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., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR 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 law 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 own citizens within its own sovereign boundaries.

PARTIES TO THE PROCEEDING

Respondents are Royal Dutch Petroleum Company (whose successor is The Shell Petroleum N.V.), and the Shell Transport and Trading Company, P.L.C. (now known as The "Shell" Transport and Trading Company, Ltd.).

Petitioners also list in their caption as Respondent Shell Petroleum Development Company of Nigeria, Ltd. But that defendant was dismissed by the district court for lack of personal jurisdiction, *Kiobel* v. *Royal Dutch Petroleum Co*., No. 02 Civ. 7618, 2010 WL 2507025, at *1 (S.D.N.Y. June 21, 2010), and was not a party to the proceeding before the court of appeals.

A Rule 29.6 Statement appears in the Brief In Opposition at ii-iii.

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BRIEF FOR RESPONDENTS

INTRODUCTION

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court declined to restrict the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), to the three international-law violations recognized at the time of the ATS's enactment in 1789, but made clear that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind." *Sosa*, 542 U.S. at 725. *Sosa* prescribed a clear, two-step process for the exercise of this restraint.

First, federal courts should not "accep[t] a cause of action subject to jurisdiction under § 1350 . . . for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. This international-law inquiry must be undertaken separately for each "given norm," *id*. at 732 n.20, and must consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued," *ibid*.

Second, even if a plaintiff satisfies that "demanding standard," *id.* at 738 n.30, he has raised only "the possibility of a private cause of action," *ibid*. A federal court, exercising its common lawmaking discretion, may proceed to recognize such a cause only after considering such issues as "the practical consequences of making that cause available." *Id*. at 732-33. The proponent of a norm bears the burden at both steps. See *id*. at 737 (referring to petitioner's "failure to marshal support for his proposed rule").

Applied here, both steps of *Sosa*'s framework foreclose ATS subject-matter jurisdiction, and a federal common-law cause of action, against Respondent corporations for violation of the specific international-law norms alleged here: arbitrary arrest and detention, torture, and crimes against humanity. At the first step, international-law sources—including a United Nations report's "conclusion [that] it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations"[1]—recognize these

[1] Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006, Report of the Special Representative of the Secretary-General on the Issue of Human

norms only against States and natural persons, not against corporations.

Even if Petitioners could reach the second step, they fail to satisfy it. In another "limited enclav[e]," *Sosa*, 542 U.S. at 729, of modern federal common law, this Court declined absent congressional guidance to extend liability to private corporations for federal constitutional violations under a *Bivens* cause of action. See *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001). (Although *Sosa* cited *Malesko*, see *Sosa*, 542 U.S. at 727, Petitioners and the United States conspicuously ignore it.) At least the same restraint is counseled here, especially given the adverse consequences to U.S. trade and foreign policy of a liberal expansion of private causes of action against corporations under international law.

Petitioners, unable to satisfy *Sosa*'s framework, attempt to avoid it. They (and the United States) urge that international law not be consulted at *Sosa*'s first step, pointing instead to U.S. domestic law principles. They decline to undertake a norm-by-norm analysis of the three specific norms at issue here, instead treating the issue as corporate liability in the abstract and therefore relying on precedents from unrelated areas such as piracy law. And they reverse *Sosa*'s assignment of the burden, insisting that Respondents must show that international law *excludes* corporations from the norms applicable to natural persons, rather than that Petitioners must show that international law *recognizes* corporate liability under the international norms at issue. This Court should not sanction any of these departures from *Sosa*'s framework.

Rights and Transnational Corporations and Other Business Enterprises, ¶ 44, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

Finally, even if the ATS provides jurisdiction, and federal common law provides a cause of action, for claims against corporations as primary violators of the offenses alleged here, they do not do so (a) against corporations as aiders/abettors of such violations, at least without a plausible allegation that the corporation had a purpose to facilitate the primary violation, or (b) where the alleged misconduct occurred within a foreign country rather than within the United States or on the high seas. Both of these features of the complaint here furnish alternative grounds for affirmance of the judgment below.

STATEMENT

1. This case concerns allegations that a Nigerian corporation, Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC"), assisted the Nigerian government in harming Nigerian citizens in Nigeria. Personal jurisdiction was found absent as to SPDC. *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 02 Civ. 7618, 2010 WL 2507025, at *1 (S.D.N.Y. June 21, 2010). This suit is against the English and Dutch companies that indirectly hold the shares of SPDC. Petitioners do not allege that Respondents directly committed any violations of international law, but rather that SPDC aided and abetted Nigerian government officials' commission of those offenses. J.A. 43, 55.

Soon after the original complaint was filed, the Nigerian government formally objected to the Attorney General of the United States that the suit would improperly assert "extra territorial jurisdiction of a United States court … for events which took place in Nigeria"; "jeopardize the on-going process initiated by the current government of Nigeria to reconcile

with the Ogoni people in Nigeria"; "compromise the serious efforts of the Nigerian Government to guarantee the safety of foreign investments, including those of the United States"; and "gravely undermin[e] [Nigeria's] sovereignty and plac[e] under strain the cordial relations that exist with the Government of the United States of America." J.A. 129-31.

2. Respondents moved to dismiss under Fed. R. Civ. P. 12(b). The district court sustained Petitioners' claims for aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture. Pet. App. B16-B20. The court dismissed Petitioners' claims for aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights to life, liberty, security, and association. *Id.* at B13-B15, B20-21. The court certified the order *sua sponte* for appeal under 28 U.S.C. § 1292(b). Pet. App. B21-23.

3. Petitioners sought leave to appeal the dismissal of the claim for aiding and abetting extrajudicial killing, and Respondents sought leave to appeal the refusal to dismiss the claims for aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture. The court of appeals granted the petition and the cross-petition.

Respondents' principal brief on the merits argued, *inter alia*, that (a) there is no norm of corporate liability for the offenses at issue, Br. In Opp. App. 59a-60a;[2] and (b) neither international law nor federal common law recognizes a cause of action for aiding and abetting the offenses at issue, *id.* at 69a-70a, 72a, 77a, and even if such a cause is recognized,

[2] Respondents had not so argued in the district court.

it requires that the aider/abettor acted with a purpose (not merely knowledge) to facilitate the primary actor's violation, *id.* at 53a n.9. Petitioners' reply brief responded to both arguments. *Id.* at 98a-99a, 110a-122a, 138a n.31.

The court of appeals reversed, ordering dismissal of the amended complaint. Judge Cabranes authored the majority opinion, joined by Chief Judge Jacobs; Judge Leval concurred in the judgment.

a. The majority focused on the corporate-liability question, framing it as whether "the customary international law *of human rights* has … to date recognized liability for corporations that violate its norms." Pet. App. A26 (emphasis added). The majority held, at the threshold, that this question should be answered by international law rather than U.S. domestic law. *Id.* at A26-A39. The majority then examined several sources of international law to ascertain whether such law has recognized in a sufficiently "'specific, universal, and obligatory'" manner, *id.* at A39 (quoting *Sosa*, 542 U.S. at 732), a norm of corporate responsibility for violations of the human rights at issue. The majority answered in the negative. Pet. App. A72.

b. Judge Leval disagreed with the majority's holding regarding corporate responsibility. *E.g.*, *id.* at A158 (concurring opinion). Judge Leval nonetheless agreed that Petitioners' amended complaint should be dismissed because it "does not contain allegations supporting a reasonable inference that [Respondents] acted with a purpose of bringing about the alleged abuses." *Id.* at A169.

This Court granted certiorari. 132 S. Ct. 472 (2011).

SUMMARY OF ARGUMENT

I

The court of appeals properly considered whether the ATS extends to corporations for the alleged offenses here even though that issue was not briefed in or decided by the district court. An issue of subject-matter jurisdiction may be raised at any time and, as *Sosa* explained, the ATS is "in terms only jurisdictional." Petitioners resist this conclusion, relying on case law involving other federal statutes, but those statutes are worded differently from the ATS, referring to "jurisdiction" (if at all) only in a subsidiary way, not as the premise for the entire provision. The United States seeks to analogize to 28 U.S.C. § 1331, but that section's "arising under the … la[w]" formulation is broader than the ATS's "in violation of the law" formulation. Finally, even if the question of corporate liability for the offenses at issue goes to the merits rather than jurisdiction, it was properly considered by the court of appeals as a threshold issue, as the United States agrees.

II

Petitioners fail to demonstrate that international law, with the requisite specificity and universal acceptance, imposes responsibility on corporations for the offenses alleged here. Even if Petitioners could make that showing, they do not establish that a federal common law cause of action should be afforded, given this Court's contrary precedent and the practical consequences of affording the cause.

A

Petitioners, unable to make the requisite showing under international law at *Sosa*'s first step, seek to

evade that inquiry by characterizing "who may be liable" as a question of remedy that is solely for U.S. domestic law to determine. Petitioners' approach is incorrect. The distinction between corporations and natural persons is one of several categories of distinctions drawn by international law among perpetrators who may be responsible for international-law violations. *Sosa* recognized one category, states vs. private actors. The majority of the courts of appeals have recognized a second, primary vs. secondary actors. And the court of appeals below, accurately citing numerous international-law sources, recognized a third, corporations vs. natural persons.

