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 THE ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE, FEDERATION OF GERMAN INDUSTRIES, CBI, CONFEDERATION OF SWEDISH ENTERPRISE, ECONOMIESUISSE, AND INTERNATIONAL CHAMBERS OF COMMERCE GERMANY, NETHERLANDS, SWITZERLAND, AND UNITED KINGDOM AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the applicability of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), to a corporation's alleged "violation of the laws of nations" is an issue of subject-matter jurisdiction, and was in any event properly considered by the court of appeals.

2. Whether the "high bar to new private causes of action for violating international law," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004), precludes subject-matter jurisdiction under the ATS, and a cause of action under federal common law, for a corporation's alleged complicity in a foreign government's commission of arbitrary arrest and detention, crimes against humanity, and torture against its citizens within sovereign boundaries.

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INTEREST OF *AMICI*[1]

Amici represent the interests of European businesses and industries, which are among this nation's most frequent and reliable economic partners. *Amici* therefore have a substantial interest in whether the law of nations contains a universal norm of corporate liability, such that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, permits U.S. courts to adjudicate international-law causes of actions against corporations (including non-U.S. corporations). As set forth in detail below, European companies engage in foreign commerce on terms—including exposure to tort liability—established by the *domestic* laws of their places of domicile and operations, but *international* norms do not impose corporate liability. The unprecedented imposition of law-of-nations corporate liability would increase the risk of locating operations and assets in the United States, make business operations in the developing world prone to expensive and burdensome lawsuits, and ultimately chill foreign companies' investment and trade.

The Association of German Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag e.V., (DIHK)*) is the umbrella organization of Germany's 80 regional Chambers of Industry and Commerce, representing by law the interests of more than 3.6 million commercial enterprises of all sizes in

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party wrote this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Germany. Further, it supervises and coordinates the German Chamber Network (*Auslandshandelkammern (AHKs)*) with 120 locations in 80 countries worldwide, including in the United States. The Federation of German Industries (*Bundesverband der Deutschen Industrie*) serves as the umbrella organization for associations of industrial businesses and industry-related service providers in Germany. It represents 38 industrial sector associations and speaks for more than 100,000 enterprises in Germany. Together, the Association and the Federation represent businesses that employ millions of people worldwide.

The CBI is the United Kingdom's leading business organization, speaking for some 240,000 businesses that together employ around a third of the UK's private-sector workforce. The CBI coordinates the voice of British business around the world, with offices across the UK and in Washington, Brussels, Beijing, and New Delhi. The CBI's mission is to promote the conditions in which businesses of all sizes and sectors in the UK can compete and prosper for the benefit of all. To achieve this, the CBI campaigns in the UK, the EU, and internationally for a competitive business environment.

The Confederation of Swedish Enterprise (*Svenskt Näringsliv*) is Sweden's largest and most influential business federation, representing 50 member organizations and 60,000 member companies with over 1.6 million employees. The Confederation plays a critical role in protecting, supporting, and promoting the interests of businesses, as well as in creating broad popular support for the value and importance of enterprise.

Economiesuisse is Switzerland's largest business federation, with direct membership including 100 trade and industry associations, 20 cantonal chambers of commerce, and several individual companies. Directly or indirectly, it represents the interests of 30,000 companies employing approximately 2.5 million people in Switzerland and abroad. Economiesuisse's mission is to create an optimal environment for business within and outside Switzerland by preserving entrepreneurial freedom, improving global competitiveness, and promoting sustained growth and high employment.

The International Chamber of Commerce (ICC) Germany, ICC Netherlands, ICC Switzerland, and ICC United Kingdom are representative business organizations that work to further international trade and investment by promoting open markets, sensible regulation, and the rule of law. Their members include many of their respective countries' largest listed and unlisted corporations from all sectors. These organizations are part of the global International Chamber of Commerce network, which has members in more than 130 countries worldwide, with National Committees in 92 of them.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici's vast experience representing European businesses around the world fully supports the court of appeals' conclusion that "imposing liability on corporations for violations of customary international law has not attained a discernable, much less universal, acceptance among nations of the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010).

