rights policy, and general relations with other nations. Basic separation of powers principles that were reaffirmed in *Sosa* demand that Congress, and not courts, make this decision. *Sosa* cautioned that courts "have no congressional mandate to seek out

and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." 542 U.S. at 728. The requested extension of international human rights law to corporations is brand new and very debatable—so new and debatable that universal civil jurisdiction in this context would be contrary to international law. *Sosa* also emphasized that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Id.* at 727-28. This case is a clear instance when the foreign policy risks are real, and the proposed remedy should be rejected. The ATS was designed to maintain and improve foreign relations, not harm them. *See id.* at 716-24.

Similar separation of powers concerns are reflected in the canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). This Court has often employed the *Charming Betsy* canon to limit the extraterritorial effect of U.S. laws that arguably violate the territorial sovereignty of another nation. *See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-16 (1993) (Scalia, J., dissenting). As applicable here, this canon reflects "principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow." *Empagran*, 542

U.S. at 164; *see also Hartford Fire Ins. Co.*, 509 U.S. at 815 (Scalia, J. dissenting) (noting that *Charming Betsy* canon "is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe").

The ATS was designed to ensure American compliance with international law, and Congress has done nothing in the ATS or any other statute to suggest that it wants the ATS to be construed in a way contrary to international law. In the rare instances where Congress creates express extraterritorial civil causes of action related to international human rights law that arguably impinge on foreign sovereignty, it has defined these actions carefully and limited their scope to narrowly defined defendants, none of which includes corporations. *See, e.g.*, 28 U.S.C. § 1605A(a)(1), (c) (creating cause of action against defined state sponsors of terrorism for various international human rights law violations); 28 U.S.C. § 1350 note, sec. 2(a) (creating cause of action, with many qualifications, against an "individual who, under actual or apparent authority, or color of law, of any foreign nation," commits torture).

CONCLUSION

In many decisions in recent years, this Court has looked to international law to inform the scope of U.S. domestic law. The Court has, for example, considered international law in domestic constitutional interpretation. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-79 (2005) (looking to international law and practice, and the United States's global outlier status, to support conclusion that Eighth Amendment prohibits executions of individuals who committed capital offenses before the age of 18); *Atkins v.*

Virginia, 536 U.S. 304, 316 n.21 (2002) (noting "overwhelming disapprov[al]" of "world community" in support of conclusion that Eighth Amendment prohibits execution of persons with mental retardation). It has also looked to international law to inform domestic statutory interpretation. In one prominent national security decision, for example, the Court interpreted international law in a way contrary to the views of the executive branch. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629-32 (2006). And of course the Court in *Sosa*, interpreting a jurisdictional statute that refers to "the law of nations" and "treaties," looked to international law to discern the proper scope of causes of action in ATS cases.

This is a case where respect for international law, and indeed for the international rule of law, has clear application and dispositive impact. Since World War II, the nations of the world have created an elaborate international law structure that defines international human rights, prescribes their proper modalities (including which entities are covered), and specifies the circumstances under which they can be enforced in domestic and international courts. The resulting international human rights system is one of the great achievements of international law that has helped to enhance respect for persons and extend enforceable human rights around the globe. The legitimacy of this system, however, has rested on the fact that it proceeded at every stage on the basis of the consent of nations, in careful accord with foundational international law rules of sovereign equality and the limits of prescriptive jurisdiction.

The novel creation of universal civil jurisdiction causes of action for alleged extraterritorial human rights law violations, and the extension of such

causes of action to corporations, is contrary to these foundational international law rules. Petitioners correctly note that "the ATS is designed to enforce universal norms governing conduct and not idiosyncratic American norms." Pet. Br. 25, n.16. But a civil cause of action against a foreign corporation for alleged international human rights law violations committed outside the United States is a paradigmatic example of an idiosyncratic American norm. Such causes of action are not contemplated by any treaty or other binding international obligation. They have never been recognized by any other foreign or international court or tribunal. And they are viewed by many respected jurists, courts, and governments to impinge on the sovereignty of other nations and violate international law. Respect for international law, for the ATS's underlying and oft-invoked aspiration to vindicate this law, and for Congress's exclusive role in crafting novel and controversial extraterritorial causes of action requires this Court to rule for Respondents.

Respectfully submitted,

JACK GOLDSMITH
Counsel of Record
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-8159
goldsmith@pobox.com

Counsel for Amici Curiae

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