Petitioners and the United States also err in characterizing the fundamental question "who may be liable" as remedial. Their sources do not so state, instead identifying as remedial such matters as whether a cause of action will proceed in an administrative rather than a judicial forum. And choice-of-law principles have always viewed "who may be liable" as a substantive issue, not a remedial one. Finally, Petitioners' effort to support corporate liability as a categorical matter by reference to decisions involving entirely different norms (like piracy) fails to heed *Sosa*'s instruction to perform the inquiry on a norm-by-norm basis.

The international-law sources on the specific offenses at issue refute corporate responsibility. As to torture, the Convention Against Torture, on its face but especially as implemented by the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), extends responsibility only to natural persons and not corporations or other juridical entities (as this Court should hold in *Mohamad* v. *Palestinian Authority*, No. 11-88). As to each of the

three offenses at issue, the organic statutes of several international tribunals explicitly restrict the tribunal's jurisdiction to natural persons. Likewise, jurists and commentators, including the Special Representative of the United Nations Secretary General on the issue of human rights, have concluded that international human-rights instruments do not currently impose direct responsibilities on corporations. In the face of all this evidence, Petitioners' reliance on a secondary source of international law, so-called "general principles" universally recognized by domestic law and incorporated into international law, does not carry their burden. In any event, corporate liability in the abstract is too "general" a principle; the proper approach is again to consider corporate liability for the offenses alleged, and, so characterized, there is divergence among various nations' domestic laws.

B

Even if Petitioners need not make an international-law showing at *Sosa*'s first step (or if they satisfy it), Petitioners have raised only the possibility of a private cause of action, and cannot satisfy their burden at *Sosa*'s second step to show that such a cause should be afforded as a matter of federal common law.

First, this Court declined in another enclave of federal common-lawmaking authority, *Bivens*/*Malesko*, to recognize corporate liability for federal constitutional torts. Petitioners provide no reason why federal common law should extend more broadly when it comes to alleged violations of the law of nations, recognition of which raises risks of adverse consequences to foreign policy and U.S. trade and investment abroad.

Second, those adverse foreign policy and trade consequences independently counsel against affording a cause against corporations. Even a meritless federal suit against a corporation can take years to resolve and cause substantial public-relations damage in the interim. These costs in turn may lead corporations to reduce their operations in the less-developed countries from which these suits tend to arise, to the detriment of citizens of those countries who benefit from foreign investment. Foreign governments too will suffer economically from reduction of such investment; and will be offended as sovereigns when U.S. courts pass judgment on the foreign government's actions within its borders. At the same time, denying plaintiffs a federal common law action against corporations for the alleged offenses at issue here does not foreclose other actions, such as a suit against natural persons who committed the offenses.

III

In the event this Court rejects Respondents' arguments concerning corporate liability for the offenses alleged here, the Court should nonetheless affirm the judgment below on either or both of two alternative grounds.

First, the international-law sources that must be consulted at *Sosa*'s first step hold that aiding/abetting liability is recognized only when the secondary actor acted with a purpose (not merely knowledge) to facilitate the primary violation, as the complaint failed to plead here. At *Sosa*'s second step, a private right of action for aiding/abetting liability should not be recognized at all, for Congress has not provided for such liability by clear statement.

Second, the ATS should not be construed to extend to conduct occurring, as here, entirely within a foreign nation's borders. A federal statute cannot apply to conduct outside the United States absent a clear statement by Congress. The ATS contains no such clear statement, nor did Congress contemplate such extraterritorial application (apart from piracy on the high seas), for the statute was prompted by two incidents of assaults against foreign ambassadors on U.S. soil. A related canon, favoring interpretation of federal statutes in compliance with international law, confirms that the ATS should not apply to conduct within a foreign nation's borders. Construing the ATS to apply only to conduct within the United States or on the high seas avoids bringing the United States into arguable violation of international law.

ARGUMENT

I. APPLICATION OF THE ATS TO A CORPORATION UNDER INTERNATIONAL LAW IS AN ISSUE OF SUBJECT-MATTER JURISDICTION THAT MAY BE CONSIDERED AT ANY TIME, AND IN ANY EVENT, THE COURT OF APPEALS PROPERLY CONSIDERED THE ISSUE

The court of appeals held that the complaint must be dismissed for lack of subject-matter jurisdiction because international law has not yet recognized corporate responsibility for the specific human-rights offenses alleged by Petitioners. It did so even though the district court had not considered the corporate-liability issue, reasoning that the issue was one of subject-matter jurisdiction that could be reached at any time. That reasoning was correct, for the ATS is a jurisdictional statute and each of its elements,

including the extent to which a norm under "the law of nations" extends to a corporation, is jurisdictional. Even if the issue went instead to the merits, the court of appeals had the power to decide it and this Court should do so as well, as the United States agrees. Brief For The United States As *Amicus Curiae* Supporting Petitioners ("U.S. Br.") 8, 12.

A. The ATS Is A Jurisdictional Statute

The majority below correctly treated the question whether the ATS covers Petitioners' claims against Respondent corporations as one of subject-matter jurisdiction, and therefore as open for consideration for the first time on appeal. See, *e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 506 (2006). As *Sosa* stated, the ATS is "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." 542 U.S. at 714. See also *id.* at 712 (ATS "is in terms only jurisdictional"). *Sosa* based this conclusion on the ATS's original text and its "place[ment] in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction." *Sosa*, 542 U.S. at 713.

Both before and after *Sosa*, lower courts have treated as jurisdictional each of the ATS's elements, including what constitutes a "violation of the law of nations." See, *e.g.*, *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (describing ATS's "requirement of alleging a 'violation of the law of nations' … at the jurisdictional threshold"); *Kadic* v. *Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) ("it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations"); *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (simi-

lar); Pet. App. A25 (similar). But cf. *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011) (noting but not deciding question whether this element is jurisdictional).

The question what constitutes a "violation of the law of nations" subsumes the question who may violate that law, making the question of corporate liability for the offenses alleged here one of subject-matter jurisdiction as well. Petitioners' *amici* concede that the ATS's textual limitation of the universe of plaintiffs to "alien[s]" is jurisdictional (Brief Of Civil Procedure Professors As *Amici Curiae* In Support Of Petitioners ("Civ. Pro. Br.") 12-13; see also U.S. Br. 9), but offer no persuasive reason why the ATS's textual limitation of the universe of defendants (through the phrase "in violation of the law of nations") is instead a merits question.

Petitioners argue (Br. 14-18) that corporate liability for the offenses alleged here is a merits question by analogizing the ATS to miscellaneous other statutory provisions. Those provisions, however, are inapposite. The ATS centrally provides that "[t]he district courts shall have original jurisdiction," 28 U.S.C. § 1350, and thus qualifies as a situation where "the Legislature clearly state[d] that a threshold limitation on a statute's scope shall count as jurisdictional," *Arbaugh*, 546 U.S. at 515. By contrast, the provisions cited by Petitioners use the term "jurisdiction" (if at all) only in a subsidiary role. See *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1247 (2010) (discussing 17 U.S.C. § 411(a), in which "jurisdiction" appears only in final sentence and refers to jurisdiction to consider a single issue); *Morrison* v. *Nat'l Australian Bank Ltd.*, 130 S. Ct. 2869, 2881-82 (2010) (interpreting 15 U.S.C. § 78j(b), which does not

use the term "jurisdiction"); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (42 U.S.C. § 11046(c) addresses only the court's power to enforce a requirement by imposing civil penalties).

The United States likewise insists (Br. 8-9) that the issue of corporate liability is a merits issue, citing *Bell* v. *Hood*, 327 U.S. 678 (1946), and *Ex Parte Poresky*, 290 U.S. 30 (1933), which interpreted 28 U.S.C. § 1331 to confer jurisdiction on all cases "arising under" federal law so long as the plaintiff's claim is not "plainly unsubstantial." *Ex Parte Poresky*, 290 U.S. at 32. But Section 1331 is inapposite.

First, while the ATS sets forth a strict textual "requirement" that a plaintiff allege "a '*violation* of the law of nations' … at the jurisdictional threshold," Section 1331 employs "the more flexible 'arising under' formulation." *Filartiga*, 630 F.2d at 887. Section 1331 demands only that the action arose under a law, not that the law was violated.[3]

Second, construing ATS jurisdiction broadly poses greater "risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 728; see also *id.* at 761 (Breyer, J., concurring in part and concurring in the

[3] The various statutes cited at Civ. Pro. Br. 8-10 & nn.4-5 are also "more flexible" than the ATS. While some mention a "violation," they go on (unlike the ATS) to employ the phraseology "jurisdiction of … all suits in equity and actions at law brought to enforce any liability or duty …," which resembles Section 1331's "arising under" formulation. 15 U.S.C. § 78aa (at issue in *Morrison*, 130 S. Ct. 2869). See also 7 U.S.C. § 1642(e) (similar); 15 U.S.C. § 80a-43 (similar). 18 U.S.C. § 1964(c) does not use "jurisdiction" and the section is titled "Civil Remedies," and 28 U.S.C. § 1363 uses "action brought for protection," which is broader than "action … committed in violation," *id.* § 1350.

judgment); Brief For The United States As *Amicus Curiae* In Support Of Petitioners 8, 15, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) ("U.S. *Ntsebeza* Br."), than does Section 1331 jurisdiction. A federal court shows greater respect for these foreign policy interests if it declines jurisdiction over an ATS case than if it exercises jurisdiction and dismisses the case on the merits.