This country's European trading partners, like their U.S. counterparts, operate within well-developed legal systems that take human rights seriously. Indeed, in recent decades many European governments have been rightly lauded for their leadership in working to safeguard human rights around the globe. And yet nothing even approaching a consensus has emerged in Europe or elsewhere that *the law of nations* (as opposed to *domestic* legal norms) extends liability to legal persons such as corporations. If the invention of such an international-law cause of action were condoned by this Court, it would severely chill foreign investment by European companies and others in this country and have negative repercussions abroad.

I. The experience in international law—including throughout Europe—has been to recognize that the law of nations now holds *individuals* accountable for certain transgressions against all humanity, in addition to establishing the duties and obligations of *states*. That norm of personal, individual liability for specific offenses under customary international law has emanated most markedly out of the community of nations' response to the atrocities of the Second World War and more recent tragedies in Europe and elsewhere. The latest international developments have reinforced the consensus that although *natural* persons can be held liable under customary international law for their behavior, the law of nations imposes no corresponding norm of enterprise liability attaching to *legal* persons for particular human-rights offenses.

Instead, the governance of legal persons is—as it always has been—the purview of the domestic laws

wherever such an entity is domiciled or conducts its business. And that is not surprising. Corporations, for example, often transact business in multiple countries at once, and frequently do so through any number of complicated relationships with parents, subsidiaries, affiliates, contractors, and agents. Indeed, there is not even a consensus among nations on what a "corporation" is; the corporate form takes myriad shapes in countries around the world, and there is no uniformity in the laws governing the extent and exercise of control that shareholders, directors, and management have over business operations. Moreover, developed nations do not agree, even under their respective *domestic* laws, as to whether or when corporations should be liable for the malfeasance of international affiliates and staff.

II. Any decision to create a cause of action against corporations under the law of nations would do considerable harm to international commerce—including foreign investment in the United States. In the lower courts, law-of-nations litigation against non-U.S. corporations has been an expensive, delay-prone, headline-grabbing endeavor designed to attract publicity and to extract settlements from companies as a cost of doing business in weakly governed and conflict-afflicted areas. A decision by this Court permitting such lawsuits—no doubt fueling their proliferation—will require non-U.S. corporations to reassess the risk of locating operations and capital in the United States (actions that could serve as the basis for the exercise of personal jurisdiction and put a business's assets in jeopardy from an adverse ATS judgment). Such increased risk would also strongly discourage some companies from continuing to invest and engage in

conflict-prone areas of the world, which often stand to gain the most from such corporate leadership. Indeed, this has already happened: In one case, for example, ATS suits caused a Canadian energy firm to withdraw from Sudan—making room there (perversely) for increased dominance by state-controlled Chinese companies with spottier human-rights records.

In short, there is no norm of customary international law requiring the United States to become the world's corporate court under the rubric of a jurisdictional statute enacted centuries ago for very different purposes. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 715 (2004) (The "men who drafted the ATS" probably contemplated a "narrow set of violations of the law of nations": "violation of safe conducts, infringement of the rights of ambassadors, and piracy."); *id.* 719–20 (similar). Non-U.S. corporations should not be haled into U.S. federal courts and made to answer private allegations of odious conduct in all corners of the globe, based on a theory of corporate law-of-nations liability that is supposedly recognized universally but, in reality, exists nowhere else.

ARGUMENT

I. The Experience Of Other Nations, Including Those In Europe, Demonstrates That International Law Contains No Universal Norm Of Corporate Liability

The law of nations governs whether corporations are liable under customary international law. The norms that form the law of nations are constructed around the identification of "international persons" and the specification of their duties, obligations, and

responsibilities. See, *e.g.*, Restatement (Third) of the Foreign Relations Law of the United States, pt. 2, intro. note (1987) (discussing "the entities that are persons *under international law*" because they "have legal status, personality, rights, and duties *under international law*" and their "acts and relationships are the principal concerns *of international law*" (emphasis added)). No nation, to our knowledge, treats the identification of "international persons" under the law of nations as a matter of purely local concern, governed by domestic law. See, *e.g.*, *Sosa*, 542 U.S. at 732 n.20; *id.* at 760 (Breyer, J., concurring); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (the "definition and punishment" of an international-law offense depends "not upon the particular provisions of any municipal code, but upon the law of nations").

This is hardly "irrelevant," as petitioners contend. Pet. Br. 52. Indeed, it compels this Court's rejection of corporate law-of-nations liability for specific human-rights offenses because the law of nations contains no universal norm supporting such liability. Many nations in Europe and elsewhere regulate such abstract legal entities—including their activities abroad—as a matter of purely *domestic* law. But as the court of appeals recognized below, it is difficult to discern *any* coherent custom of corporate liability among developed nations—let alone a "universal" one. 621 F.3d at 145; see also *Sosa*, 542 U.S. at 728.

This is readily apparent from what occurred at tribunals that arose out of some of Europe's darkest hours. In the aftermath of the atrocities of the Second World War, international tribunals at Nuremberg and elsewhere recognized that natural

persons could commit war crimes and other crimes against humanity, but they did not establish a norm that corporations and other abstract entities should likewise be liable under the law of nations. The Nuremberg Charter, for example, established that tribunal's jurisdiction over persons who committed crimes against humanity "whether as individuals or as members of organizations," but the allies did not claim jurisdiction over organizations *themselves*. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

In the course of the Nuremberg proceedings, prosecutors indicted and tried individual business representatives for their own egregious conduct, but they did not attempt to bring charges against corporations *qua* corporations. See *United States* v. *Krupp*, 9 Trials of War Criminals 1327 *et seq.* (indictment of 12 Krupp officials, including Alfried Krupp, who was sentenced to 12 years' imprisonment); *United States* v. *Flick*, 6 Trials of War Criminals 1187 *et seq.*; *United States* v. *Krauch*, 8 Trials of War Criminals 1081 *et seq.* (indictment of 23 I.G. Farben employees); accord *In re Tesch & Two Others (Zyklon B Case)* (Brit. Mil. Ct. 1946), in 1 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals 93 (1947).[2] The Allies "seriously explored"

[2] This is not to say that that Allies left unscathed those German corporations whose activities were linked to Nazi atrocities. Instead, the Allies' plan for their occupation of Germany included dismantling certain war-related companies (most notably chemical conglomerate I.G. Farben) that the Allies deemed to be dangerous to their cause and to future peace in Europe. Those actions happened without any semblance of being adjudication in a law-of-nations tribunal or as punishment for those corporations' past conduct under human-rights norms.

whether to attempt to prosecute the corporations that had most significantly engineered the Nazi war effort, but in the end that idea was "not adopted" and was acknowledged as "novel." Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009). The point of this historical evidence is not that Nuremberg's prosecutors sought *to create* an international norm of corporate *immunity* (cf. Br. of *Amici Curiae* Nuremberg Scholars 3, 16–17 n.17), but rather that they did not recognize or try *to establish* that unknown theory of corporate *liability*.

The same is true for the law of nations developed in the Asian theater following the Second World War. The Tokyo Charter, like its European counterpart, limited the jurisdiction of that International Military Tribunal to "Far Eastern war criminals *who as individuals or as members of organizations* are charged with offences." Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, as amended Apr. 26, 1946, T.I.A.S. No. 1589. The charter did not grant jurisdiction over corporations or other legal persons.