Third, even if the "plainly unsubstantial" test did separate jurisdiction from the merits under the ATS, a claim against a corporation would be "plainly unsubstantial" unless and until such a norm were universally accepted as a rule of international law. Here, as explained in Point II.A.2 below, corporate liability for each of the offenses alleged here has not yet been so accepted as a rule of international law, leaving the analysis at the threshold, jurisdictional stage.[4]

B. The Court Of Appeals Had Power To Address The Issue Of Corporate Liability For The First Time On Appeal

Even if the issue of corporate liability under the ATS for the offenses alleged here is not one of

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[4] Neither Petitioners nor their *amici* address whether, even if the question of corporate liability is not jurisdictional, the question of the ATS's extraterritorial scope (discussed in Point III.B below) is jurisdictional, as the Ninth Circuit treated it in *Sarei* v. *Rio Tinto, PLC*, 2011 WL 5041927, at *3 (9th Cir. Oct. 25, 2011) (*en banc*), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011), and thus warrants review by this Court here in the first instance. Several dissenting judges in *Sarei* further argued that ATS jurisdiction does not extend to a suit, as here, by an alien against an alien. *Id.* at *69 (Ikuta, J., dissenting, joined by Kleinfeld, Callahan, and Bea, JJ.). See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011).

subject-matter jurisdiction, the court of appeals had power to address it even though the district court had not done so. A court of appeals possesses discretion to consider dispositive merits issues for the first time on appeal. See, *e.g.*, *U.S. Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446-47 (1993); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1997) (rejecting court of appeals' refusal to consider a potential source of federal common law proffered for the first time on appeal). Notably, the D.C. Circuit, after assuming *arguendo* that the issue of corporate liability for human-rights violations is *not* jurisdictional, nonetheless proceeded to address that issue under the ATS even though it had been raised "for the first time on appeal." *Doe VIII*, 654 F.3d at 40.

Thus, whether or not the corporate-liability issue is jurisdictional, the Second Circuit had power to reach and decide it, and so does this Court. Accord U.S. Br. 8, 12.

II. THE ATS DOES NOT EXTEND JURISDICTION TO, AND FEDERAL COMMON LAW DOES NOT AFFORD A CAUSE OF ACTION FOR, A CORPORATION'S COMMISSION OF THE OFFENSES ALLEGED BY PETITIONERS

As the decision below correctly found, Petitioners fail to satisfy either step of *Sosa*'s "vigilant doorkeeping," 542 U.S. at 729. *First*, they cannot meet their burden of demonstrating that a norm of corporate responsibility for the human-rights offenses they allege is one "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." *Id.* at 725.

Nor, *second*, can Petitioners satisfy *Sosa*'s additional, separate inquiry into whether federal common law should provide a cause of action. See *Sosa*, 542 U.S. at 732-33, 738 n.30. In *Malesko*, 534 U.S. 61, this Court declined to extend federal common law to allow a *Bivens*-type action against corporations for violations of U.S. constitutional norms. This Court should not hold that a Nigerian citizen has a greater right to sue an Anglo-Dutch oil company in the United States for alleged human-rights offenses in Nigeria than an American citizen has to sue his private corporate jailer for alleged constitutional violations in New York.

A. International Law Does Not Recognize Corporate Responsibility For The Alleged Offenses Here

Sosa instructs that federal courts consult international law (not U.S. domestic law) to determine whether a norm of responsibility is recognized with sufficient specificity and universal acceptance against a particular perpetrator. And international law does not recognize corporate responsibility for the alleged offenses at issue here at all, much less with the clarity needed to meet *Sosa*'s high bar.

1. The Question Who May Be Liable In A Suit Under The ATS Is A Question Of International Law

Like the question "what" conduct constitutes a "violation of the law of nations" in a suit under the ATS, the question "who" may be liable for such a violation is a matter of international law. The court of appeals was correct in so holding, Pet. App. A38,

and the Ninth Circuit was in accord on this aspect of the analysis even though it reached a different result, see *Sarei* v. *Rio Tinto, PLC*, 2011 WL 5041927, at *7 (9th Cir. Oct. 25, 2011) (*en banc*) ("*Sosa* expressly frames the relevant international-law inquiry … [as] consider[ing] separately each violation of international law alleged and which actors may violate it."), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).[5]

The distinction between corporations and natural persons is just one of several categories of distinctions among perpetrators recognized in international law and by U.S. courts applying the ATS. The first, identified by this Court in *Sosa*, is a distinction between state and private actors:

> A related consideration [to whether a norm is sufficiently definite to support a cause of action] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* v. *Karadzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

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[5] Accord Brief Of Yale Law School Center For Global Legal Challenges As *Amicus Curiae* In Support Of Petitioners 3 ("Yale Br.").

Sosa, 542 U.S. at 732 n.20. See also *id.* at 760 (Breyer, J., concurring in part and concurring in the judgment) (similar).[6]

A second category, identified by several courts of appeals relying on *Sosa*, involves the distinction drawn by international law between primary actors and secondary actors (*i.e.*, aiders/abettors). See *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011) ("*Sosa* guides courts to international law to determine the standard for imposing accessorial liability ...."); *Doe VIII*, 654 F.3d at 33 ("Consistent with *Sosa*, the question is whether the international community would express definite disapprobation toward aiding and abetting conduct only when based on a particular standard."); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) ("*Talisman*") ("[F]ootnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law") (footnote omitted); *id*. at 259 ("*Sosa* ... send[s] us to international law to find the standard for accessorial liability.").

The third category, corporations vs. natural persons, is the one at issue here. Again, numerous international-law sources distinguish corporations from natural persons in determining international legal obligations. For example, the statutes creating the international criminal tribunals for Rwanda and the former Yugoslavia—tribunals created to address

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[6] Contrary to U.S. Br. 18, no inference can be drawn from the D.C. Circuit's failure to address that the defendants in *Tel-Oren* were organizations, given that the panel members rejected the claim on other grounds. See *Tel-Oren*, 726 F.2d at 775 (*per curiam*).

some of the most heinous human-rights offenses of our era—expressly limit those tribunals' jurisdiction to "natural persons." Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 5, 33 I.L.M. 1598 (Nov. 8, 1994) ("ICTR Statute"); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 6, 32 I.L.M. 1192 (May 25, 1993) ("ICTY Statute"). To be sure, some specialized treaties recognize corporations as perpetrators, but they operate in contexts far from the alleged human-rights violations at issue here. See, *e.g.*, International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art. 5(1), U.N. Doc. A/54/109 (Dec. 9, 1999) (providing for "criminal, civil or administrative" liability of a "legal entity"). In light of these and similar indicia that international law distinguishes between entities and natural persons, numerous authorities view international law (rather than U.S. domestic law) as the starting point for analysis of a proposed norm against a corporation under *Sosa*. See *Sarei*, 2011 WL 5041927, at *7 ("We … believe the proper inquiry is … whether international law extends its prohibitions to the perpetrators in question."); *Doe VIII*, 654 F.3d at 82 (Kavanaugh, J., dissenting); *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057, 1127 (C.D. Cal. 2010), appeal docketed, No. 10-56739 (9th Cir. Nov. 4, 2010).[7]

Contrary to Petitioners' and the United States' arguments (Pet. Br. 36; U.S. Br. 18), international law does not deem "who may be responsible" a remedial issue for individual nations to decide. None of their authorities so states; they instead treat as

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[7] But see *Doe VIII*, 654 F.3d at 51; *Flomo* v. *Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1019-20 (7th Cir. 2011).

remedial only such issues as "the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations." 1 OPPENHEIM'S INTERNATIONAL LAW § 21, at 83 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992). See also ANTONIO CASSESE, INTERNATIONAL LAW 168-71 (2001); 1 OPPENHEIM'S INTERNATIONAL LAW § 21, at 83.[8]

Several of Petitioners' and the United States' authorities indeed recognize that "who may be responsible" is a *substantive* issue addressed by international law. Professor Henkin, for example, identified the international-law violation by reference to the perpetrator, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (2d ed. 1996) (cited at U.S. Br. 18-19) ("when *Castro's Cuba* expropriated U.S. properties, probably in violation of international law") (emphasis added), and only then noted that "whether and how the United States should react to such [a] violatio[n] are domestic, political questions," *ibid.* Similarly, Judge Edwards clearly did not intend his reference to "technical accoutrements to an action" being governed by nations' "respective municipal laws,"

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[8] Nor do Petitioners' cited cases involve invocation of U.S. law to provide a remedy for an international-law violation. In *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133, 159 (1795) (cited at Pet. Br. 25), for example, the defendant's taking of a Dutch ship would not be considered piracy if the defendant were a French citizen (since France and the Netherlands were at war), but would be considered piracy if the defendant were a U.S. citizen (since the United States was not at war with the Netherlands). There was no dispute that the defendant once was a U.S. citizen, and the question was whether he had become a French citizen. This Court's application of U.S. law to decide that question was not a matter of remedy.

Tel-Oren, 726 F.2d at 778, to encompass who may be liable; rather, Judge Edwards recognized that it is "treaties or the law of nations," *id.* at 778 n.2, that make "obligations binding *on parties*," *ibid.* (emphasis added).[9] And, in the primary actor vs. secondary actor context, despite a "remedies" argument similar to the Petitioners' and United States' here, see *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (Hall, J., concurring), the majority of

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[9] To be sure, nations are free to enact norms of responsibility *as a matter of domestic law* that are broader than norms recognized by the law of nations. See Pet. Br. 49 & n.43 (*some* nations have gone further than the Rome Statute, discussed *infra*, at 33-36, in enacting "domestic statutes imposing corporate criminal liability"); U.S. Br. 29-30 (similar). But the ATS is not such a statute; rather, Congress created federal jurisdiction for "tort[s] … committed in violation of the law of nations," 28 U.S.C. § 1350, thus taking international law as Congress found it, not going beyond international law. Although the text of the ATS may "not distinguish among classes of defendants," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), the "law of nations" incorporated by the ATS does make such distinctions.

Petitioners in *Mohamad* v. *Palestinian Authority*, No. 11-88, cite authorities that purportedly "hol[d] organizations civilly liable under domestic laws that track the law of nations" (Br. 16 n.4). But these authorities either involved violations of domestic laws with no reference to "track[ing] the law of nations," see *The Case of Thomas Skinner, Merchant* v. *The East-India Co.* (1666) 6 State Trials 710, 711 (H.L.) (English tort law concerning assault and seizure of property); *Guerrero* v. *Monterrico Metals PLC*, [2010] EWHC 3228 (QB) (English tort law), *Association Canadienne contre l'Impunité* v. *Anvil Mining Ltd.*, 2011 (Superior Court of Quebec) 500-06-000530-101 (laws of Democratic Republic of Congo), suits against States/quasi-States rather than corporations, *e.g.*, S.C. Res. 1333, ¶ 5, U.N. Doc. S/RES/1333 (Dec. 19, 2000), or norms distinct from those here, see *infra*, at 25-26.

the courts of appeals has held that international law controls that issue in the first instance.

Conflict-of-laws principles—also known as "Private International Law," PETER HAY *ET AL.*, CONFLICT OF LAWS § 1.1 (5th ed. 2010) ("HAY")—likewise recognize that "who may be liable" is a substantive question that is usually governed by the law of the place of conduct/injury, not the law of the forum. Indeed, they do so in the specific context of whether a principal is derivatively liable for its agent's conduct. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 174 (1971) ("The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person."); 173 (same for contribution and indemnity); 145 (pointing to law of jurisdiction(s) where injury and conduct causing injury occurred, where parties are domiciled, and where relationship of parties is centered).[10] The Restatement (Second) elsewhere reconciles this substantive characterization of the "who may be liable" question with the principle that procedural issues are typically governed by forum law. See, *e.g.*, *id.* § 125 cmt. a ("the local law of the forum will not be applied to permit a person against whom contribution is sought to be joined in the action as a third party defendant *if he would not be liable for*

[10] Here, none of those contacts points to the United States; rather, they point predominantly to Nigeria. J.A. 41-89. This is not to suggest that Nigerian law applies here; rather, the ATS selects the "law of nations." But choice-of-law principles are relevant in that they treat "who may be liable" as a substantive rather than remedial issue, and thus undermine Petitioners' and the United States' approach here.

contribution under the law selected by application of the rule of § 173") (emphasis added).[11]

A final aspect of the *Sosa* framework is that the international law inquiry must be conducted on a norm-by-norm basis. See *Sosa*, 542 U.S. at 732 n.20 (inquiry is "whether international law extends the scope of liability for a violation of a *given* norm to the perpetrator being sued") (emphasis added); *Sarei*, 2011 WL 5041927, at *7 ("The proper inquiry … should consider separately each violation of international law alleged ….").[12] Contrary to the United States' argument, the court of appeals did not

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[11] Foreign nations' conflict-of-laws principles are in accord with the Restatement (Second). See, *e.g.*, Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), art. 4, 2007 O.J. (L 199/40) ("Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs …."); *id.* art. 15 ("The law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; … (g) liability for the acts of another person …."); Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, §§ 9, 11 (U.K.) (similar). The glancing reference in WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 69 at 500 (5th ed. 1984) (cited at Pet. Br. 26-27), to loss allocation was not in the context of a conflict-of-laws analysis and in any event would point not to the law of the forum, but to the law of the parties' domicile(s). See HAY § 17.36 at 875-77.

[12] To illustrate the degree of specificity required, *Sosa* cited, 542 U.S. at 732, *United States* v. *Smith*, 5 Wheat. 153 (1820), where the Court surveyed more than 35 sources and found them unanimous before finding that piracy was sufficiently defined, *Smith*, 5 Wheat. at 163-80 n.h.

"examin[e] the question of corporate liability in the abstract" (U.S. Br. 21). The majority below framed the question as whether "the customary international law *of human rights* has … to date recognized liability for corporations that violate its norms." Pet. App. A26 (emphasis added). See also, *e.g.*, *id.* at A63 ("there is nothing to demonstrate that corporate liability has yet been recognized as a norm of the customary international law *of human rights*") (emphasis added); *id.* at A57 (acknowledging that specialized treaties outside the human-rights context recognize a norm of corporate liability).

Given *Sosa*'s norm-by-norm approach, Petitioners and their *amici* err in their attempt to piece together elements of different international-law norms into a pastiche of corporate responsibility/liability. They would rely on supposed norms of corporate responsibility for piracy (Pet. Br. 28-34, Yale Br. 34-38), expropriation of property (U.S. Br. 25 (citing 26 Op. Att'y Gen. 250, 251 (1907)), genocide (Yale Br. 7-11), war crimes (*id.* at 25-29), slavery (*id.* at 29-34), and, "[m]ore generally, the proposition that corporations are deemed persons for civil purposes, and can be held civilly liable" (U.S. Br. 25 (internal quotation marks omitted)). But Petitioners have not sued for such norms or torts;[13] they have alleged instead three

[13] Even accepting *arguendo* that an element of the international law of piracy may be imported into the proposed human-rights norms at issue here, that law did not recognize *corporate* liability. Rather, it provided that the *ship and its cargo* could be seized *in rem* as a result of the offense. As Petitioners concede, "liability for damages … was limited to the value of the ship and its cargo" and did not extend to the owner's other assets (Pet. Br. 28 n.20) (citing *The Rebecca*, 20 F. Cas. 373, 378-79 (D. Me. 1831)). See also, *e.g.*, Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in Inter-*

specific human-rights offenses that were not recognized as violations of the law of nations as of 1789: aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture.[14] *Sosa* left the door open to recognition of new norms, but did not suggest that plaintiffs could piece together elements of pre-1789 norms with elements of post-1789 norms to establish responsibility under international law, particularly where the post-1789 sources do not adequately support corporate responsibility for Petitioners' proposed norms.

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national Criminal Law: What Nuremberg Really Said, 109 Colum. L. Rev. 1094, 1154 (2009) (among U.S. prosecutors in Nuremberg, "[t]here was discussion of 'enemy character' in the context of when private assets, ships, and cargoes, some of them corporately owned, could be seized in wartime. But neither of these discussions addressed the question of corporate amenability to prosecution aside from in rem proceedings ...."). In other words, liability extended to "Pirate Ship," not "Pirate Inc." *Sosa's* norm-by-norm approach also refutes the attempt by *Amici Curiae* Professors Of Legal History (Br. 11-34) to draw a general principle of corporate liability from the law as it stood in 1789, when the offenses at issue here were indisputably not yet recognized even against States or natural persons.

[14] Arguably, aiding and abetting extrajudicial killing is a fourth proposed norm in this case. See Pet. Br. i. The district court rejected it on a ground unrelated to the corporate-liability issue, Pet. App. B15, and the Second Circuit did not address it separately from the three proposed norms that survived dismissal. As shown *infra*, Point II.A.2, international-law sources reject corporate responsibility for aiding and abetting extrajudicial killing.

2. International Law Does Not Prescribe A Specific And Universal Norm Of Corporate Responsibility For The Offenses Alleged Here

Sosa enumerated several sources of international law as ones this Court has "long, albeit cautiously, recognized," 542 U.S. at 733:

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Id. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (alteration in original).[15] Contrary to

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[15] The *Sosa* inquiry is positive ("what the law really is") rather than normative ("what the law ought to be"), but various policy concerns help explain international law's hesitancy to impose liability on corporations (rather than natural persons) for violations of human rights. See, *e.g.*, Bush, 109 Colum. L. Rev. at 1120-22 (prosecution of corporations was disfavored at Nuremberg because of collateral effects on innocent persons); Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 Am. L. & Econ. Rev. 72, 81-82 (2007) (vicarious corporate liability is less beneficial where, *inter alia*, there are "act[s] by employees that the employer cannot observe or verify (perhaps because the employee operates in a remote location)" and "vicarious liability may lead to greater litigation costs"); *Malesko*, 534 U.S. at 71 ("if a corporate defendant is available for suit, claimants will

the United States' incorrect suggestion that the burden is Respondents', see U.S. Br. 20 ("[T]he United States is not aware of any international-law norm … that requires, or necessarily contemplates, a distinction between natural and juridical actors."), the burden of identifying a proposed norm from these sources rests with Petitioners, *Sosa*, 542 U.S. at 737 (proponent "fail[ed] to marshal support for his proposed rule").