Following closely in those footsteps, modern tribunals have refused to invent law-of-nations liability for corporations. In Europe, the International Criminal Tribunal for the Former Yugoslavia (ICTY)—which was tasked with meting out

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Instead, certain companies were dissolved, while others were left intact, based more on political determinations of their future prospects for peaceful development than on the relative abhorrence of their past misdeeds. See Brief *Amici Curiae* of Nuremberg Historians and International Lawyers 26–37.

punishment under international law for atrocities committed during that country's bloody civil war—was given "jurisdiction over natural persons" by the international community, but not over corporations or other legal persons.[3] The International Criminal Tribunal for Rwanda (ICTR) likewise had jurisdictional reach over natural, but not legal, persons.[4] Just like their forbears at Nuremberg, the prosecutors at these modern tribunals leveled charges against *individuals* whose crimes resulted from their participation in business enterprises and other organizations, but stopped short of leveling charges against those *legal entities*. See, *e.g.*, *Prosecutor* v. *Musema*, Case No. ICTR-96-13-A, Legal Findings ¶ 895 (Jan. 27, 2000) (defendant *personally* liable because his control and influence over employees influenced them to commit war crimes); *Prosecutor* v. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 8–10 (Dec. 3, 2003) (newspaper and radio station operators *personally* liable for inciting ethnic violence).

The absence of an international norm of corporate liability was borne out even more recently, when the framers of the Rome Statute (establishing the International Criminal Court (ICCt)) made a conscious decision *not* to subject corporations to law-of-nations criminal liability. See Rome Statute of the Int'l Criminal Court art. 25(1), adopted July 17, 1998,

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[3] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6, adopted May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827, 32 I.L.M. 1159.

[4] Statute of the International Tribunal of Rwanda, art. 5, adopted Nov. 8, 1994, S.C. Res. 955, U.N. Doc. S/RES/955, 33 I.L.M. 1598.

2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002). Significantly for present purposes, the participating nations premised that important decision on the lack of any international consensus on corporate criminal liability.

More particularly, in the run up to the ICCt's launch, the French delegation had proposed to include legal persons within the new international court's jurisdiction. Per Saland, *International Criminal Principles*, in The International Criminal Court: The Making of the Rome Statute 199 (Roy S. Lee ed., 1999). According to Swedish foreign minister Per Saland, that proposal "deeply divided the delegations" and angered countries "whose legal system does not provide for the criminal responsibility of legal entities" *at all*. *Ibid*. In the view of these objecting countries, "it was hard to accept [the] inclusion" of such a liability as a matter of international law with its "far-reaching consequences" for the complementary relationship between domestic and international law. *Ibid.* In the end, the proposal was soundly rejected by parties who discerned no "universally recognized common standards for [private entity] liability" because that concept was "not even recognized in some major criminal law systems." Kai Ambos, *Article 25: Individual Criminal Responsibility*, in Commentary on the Rome Statute of the International Criminal Court 475, 477–78 (Otto Triffterer ed., 1999).[5] That

[5] International agreements that *do* speak to corporate conduct (none of which is implicated in this case) are, by and large, explicitly aspirational "exhortations" that "do not constitute international law." Restatement (Third) § 213 reporter's note 7. The handful that address corporations or other legal persons in any meaningful way do so in very specific contexts (*e.g.*, Int'l

decision is convincing evidence that the community of nations has *not* coalesced around any "definite" (*Sosa*, 542 U.S. at 732) norm of corporate liability under international law, despite multiple opportunities in which to consider the question.

Other recent proposals attempting to establish international corporate-liability norms likewise have fallen flat. For instance, in 2003 a United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a working group's draft "norms" that purported to specify the human-rights duties and liabilities of transnational corporations and other business enterprises under the law of

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Convention on Civil Liability for Oil Pollution Damage, adopted Nov. 29, 1969, 973 U.N.T.S. 3 (not ratified by the United States)). What is more, they operate not by imposing direct liability on corporations, but rather by placing duties *on states* to regulate certain corporate conduct *under their domestic laws* (see, *e.g.*, Council of Europe Criminal Law Convention on Corruption art. 18, *opened for signature* Jan. 27, 1999, E.T.S. No. 173, 38 I.L.M. 505 (requiring state parties to "adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering"); Inter-American Convention Against Corruption art. 8, Mar. 29, 1996, 35 I.L.M. 724 (requiring state parties to "prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value"); United Nations Convention Against Transnational Organized Crime Annex I, art. 10, adopted Nov. 15, 2000, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) (requiring state parties to "adopt such measures" in their *domestic* laws, as necessary and "subject" to their own "legal principles," that will "establish the liability of legal persons for participation in serious crimes involving an organized criminal group")).

nations.[6] That proposal—much like the earlier proposal in Rome for ICCt corporate liability—triggered a "deeply divisive debate" across the international community and "evok[ed] little support from Governments." U.N. General Assembly, Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) ("U.N. Guiding Principles"). Ultimately, those proposed "norms" were never adopted by the UN's Human Rights Commission or any other international body.

Instead, after *eight years* of further discussion and negotiation, that Commission's successor—the UN's Human Rights Council—adopted a compendium of "guiding principles" for the protection of human rights by transnational corporations. See generally *ibid.* But unlike the discarded "norms," those resulting "principles" *do not* "claim to impose human rights obligations directly on corporations," but rather articulate a general set of societal expectations that are to be "enforced through *domestic legal sanctions* as well as in the court of public opinion." John H. Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, 15 Insights

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[6] See U.N. Econ. & Soc. Council, Comm. on Human Rights, Sub-Comm. on the Promotion & Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard To Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

(American Soc. of Int'l Law), no. 21, Aug. 1, 2011 (emphasis added), available at http://www.asil.org/pdfs/insights/ insight110801.pdf.

As the U.N. Secretary-General's Special Representative explained, his analysis of existing international norms supported "[t]he traditional view" that "international human rights instruments * * * impose only '*indirect*' responsibilities on corporations" that are "*provided under domestic law*," and the available evidence "d[id] not indicate" to him that states have "impos[ed] *international* legal responsibilities for human rights directly on corporations * * * *to any appreciable extent*." John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. Int'l L. 819, 832–33 (2007) (emphasis added); see also Resp. Br. 39. Once again, when asked to consider the very kind of corporate liability that petitioners advance here, the international community resoundingly favored the domestic rather than international regulation of corporate entities.

That is consistent even with the variety of *domestic* European laws covering corporate liability, which also evidence a clear lack of any international consensus about if (or when) to hold corporations liable for their alleged misconduct and that of their parents, subsidiaries, affiliates, employees, contractors, and agents. European nations, for example, do not generally recognize corporate criminal liability. See, *e.g.*, Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1777–78 (2011) ("Corporate criminal liability is a form of American Exceptionalism. Most countries in Europe and the world lack corporate criminal liability

generally."); see also *id.* at 1792 ("European countries have long lacked criminal respondeat superior liability"); *id.* at 1846 ("The United States has long permitted criminal liability for firms, in contrast to, for example, Europe, where such a change would be considered 'invasive and fundamental.'").

Germany, to take one example, opts to manage corporations domiciled or doing business in Germany through efficient and effective administrative and civil regulation. See, *e.g.*, Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 Yale L.J. 126, 142–44 (2008). Likewise, German corporate law on parent-subsidiary liability (an important issue in this and many other ATS lawsuits) is, in important respects, "[u]nlike the corporations codes of each of the fifty state jurisdictions constituting the United States." René Reich-Graefe, *Changing Paradigms: The Liability of Corporate Groups in Germany*, 37 Conn. L. Rev. 785, 788 (2005). The United Kingdom, by contrast to many of its continental neighbors, makes corporate criminal liability available in certain contexts, including under still-recent legislation. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19 (U.K.). The overwhelming diversity of domestic laws that govern and regulate legal persons around the globe is fatal to any attempt to forge a universal consensus of corporate liability under the law of nations.[7]

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[7] Even petitioners' own references reveal surveys highlighting these disparate legal regimes. See Pet. Br. 54 n.52 (citing Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave*

II. Corporate Liability For Law-Of-Nations Torts Would Stifle Foreign Corporations' Investment In The United States And Overseas

This Court should reject petitioners' invitation to create the world's first law-of-nations cause of action against corporations. Such liability would have important and detrimental "practical consequences" (*Sosa*, 542 U.S. at 732) for foreign corporations that do business in this country and elsewhere.