The relevant international-law sources here all decline to deem corporations responsible for the specific human-rights violations Petitioners have alleged. Any doubt about corporate responsibility arising from these and other sources must be resolved against ATS coverage because Petitioners bear the burden of establishing that a specific and universal international norm extending to corporations exists.

a. The Convention Against Torture, As Interpreted By Congress In The TVPA

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[16] is the key international-law source on one of the three alleged human-rights norms at issue here (*i.e.*, torture), see art. 1,[17] and it contemplates *civil* as

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focus their collection efforts on it, and not the individual directly responsible for the alleged injury").

[16] Adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

[17] To the extent aiding and abetting extrajudicial killing is properly considered a fourth proposed norm in this case, see *supra*, at 26 n.14, it is also covered by the TVPA (which addressed torture in implementing the CAT and extrajudicial killing in

well as criminal liability, *id.* art. 14(1).[18] Moreover, because the CAT was implemented by the U.S. Congress in the TVPA, see S. Rep. No. 102-249, 102d Cong., 1st Sess. 3 (Nov. 26, 1991) ("This legislation will carry out the intent of the Convention Against Torture …."); 28 U.S.C. § 1350 note, preamble (similar), the TVPA represents the single most instructive data point for a federal court applying the *Sosa* framework. See *Sosa*, 542 U.S. at 727 (noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases") (citing, *inter alia*, *Malesko*, 534 U.S. at 68).

As an initial matter, the CAT does not expressly mention corporate responsibility or liability for torture, and its command to take a perpetrator "into custody" and reference to the perpetrator as "him" rather than "it" strongly suggests that only natural persons are contemplated. See CAT, art. 6 ("Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence.").

But however one might construe the CAT on a clean slate, Congress, according to several courts of

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implementing common article 3 of the Geneva Conventions). See 28 U.S.C. § 1350 note, § 2(a)(2).

[18] Petitioners' *amici* assert that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights support corporate liability for torture and extrajudicial killing (Yale Br. 16-21). *Sosa* rejected those sources because they do not impose obligations. 542 U.S. at 734-35.

appeals,[19] and as Respondents respectfully submit this Court should hold in *Mohamad* v. *Palestinian Authority*, No. 11-88, has implemented it in the TVPA to apply only to "individuals" (*i.e.*, natural persons), not corporations. See 28 U.S.C. § 1350 note, § 2(a)(1) ("An individual who … subjects an individual to torture shall, in a civil action, be liable ….") As Judge Kavanaugh explained, "*Sosa* told courts in ATS cases to look to Congress for guidance, and Congress has specifically delineated what limits should attach to civil suits for torture …. Consistent with that direction in *Sosa*, we should follow the TVPA when fashioning the contours of the famously vague ATS." *Doe VIII*, 654 F.3d at 87 (dissent). It would be incongruous to allow an alien to sue a corporation under the ATS while a U.S. citizen is barred from suing the same corporation for torture under the TVPA. See *id*. at 88.

Petitioners do not address the TVPA, and the United States' responses are unpersuasive. *First*, the United States argues that, "[i]f the Court concludes [in *Mohamad*] that acts of torture … can be brought under the TVPA only against natural persons, that would not support a categorical rejection of corporate liability under the ATS" (U.S. Br. 27 n.16). But Respondents do not argue for a "categorical rejection," only for viewing the TVPA as the most persuasive data point on whether there is corporate responsibility for one of the proposed norms at issue here (torture, and potentially also extrajudicial killing,

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[19] See *Mohamad* v. *Rajoub*, 634 F.3d 604, 607-08 (D.C. Cir. 2011), cert. granted sub nom. *Mohamad* v. *Palestinian Authority*, No. 11-88; *Aziz*, 658 F.3d at 392; *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116, 1126-27 (9th Cir. 2010). But see *Sinaltrainal*, 578 F.3d at 1264 n.13.

see, *supra*, at 26 n.14, 28-29 n.17). *Second*, the United States argues that the ATS, unlike the TVPA, is "silent as to the identity of the defendant" (U.S. Br. 27 n.16). But the ATS incorporates "the law of nations," and the TVPA is Congress's interpretation of the law of nations vis-à-vis torture (and extrajudicial killing). *Third*, that the TVPA restricts the scope of liability to individuals who commit torture (and extrajudicial killing) *under color of law* (U.S. Br. 27 n.16) does not distinguish the ATS, since again the ATS incorporates "the law of nations," which recognizes a norm of torture only when committed under color of law, *Sosa*, 542 U.S. at 732 n.20.[20]

b. International Criminal Tribunals

Several international criminal tribunals, from the post-World War II Nuremberg tribunals through the International Criminal Court, have either expressly or in practice been limited to prosecution of natural persons rather than corporations. If these unique and historic tribunals, created to address the most heinous human-rights crimes of the past 70 years, could not pursue corporations, it is fair to assume that the human-rights norms themselves do not extend to corporations (especially when each of the organic statutes endeavors to define norms as well as to set the tribunals' jurisdiction).

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[20] This "TVPA as data point" argument is not precluded by this Court's denial of Respondents' "conditional cross-petition for certiorari presenting the question whether the TVPA has 'displaced' certain claims brought under the ATS" (U.S. Br. 13 n.6). Whereas a displacement argument would foreclose the ATS's incorporation of any future extension of international-law norms against torture to corporations, the data-point argument does not.

Nor does the criminal (rather than civil) focus of these tribunals undermine their relevance to discerning an international-law norm. As Justice Breyer recognized in *Sosa*, the criminal and civil spheres are not as separate internationally as in the United States. See 542 U.S. at 762-63 (opinion concurring in part and concurring in the judgment) ("the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself").[21] Thus, several courts of appeals have relied on criminal tribunals and/or their organic statutes to determine the elements of aiding/abetting liability in civil ATS suits. See, *e.g.*, *Aziz*, 658 F.3d at 399-400 (relying on Rome Statute of the International Criminal Court to determine elements of aiding/abetting liability in civil ATS suit); *Talisman*, 582 F.3d at 258-59 (relying on international criminal tribunals); *Doe VIII*, 654 F.3d at 31-32 (same). Indeed, *Sosa* observed that there is arguably greater need for restraint in the civil than criminal realm because a civil suit "permit[s] enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 727.

International Criminal Tribunal for the Former Yugoslavia. The United Nations created this tribunal in 1993 "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." ICTY Statute, art. 1. Because these violations encompass, *inter alia*,

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[21] Particularly in the context of corporate defendants, which cannot be incarcerated, "the distinction between 'civil' and 'criminal' penalties for corporations … is a meaningless one." Posner & Sykes, 9 Am. L. & Econ. Rev. at 96.

"imprisonment," *id.* art. 5(e), "[c]rimes against humanity," *id.* art. 5, and "torture," *id.* arts. 2(b), 5(f), they include the same three norms alleged by Petitioners here as against Respondent corporations (*i.e.*, arbitrary arrest and detention, crimes against humanity, and torture).

The ICTY Statute explicitly limits the tribunal's jurisdiction to "natural persons," *id.* art. 6 ("The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."), and thus excludes corporations. Accord Yale Br. 5.[22]

International Criminal Tribunal for Rwanda. The United Nations created this tribunal in 1994 to perform a function similar to that of the ICTY Tribunal, but in respect to violations committed in Rwanda and neighboring States between January 1, 1994, and December 31, 1994. ICTR Statute, art. 1. Like the ICTY Statute, the ICTR Statute encompasses the three norms proposed by Petitioners here, see ICTR Statute arts. 3(e) ("imprisonment"), 3 ("crimes against humanity"), 3(f) ("torture"), and limits the tribunal's jurisdiction to "natural persons," *id.* art. 5.

International Criminal Court. The 1998 Rome Statute of the International Criminal Court ("ICC") created the ICC "to exercise its jurisdiction over

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[22] Although the tribunal, recounting the prosecutor's argument, has referred to crimes being committed "by a terrorist group or organization," *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 654 (ICTY May 7, 1997), it did so in the context of a prosecution against an individual, and thus did not suggest the existence of an international human-rights norm enforceable against a corporation.

persons for the most serious crimes of international concern." Rome Statute of the International Criminal Court, art. 1, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) ("Rome Statute"). Like the ICTY and ICTR Statutes, the Rome Statute encompasses the norms proposed by Petitioners here. See Rome Statute, arts. 5(1)(b) ("[c]rimes against humanity"); 7(1)(f), (i) (defining "crimes against humanity" to include "torture" and "[e]nforced disappearance of persons," which in turn encompasses arbitrary arrest and detention).

Like the ICTY and ICTR Statutes, the Rome Statute limits the ICC's jurisdiction to "natural persons," Rome Statute, art. 25(1), and thus excludes corporations. "[T]here can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates—at least for its own jurisdiction—the punishability of corporations and other legal entities." Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 778 (Antonio Cassese, *et al.*, eds., 2002) ("Eser").[23]

Petitioners (Br. 49 & n.44) and the United States (Br. 29) unpersuasively attempt to discount the Rome Statute's exclusion of corporations as resulting from a concern of complementarity: the ICC's jurisdiction should align with that of national tribunals because the ICC exists as a court of last resort, see Rome Statute arts. 1, 17, and many nations' domestic laws did not then recognize corporate criminal liability.