In recent years, foreign corporations have been targeted by a flood of high-profile, law-of-nations claims brought, almost without exception, by alien plaintiffs regarding alleged activities in third countries. See, *e.g.*, *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), reh'g denied, 2011 WL 5402020 (Nov. 9, 2011) (claims against Germany's Daimler Corp. for alleged activities of its Mercedes-Benz subsidiary in Argentina); *Sarei* v. *Rio Tinto, PLC*, 2011 WL 5041927, at *1 (9th Cir. Oct. 25, 2011) (en banc), petition for cert. pending, No. 11-649 (Nov. 23, 2011) (claims against England and Australia's Rio Tinto mining group for alleged activities in Papua New Guinea); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (claims against Canada's Talisman Energy Inc. for alleged activities in Sudan); *Khulumani* v. *Barclay*

Breaches of International Law: A Survey of Sixteen Countries (2006), which describes (at 13) a country survey demonstrating that "the manner in which a business entity or legal person may be found liable for a crime" varied "from jurisdiction to jurisdiction," and that "[v]arious countries have developed different methods for attributing the actions of a responsible employee or board member to a company for purposes of finding intent and imposing criminal liability").

Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (claims against dozens of corporations, including many non-U.S. companies and unnamed "Corporate Does," for alleged activities in apartheid South Africa); *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (claims against Switzerland's Nestle S.A. for alleged actions of a subsidiary in Cote d'Ivoire).

This relatively new breed of lawsuit already threatens to chill the operations of non-U.S. corporations both here and abroad. For one thing, ATS lawsuits of this kind impose substantial costs on a foreign corporation, regardless of the ultimate outcome. The mere allegation that a company has violated the law of nations often inflicts considerable harm on relationships with customers, counter-parties, and investors—casting a cloud that hangs over the company while the law-of-nations claims are litigated. Media coverage of such claims frequently attempts to tie the defendant corporation to heinous practices by foreign regimes, often without regard to the true nature of the relationship between the defendant company and its local subsidiary or contractor—let alone the truth or falsity of the allegations themselves. See generally Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis* ("ATS Economic Analysis") 32–34 (preliminary draft Jan. 11, 2012), at http://www.ssrn.com/abstract=1983445 (explaining reasons why "ATS litigation can be quite expensive, to say the least"). All of this inflicts real-world damage on foreign corporations and their stakeholders.

And the litigation itself is a lengthy and costly endeavor. Discovery is particularly expensive and

burdensome for foreign corporate defendants, which typically must trace the activities of subsidiaries, affiliates, or contractors in conflict-stricken foreign locales. Disproving an alleged link between claims of human-rights abuses and a corporation's operations abroad often demands substantial overseas discovery—including efforts to seek documents and information from uncooperative states and their regimes. See *id.* at 33–34 (noting that the "error" rate in ATS litigation can be particularly high because "when [the] conduct [at issue] occurs in a foreign country with an undeveloped legal system that does not or cannot cooperate with discovery, or in a country with a government that is hostile to the litigation and associated discovery, access to information can be quite poor").

What is more, the notion that corporate ATS suits succeed in achieving ends commensurate with these severe consequences is dubious, at best. As with other litigation that is long on PR or shock value but often short on the merits, ATS suits against deep-pocketed corporations are often just a means to coerce settlement and sometimes achieve downright perverse results. Professor Sykes has recounted, for example, that an ATS suit against Canadian firm Talisman Energy *that was eventually dismissed by the Second Circuit* nonetheless caused the company to sell its holdings in Sudan—clearing room for other countries to dominate that market. The end result was that "an American tort statute had the effect of replacing a Canadian company with a Chinese company [in Sudan], all in the name of human rights." *Id.* at 40. Using ATS suits as a means to extract substantial civil judgments and settlements against foreign corporations is, to put in kindly, an

imperfect approach to rectifying international wrongs. See, *e.g.*, *Sarei*, 2011 WL 5041927, at *66 (Kleinfeld, J., dissenting).

Accordingly, as a former Secretary General of the International Chamber of Commerce explained to the European Commission's President, "the practice of suing EU companies in the US for alleged events occurring in third countries could have the effect of reducing investment by EU companies in the United States, or in third countries[,] if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui, Secretary General, International Chamber of Commerce to Romano Prodi, President, European Commission (Oct. 22, 2003), available at http://www.iccwbo.org/policy/environment/icccbhc/index.html.

In this country, for one thing, the maintenance of an ATS suit against a non-U.S. corporation would depend on a federal district court having personal jurisdiction over the foreign-corporate defendant. See, *e.g.*, *Sarei*, 2011 WL 5041927, at *2 (mining company Rio Tinto had U.S. operations substantial enough to establish the district court's personal jurisdiction over that defendant in a case arising out of events in Papua New Guinea).[8] If law-of-nations lawsuits are permitted against corporations under the ATS, then a company with overseas operations

[8] This is a particularly salient concern to foreign corporations in light of the Ninth Circuit's recent assertion of personal jurisdiction over non-U.S. companies in ATS suits under a virtually limitless "agency" theory of general personal jurisdiction that ignores the corporate separation of a foreign parent company and its U.S. subsidiary any time the latter's activities are "sufficiently important" to the former. See *Bauman*, 644 F.3d at 919–21.

but no U.S. presence will face more substantial risks in transacting business in this country, because doing so may subject it to international-law tort liability not found in any other country. Likewise, non-U.S. companies will think twice about partnering with U.S. corporations in overseas operations, for fear that the partnership renders their activity subject to international-law oversight by the U.S. courts.

For another thing, companies that cannot avoid transacting *some* business in this country—subjecting them to personal jurisdiction in ATS suits—may nonetheless carefully consider the extent of those operations. In particular, non-U.S. companies that are considering whether to locate certain assets (*e.g.*, factories, distribution centers, and financial investments) in the United States will necessarily consider the added risk to those assets produced by corporate law-of-nations liability. If a judgment may be ordered against a foreign company arising out of events anywhere in the world, and then executed against any assets located in the United States, then the risk of putting such assets within the reach of the U.S. courts will increase (and the cost of insuring such assets can be expected to rise commensurate with that risk).

Even those companies that have little practical choice but to submit to personal jurisdiction and to locate substantial assets within the U.S. may alter their behavior in response to the specter of corporate law-of-nations liability. For these companies, such liability would stifle their other overseas investments. While that may well be the very objective that plaintiffs' lawyers in these suits hope to achieve, it is not clearly a laudable one. Troubled regions of

the globe are often most desperate for foreign investment and corporate leadership, and experience shows that economic engagement sometimes improves conditions on the ground far more than isolationism. That policy question—whether to engage or to withdraw—should be made by policymakers through domestic law, not by courts inventing supposedly universal norms.

This country's unique establishment of a law-of-nations corporate liability regime would also infringe its agreed-upon obligation to its economic trading partners that it will avoid and minimize "the imposition of conflicting requirements on multinational enterprises." OECD Guidelines for Multinational Enterprises 9 (2011), available at http://www.oecd.org/dataoecd/43/29/48004323.pdf. Because no other country in the world imposes corporate tort liability by reference to the law of nations, the imposition of an entirely new liability scheme would present such a "conflicting requirement[]" and would stymie the cross-border operation of non-U.S. business enterprises.