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[23] In the negotiations leading up to the Rome Statute, criminal corporate liability was explicitly proposed by the French delegation and rejected. Eser at 778-79.

First, while complementarity may have been one rationale for the Rome Statute's exclusion of corporations, it was not the only one. See Eser at 779 ("it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities" and "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves") (internal quotation marks omitted).

Second, accepting *arguendo* Petitioners' and the United States' submission that all nations' domestic laws impose *civil* liability on corporations, there would have been no complementarity obstacle to including in the Rome Statute a provision for civil (not criminal) responsibility for corporations; indeed, according to the U.S. negotiator at Rome, such a provision was discussed (albeit not thoroughly), but not enacted. See Brief Of Ambassador David J. Scheffer As *Amicus Curiae* In Support Of Petitioners 18 n.6 ("Scheffer Br.") ("'Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed.'") (quoting United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* 31 n.71, U.N. Doc. A/CONF.183/13 (Vol. III)).

Third, even if complementarity was the sole driver of the Rome Statute's exclusion of corporations, it does not explain the ICTY or ICTR Statutes' earlier exclusion of corporations. These statutes, unlike the Rome Statute, did not create a regime of complemen-

tarity, but rather of primacy of the international tribunal over national tribunals. Compare Rome Statute, art. 17, with ICTY Statute, art. 9; ICTR Statute, art. 8. See, *e.g.*, Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 Int'l Lawyer 65, 80 (2000).[24] Accordingly, any absence of corporate criminal liability in nations' domestic laws posed no obstacle to the ICTY's or ICTR's prosecution of corporations. Nonetheless, those tribunals were not allowed to do so.[25]

Nuremberg Tribunals. The Nuremberg trials, from which all the later tribunals sprang, bear upon all three of Petitioners' proposed norms here, for they encompassed, *inter alia*, "crimes against humanity," Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 280 ("London Charter"), a term that the Allies shortly thereafter clarified to include "torture" and "imprisonment," Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, art. II(1)(c) (Dec. 20, 1945) ("Control Council Law No. 10"). The trials proceeded in two stages: (1) a trial conducted by the

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[24] The rationale for this different approach in the ICTY and ICTR Statutes was that the national courts in the relevant areas could not be trusted to prosecute offenders. See, *e.g.*, Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 Ariz. St. L.J. 427, 429-30 (2011); *Prosecutor* v. *Tadic*, Case No. IT-941-1-AR72, Jurisdiction Appeal ¶ 58 (ICTY Oct. 2, 1995).

[25] Additionally, neither the ICTY nor the ICTR Statute contains a provision akin to Rome Statute, art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.") (cited at U.S. Br. 28).

four-nation International Military Tribunal ("IMT") (1945-46); and (2) trials conducted by separate tribunals of the U.S. and other Allies pursuant to Control Council Law No. 10 (1946-49). See Brief *Amici Curiae* Of Nuremberg Historians And International Lawyers In Support of Neither Party 7; ("Nuremberg Historians Br."); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1102 (2009).

The IMT trial did not charge any corporations with human-rights violations under international law, and indeed "corporate criminal liability appears not to have been discussed." Nuremberg Historians Br. 7-8. See also *id.* at 14 (International Tribunal for the Far East likewise did not charge corporations). Moreover, only one natural person in the private business sector (as opposed to the Nazi regime), Gustav Krupp, was indicted (and later ruled physically unfit to stand trial). *Id.* at 7.[26]

The second round of trials was less in the nature of "international law" than was the IMT trial because the United States' planning, while authorized by Control Council Law No. 10, did not involve regular input or consensus from the other Allies. See Bush, 109 Colum. L. Rev. at 1102. During this planning, a single U.S. official proposed charging corporations, but the proposal was not adopted and thus does not

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[26] Whether the IMT's statement that "'[c]rimes against international law are committed by men, not by abstract entities'" (U.S. Br. 30 n.18 (quoting Pet. App. A12, A50)), *negates* corporate liability for human-rights violations is hardly dispositive. The inquiry under *Sosa* is whether this and other sources affirmatively *establish* corporate liability for the offenses alleged by Petitioners.

affirmatively support an inference of a norm of corporate liability for the offenses later charged by the U.S. tribunal. See *id.* at 10-11; *id.* at 14 (other Allies also did not charge corporations); *id.* at 15 (nor did later German authorities). See also Bush, 109 Colum. L. Rev. at 1120-22 (reasons for not prosecuting corporations included that such prosecutions would have collateral effects on innocent persons). The panel in one of the trials, despite its *dicta* on the notion of guilt for "private individuals, including juristic persons," *United States* v. *Krauch*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1132 (1948) (cited at Pet. Br. 50 n.45), reaffirmed that "the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings," *id.* at 1153.

Petitioners mistakenly rely (Br. 51 & n.46) on the dissolution of I.G. Farben and other companies to infer a norm of corporate liability for crimes against humanity.[27] The dissolution of I.G. Farben, mandated by Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), was a political rather than legal judgment, based on the perceived danger of keeping intact a company that had been uniquely involved with the Nazi war effort; and the determination lacked hearings, fact finding,

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[27] The Brief Of *Amici Curiae* Nuremberg Scholars In Support Of Petitioners (at 16) erroneously relies on the London Charter's provision for charges against "organizations" to infer a norm of corporate liability. Among other flaws in their account, "organizations" did not encompass business entities, but only government agencies and security and party formations. See Nuremberg Historians Br. 18-22.

or other legal proceedings. See Nuremberg Historians Br. 34 ("[I.G. Farben's] complicity with crimes against humanity or Auschwitz slave labor or poison gas was only being pieced together in November 1945" when Law No. 9 was adopted.).[28]

c. Jurists And Commentators

Jurists and commentators confirm that, when it comes to corporate responsibility for international human-rights norms, the law of nations has not yet developed a "norm of international character accepted by the civilized world." *Sosa*, 542 U.S. at 725. For example, the Special Representative of the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises recently reported that, "[i]n conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations." Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 44, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007). See also *ibid.* ("States have been unwilling to adopt binding international human rights standards for corporations").[29]

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[28] Decrees against business entities besides I.G. Farben similarly reasoned that they "were responsible for having been dangerous and for potentially posing future political and military threats, not for violating legal norms or committing crimes." Nuremberg Historians Br. 31.

[29] Although the U.N. High Commissioner for Human Rights disagrees in her *amicus* brief (*e.g.*, at 2) in support of Petitioners, the High Commissioner's role is more in the nature of

Similarly, the International Commission of Jurists ("ICJ") recently "recognized that there is a debate concerning whether corporations may be liable directly under customary international law for violations of [human] rights." ICJ, ACCESS TO JUSTICE: HUMAN RIGHTS ABUSES INVOLVING CORPORATIONS 3 n.7 (2010), http://www.icj.org/dwn/database/SouthAfrica-AccesstoJustice-2010.pdf. See also, *e.g.*, *ibid.* (describing "controversy as to the existence of liability for corporations under international law"); MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 196 (2009) ("[D]espite trends to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law, individuals, but not [transnational corporations], is still the prevailing one among international law scholars."); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 451 (2001) ("I consider whether and how the international legal process *might provide* for human rights obligations directly on corporations. My thesis is that international law *should* and can provide for such obligations ….") (emphasis added).[30]

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advocacy than interpreting or codifying international law. See, *e.g.*, Office of the High Commissioner for Human Rights, What We Do, http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx ("We provide a forum for identifying, highlighting and developing responses to today's human rights challenges, and act as the principal focal point of human rights research, education, public information, and advocacy activities in the United Nations system.").

[30] Although some commentators may disagree and think that the debate has already been resolved, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 379 (2d rev. ed. 1999) (cited at U.S. Br. 31), such lack of

d. "General Principles"

Petitioners, but not the United States, argue that "general principles of law common to all legal systems" (Pet. Br. 43) recognize civil liability of corporations, and that these general principles *are* international law. This argument departs from *Sosa*'s norm-by-norm approach and should be rejected.

First, general principles are at best a "secondary source of international law, resorted to for developing international law interstitially in special circumstances." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. l (1987).[31] See also, *e.g.*, Ratner, 111 Yale L.J. at 451 ("[D]omestic legal principles matter only to the extent they are shared by many different legal systems and, even then, are subsidiary to treaties and customary law."); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (because international law concerns dealings of states "*inter se*," "[w]e cannot subscribe to the view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations" simply because "every civilized nation doubtless has this as a part of its legal system") (some internal quotation marks omitted). Here, as shown above, numerous primary sources of international law speak to the question of corporate responsibility for the human-rights offenses at issue here and reject it. General principles do not trump those sources, especially under *Sosa*'s demanding standard.

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consensus itself proves that *Sosa*'s standard of "accept[ance] by the civilized world," 542 U.S. at 725, has not been met.

[31] Petitioners rely (Br. 45 n.38) on Restatement (Third) § 102, but ignore its comment l.

Second, even if general principles had primary status, Petitioners characterize the general principle here at too "high [a] level of generality." *Sosa*, 542 U.S. at 736 n.27. According to Petitioners, the general principle is "civil liability on corporations for torts committed by their agents" (Pet. Br. 45). But one need look no further than *Malesko*, 534 U.S. 61, to see that this principle does not hold for *all* torts. There, this Court held that the *Bivens* action for *federal constitutional torts* should not "be extended to allow recovery against a private corporation." *Malesko*, 534 U.S. at 63.[32] As discussed in more detail in Point II.B.1 below, federal constitutional torts are a closer analogy than ordinary torts to the international-law torts proposed by Petitioners here. Accordingly, general principles do not satisfy Petitioners' burden under *Sosa*.[33]

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[32] Similar examples of crime-by-crime (if not tort-by-tort) distinctions for corporate liability exist in the laws of other nations. See Scheffer Br. 19 ("Austria, Luxembourg, Spain and Switzerland have recently introduced forms of corporate criminal liability, *although not necessarily in the context of atrocity crimes*.") (emphasis added).

[33] *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (cited at Pet. Br. 46), and *Barcelona Traction, Light and Power Co. (Belg.* v. *Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5) (cited at Pet Br. 46 n.40), are inapposite. *First National* did not involve human-rights (or similar) violations or other international-law sources that contradicted the rule sought to be drawn from general principles, and the Court ended up disregarding the corporate form, which hardly supports an international-law norm of treating corporations as subjects of international law. *Barcelona Traction* likewise did not involve human-rights violations or claims against a corporation.

B. Even If International Law Recognized Corporate Responsibility For The Offenses Alleged Here, Federal Common Law Should Not Afford A Cause Of Action

Even if a plaintiff satisfies his burden at *Sosa*'s first step, he has raised only "the possibility of a private cause of action." *Sosa*, 542 U.S. at 738 n.30. At the second step, a cause of action will be afforded only after the federal court exercises its "judgment about the practical consequences of making that cause available to litigants in the federal courts," *id.* at 732-33. The second step involves consideration of other federal common law precedent as well as "the practical consequences of making [the] cause [of action] available to litigants in the federal courts." *Ibid.* Petitioners cannot carry their burden at the second step here.

1. Federal Common Law Precedent Counsels Against Extending Liability To Corporations Here

This Court has already rejected corporate liability for federal constitutional torts in exercising its common lawmaking authority in one of the "limited enclaves," *Sosa*, 542 U.S. at 729, of the federal common law authority referenced in *Sosa*. There is no basis for a more lenient approach to Petitioners' alleged international-law violations here.

In *Malesko*, this Court addressed "whether the implied damages action first recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), should be extended to allow recovery against a private corporation operating a halfway house

under contract with the Bureau of Prisons." *Malesko*, 534 U.S. at 63. The respondent, like Petitioners here (Br. 21, 26), argued, *inter alia*, that a cause of action against the corporation should be afforded because "[c]ommon law courts have long recognized the significance of an employer's ability to control its employees; it is one of the underpinnings of the *respondeat superior* doctrine." Brief Of Respondent 31, *Malesko* (No. 00-860). Applying a "'cautiou[s]'" approach, *Malesko*, 534 U.S. at 69 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)), similar to that adopted in *Sosa*, 542 U.S. at 725, this Court disagreed, *Malesko*, 534 U.S. at 74.

Just as federal common lawmaking authority under *Bivens* exists under a jurisdictional provision and without an express congressional grant of a cause of action, *Malesko*, 534 U.S. at 66 ("Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'") (quoting 28 U.S.C. § 1331), so too does federal common lawmaking authority under *Sosa*, 542 U.S. at 724 (referencing the ATS).[34] It would be incongruous to use federal common lawmaking authority to allow an alien to sue a corporation for torts in violation of the law of nations, while refraining from using that authority to enable a U.S. citizen to sue the same corporation for torts in violation of the federal Constitution.

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[34] In this respect, the D.C. Circuit majority in *Doe VIII* erred in saying that federal common lawmaking has a stronger basis under the ATS than it does in the *Bivens* context. *Doe VIII*, 654 F.3d at 55. In both contexts, the only statutory basis is a jurisdictional provision.

Indeed, the approach to torts in violation of the law of nations should be stricter, insofar as such torts are more likely than federal constitutional torts to "raise risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728. As *Sosa* explained, "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727. See also *ibid.* (citing *Malesko*, 534 U.S. at 68, in support of the proposition that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases").

2. "Practical Consequences" Counsel Against Allowing Suits Against Corporations Here

In addition to *Malesko*, the "practical consequences," *Sosa*, 542 U.S. at 732, of allowing a private cause of action against corporations for alleged violations of the norms at issue here also weigh strongly against doing so.[35] Even a meritless ATS suit against a corporation can take years to resolve, see, *e.g.*, J.A. 1 (Petitioners filed this case in 2002); *Doe VIII*, 654 F.3d at 40 ("complaint was filed more than a decade ago"), provide a platform for plaintiffs or their proxies to engage in aggressive public-relations campaigns against the corporation, see Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally:*

[35] Contrary to Petitioners' argument (Br. 57-58), federal courts must consider the "practical consequences," *Sosa*, 542 U.S. at 732, of affording a cause of action.

Trends and Out-of-Court Tactics in Transnational Tort Actions, 29 Berkeley J. Int'l L. 456, 515-16 (2011) (describing "Killer Coke Campaign," which promotes action against The Coca-Cola Company based on allegations regarding conduct in Colombia), and involve "invasive discovery that … could coerce settlements that have no relation to the prospect of success on the ultimate merits," Pet. App. D9 (Jacobs, C.J., concurring in denial of panel rehearing).

These costs have further consequences. Corporations may reduce their operations in the less-developed countries from which ATS suits tend to arise, see U.S. *Ntsebeza* Br. 6 (ATS suits "undermine efforts to encourage foreign investment"); *id.* at 20-21 (similar), to the detriment of citizens of those countries who benefit from such operations in the form of employment and higher income, see, *e.g.*, *Flomo* v. *Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1023 (7th Cir. 2011) (jobs at Firestone's rubber plantation in Liberia "are well paid by Liberian standards"). Additionally, non-U.S. corporations, such as Respondents here, may be reluctant to have a presence in the United States for fear of subjecting themselves to the personal jurisdiction of a U.S. court in an ATS suit regarding acts having no connection whatsoever to the United States. See Brief For The United States As *Amicus Curiae* 21, *Talisman Energy Inc.* v. *Republic of the Sudan*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016). And those non-U.S. corporations that avoid a U.S. presence will have a comparative advantage over U.S. corporations in operating in less-developed countries without the specter of an ATS suit. See Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. Legal Stud. 339, 372 (2008).

These consequences for corporations may in turn offend foreign governments whose judicial authority over conduct within their territories is usurped by a U.S. court. See, *e.g.*, J.A. 128-31; President Thabo Mbeki, Response to 15 National Assembly Question Paper (Nov. 8, 2007) (describing the *Khulumani* decision as a form of "judicial imperialism").[36]

At the same time, denying plaintiffs an ATS/federal common law action *against corporations* for the alleged human-rights offenses at issue here does not foreclose other actions, including ATS suits against the natural persons who committed the offenses, and suits against corporations under relevant domestic law[37] in federal court if federal jurisdiction exists on some non-ATS ground such as alienage jurisdiction.[38]

Moreover, faithful application of *Sosa*'s framework does not condemn forever Petitioners' proposal that corporations be held responsible for the alleged offenses at issue here: International law may, as some commentators have suggested it should, develop toward recognizing corporate responsibility for these offenses in the future. Nor does it foreclose corporate responsibility under international law for offenses not at issue here—such as financing of terrorism, where an international convention expressly recog-

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[36] The United States, which devoted substantial attention to such concerns in its *Ntsebeza* brief (at 2, 3, 19-21) as reasons for a narrow exercise of federal common lawmaking power in this area, does not even mention them here.

[37] Such law will usually be the law of the place where the conduct/injury occurred. See *supra*, at 23-24 & n.11.

[38] Such suits, however, remain subject to dismissal on other grounds, including *forum non conveniens*.

nizes corporate responsibility. Finally, while the ATS takes international law as it finds it, Congress and the President, the principal arbiters of the Nation's foreign policy, are free *as a matter of domestic law* to enact a new statute that goes beyond what international law currently provides.

III. THE JUDGMENT MAY BE AFFIRMED ON EITHER OF TWO ALTERNATIVE GROUNDS

Even if the ATS provides jurisdiction, and federal common law provides a cause of action, for claims against corporations as primary violators of the norms alleged here, this Court should affirm the court of appeals' judgment on either of two alternative grounds. The ATS does not apply (a) against corporations as aiders/abettors of such violations, at least without a plausible allegation that the corporation had a purpose to facilitate the primary violation, or (b) where the alleged misconduct occurred within a foreign nation rather than within the United States or on the high seas.