Moreover, it is helpful to recall that many of these cases involve *non-U.S.* corporate activity in areas of the world where *non-U.S.* trade and investment is dominant. This case, for example, arises out of Royal Dutch Shell Company's enterprises in Nigeria. European Union companies like Royal Dutch Shell—not U.S. companies—are the largest exporters to, and importers from, Sub-Saharan Africa. Vivian C. Jones, Cong. Research Serv., *U.S. Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act* 10 (2009). The overseas investment and activity of foreign

corporations under policies advanced by other developed nations should not be systemically undermined by the lurking potential that a U.S. jury may someday attach substantial tort liability to that overseas conduct.[9]

To see the inequity of such an approach, one need only consider putting the shoe on the other foot. Imagine, for example, that a European country asserted that a previously unheard-of norm of international law governed corporate behavior and was enforceable in its courts against U.S. corporations. On that basis—which, it bears repeating, is the same one advanced by petitioners here—such a European country could put a U.S. corporation on trial based on a private plaintiff's allegations of an overseas law-of-nations tort. A U.S. defense contractor with operations in Iraq or Afghanistan, for example, or a U.S. airline operator that contracted to transport foreign terrorist suspects, might find themselves defending their business activities (and the national-security policies of this country) before a foreign court—possibly with billion-dollar damages claims on the line. That such law-of-nations lawsuits have not yet arisen is further proof that there is no universal norm of corporate liability, but one can hardly expect continued

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[9] It is another negative "practical consequence" (*Sosa*, 542 U.S. at 732) of any decision to create law-of-nations corporate liability under the ATS that the United States would then uniquely exercise international-law *tort* jurisdiction over *corporations* even while it lags behind other developed nations that have joined multilateral institutions to enforce widely accepted international norms that govern the *criminal* liability of *individuals* for "the most serious crimes of international concern." Rome Statute of the Int'l Criminal Court art. 1.

forbearance were this Court to endorse petitioners' theory. See *Sarei*, 2011 WL 5041927, at *66 (Kleinfeld, J., dissenting) (imagining a law-of-nations claim brought in Papua New Guinea "by a Cherokee against descendants of those who obtained Cherokee land when President Jackson's administration forced their ancestors to leave their homes for the West").

If such a scenario came to pass, it would have two probable effects. First, U.S. corporations would attempt to reduce their risk exposure and costs by arranging their operations to stay clear of countries that imposed corporate law-of-nations liability. Second, those corporations unable to withdraw entirely would reduce overseas operations in areas of the world prone to conduct generating these kinds of lawsuits—particularly if concerned about the potential bias a foreign tribunal might have against the overseas practices of a U.S. company. The increased risk from doing business abroad (and the increased costs of insuring against such risks) would surely spur a re-evaluation of whether the possible cost of doing business in conflict-prone areas of the world exceed the likely profit. If a hitherto unrecognized form of corporate law-of-nations liability is embraced, that reassessment will suppress foreign investment.

There is no good reason to open that Pandora's box. The ATS is a jurisdictional grant covering tort claims by aliens under the law of nations, and that body of law and custom does not recognize causes of action against corporations. Indeed, the history of international cooperation over the past six decades has been marked—in Europe and elsewhere—by a considered refusal to establish any norm of corporate

liability in international law. And because the costs of creating such a cause of action would be so high, this Court should not hesitate to reject petitioners' invitation to adopt such an expansive and unprecedented construction of the law of nations.[10]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[10] Even if this Court were to conclude that the ATS grants jurisdiction over claims against corporations domiciled in the United States, the Court should hold that the same is not true for claims against *foreign* corporations. See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 552 (2011) (concluding that the original understanding of the ATS was that it would provide "an alien [with] the right to sue a US citizen in federal court for any international tort," but not to sue other aliens); see also Resp. Br. 15 n.4.