This Court regularly addresses such alternative grounds for affirmance. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989) (a prevailing party may "of course" defend the court of appeals' judgment on any ground properly raised below, "provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below"); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (respondent may advance such a ground even if not decided by the lower courts). The case to do so is especially strong when,

as here, the alternative grounds are jurisdictional and have been developed in the courts of appeals.[39]

A. Aiding And Abetting Liability Is Not Available

Under *Sosa*, aiding and abetting liability is not available here and indeed is not available in *any* case. At *Sosa*'s first step, international law forecloses aiding/abetting liability absent a purpose to facilitate the primary actors' alleged human-rights violations, which was not adequately pleaded here. Pet. App. A169 (Leval, J., concurring). At *Sosa*'s second step, federal common law should not recognize a private right of action for aiding and abetting a foreign state's violation of international law. See U.S. *Ntsebeza* Br. 18.

This alternative ground for affirmance is fairly included within Question Presented 2, for, *in the context of Petitioners' complaint*, the "violations of the law of nations" (Pet. Br. i) concerned Respondents' alleged aiding and abetting the Nigerian military's alleged crimes, not any conduct by Respondents as primary actors, see, *e.g.*, J.A. 44. But even if not fairly included within Question Presented 2, the aiding/abetting issue may be raised by Respondents because they preserved the point below, see *supra*, at 5-6, and it furnished an alternative ground for judgment, see Pet. App. A169 (Leval, J., concurring).

Moreover, judicial economy favors this Court addressing the issue now, since it has already spawned a circuit split, compare *Aziz*, 658 F.3d at 401 (affirming dismissal of complaint for failure to

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[39] Respondents raised both arguments in their Brief In Opposition. See Br. In Opp. 31-32.

allege purpose); *Talisman*, 582 F.3d at 259 (same), with *Doe VIII*, 654 F.3d at 39 (adopting knowledge standard and ruling that complaint should be sustained), and is raised in a petition for certiorari, *Rio Tinto*, No. 11-649 (filed Nov. 23, 2011) at i, that is pending before the Court. See *Carlson* v. *Green*, 446 U.S. 13, 17 n.2 (1980) (considering issue in similar circumstances to serve "the interests of judicial administration").

Under *Sosa*'s first step, the only universally accepted and well-defined norm of aiding/abetting liability to be found in international law requires that the alleged aider/abettor acted with purpose of facilitating the violation (rather than mere knowledge). As the Fourth Circuit and the Second Circuit have correctly held, see *Aziz*, 658 F.3d at 399-400; *Talisman*, 582 F.3d at 259, the Rome Statute, which requires purpose, Rome Statute, art. 25, is the most instructive source on this topic.[40] To be sure, certain decisions by the ICTY and ICTR have adopted a knowledge standard in applying their organic statutes. See, *e.g.*, *Prosecutor* v. *Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment ¶ 236 (ICTY Dec. 10, 1998). But, as the Fourth Circuit explained, the Rome Statute is more authoritative because it "'has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world.'" *Aziz*, 658 F.3d at 400 (quoting *Khulumani*, 504 F.3d at 276 (Katzmann, J.,

[40] The Fourth Circuit correctly rejected the D.C. Circuit's suggestion, *Doe VIII*, 654 F.3d at 37-38, that other provisions of the Rome Statute suggest a knowledge standard for aiding and abetting. See *Aziz*, 658 F.3d at 401 n.13 (explaining that the provisions relied upon by the D.C. Circuit concern conspiracy rather than aiding and abetting).

concurring)).[41] Additionally, where two competing international-law standards suggest themselves, *Sosa*'s "high bar," 542 U.S. at 727, requires selecting the stricter of the two, especially when both are being drawn from the criminal context and applied in the context of a civil suit "without the check imposed by prosecutorial discretion," *ibid.*

Applied here, the purpose standard mandates dismissal of Petitioners' complaint. The complaint pleads that Respondents "willfully … aided and abetted … the Nigerian military regime in the joint plan to carry out a deliberate campaign of terror and intimidation through the use of … torture, arbitrary arrest and detention, … [and] crimes against humanity …, all for the purpose of protecting Shell property and enhancing SPDC's ability to explore for and extract oil from areas where Plaintiffs and members of the Class resided." J.A. 56. See also, *e.g.*, *id.* at 43 (Respondents "instigated, planned, facilitated, conspired and cooperated in" the Nigerian military's conduct); *id.* at 62-63 ("[b]ased on past behavior, [Respondents] knew that the means to be used [by the Nigerian military] in that endeavor would include military violence against Ogoni civilians"). These general and conclusory allegations "are legally insufficient to plead a valid claim of aiding and abetting because they do not support a

[41] Even accepting *arguendo* the ICTY and ICTR decisions as more authoritative than the Rome Statute, those decisions do not clearly support a knowledge standard insofar as some addressed the issue only fleetingly, and at least one suggested a purpose standard. See *Khulumani*, 504 F.3d at 278 & n.15 (Katzmann, J., concurring) (discussing *Prosecutor* v. *Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102(i) (ICTY Feb. 25, 2004)).

reasonable inference that [Respondents] provided substantial assistance to the Nigerian government *with a purpose to advance or facilitate* the Nigerian government's violations of the human rights of the Ogoni people." Pet. App. A177 (Leval, J., concurring). Rather, they support at most an inference that Respondents had "*knowledge* that the Nigerian military would engage in human rights abuses." *Id.* at A179-80.

Indeed, at *Sosa*'s second step, no aiding and abetting case of action (even with a showing of purpose to facilitate the primary actor's violation) should be recognized at all. In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court explained that, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182. Accordingly, absent explicit provision in the statute creating a private civil right of action for private parties injured by violations of the securities laws, such private parties could not sue aiders and abettors. *Id.* at 185.

As the United States has explained, *Central Bank* applies *a fortiori* under the *Sosa* framework, given the concern that a "vast expansion of the ATS to reach claims against private parties who are alleged to have aided and abetted a foreign state's violation of international law in its own territory poses serious risks to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy." U.S. *Ntsebeza* Br. 18. Efforts to distinguish *Central Bank* as irrelevant to an inquiry under international law, see, *e.g.*, *Khulu-*

mani, 504 F.3d at 288 n.5 (Hall, J., concurring), misperceive *Sosa*'s two steps. Again, international law is the focus of the first step, but satisfying that step only "raise[s] … the possibility of a private cause of action." *Sosa*, 542 U.S. at 738 n.30. U.S. law considerations, such as precedent (*Malesko* and *Central Bank*) and "practical consequences," *Sosa*, 542 U.S. at 732, come into play at the more demanding second step. Applying *Central Bank* here, Petitioners' complaint, which asserts only aiding/abetting and not primary liability, must be dismissed.

B. The ATS Should Be Construed Not To Apply To Conduct Within A Foreign Nation's Borders

Whether the ATS extends to conduct occurring within a foreign nation's borders is a question of subject-matter jurisdiction. See *Sarei*, 2011 WL 5041927, at *3. Cf. U.S. Br. 9 (arguing that ATS is jurisdictional, apart from element whether the plaintiff has alleged a "violation of the law of nations or a treaty of the United States") (quoting 28 U.S.C. § 1350). Accordingly, this Court can address the issue, even though it was not raised or decided below. See, *e.g.*, *Gonzalez* v. *Thaler*, No. 10-895, slip op. 5-6 (Jan. 10, 2012); *United States* v. *Hays*, 515 U.S. 737, 742 (1995); *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963). Even aside from its jurisdictional character, the issue has spawned disagreement among circuit judges,[42] and is presented by the pending *Rio Tinto* petition.[43]

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[42] Compare *Sarei*, 2011 WL 5041927, at *5 (ATS applies to conduct within foreign country's borders); *Doe VIII*, 654 F.3d at 26 (same); *Flomo*, 643 F.3d at 1025 (same), with *Sarei*, 2011 WL 5041927, at *62 (Kleinfeld, J., joined by Bea and Ikuta, JJ.,

If alternative ground for affirmance is needed, this Court should hold that the ATS does not extend to conduct within a foreign nation's borders and thus does not extend to Petitioners' complaint concerning conduct within Nigeria.

First, a statute will not be interpreted to apply outside the United States unless an "affirmative intention of the Congress clearly expressed" indicates an intent so to apply the statute. *Morrison*, 130 S. Ct. at 2877 (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This presumption avoids the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004).[44]

Applied here, the presumption prevents interpreting the ATS to apply to conduct within foreign nations. The ATS's text does not "clearly express" an intention to do so; its reference to an "alien plaintiff" and the "law of nations" do not constitute such an expression, given that the precedents that motivated the ATS's enactment involved foreign ambassadors who suffered mistreatment on U.S. soil. See *Sosa*, 542 U.S. at 716-17. Although piracy, the third paradigm of an international-law violation that was contemplated at the ATS's enactment, see *id.* at 720,

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dissenting) (ATS does not apply to such conduct); *Doe VIII*, 654 F.3d at 74 (Kavanaugh, J., dissenting) (same).

[43] To the extent *Sosa* assumed *sub silentio* that the ATS extends to conduct in a foreign country, the assumption is not binding precedent. See, *e.g.*, *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1448-49 (2011).

[44] The presumption applies regardless whether the defendant is a U.S. citizen. See *Doe VIII*, 654 F.3d at 75 & n.4 (Kavanaugh, J., dissenting) (collecting cases).

did occur outside the United States (on the high seas), it did not occur on land within the borders of a foreign nation. See *Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57, 58 (1795) ("So far, therefore, as the transactions complained of originated or took place *in a foreign country*, they are not within the cognizance of our courts …. But crimes committed *on the high seas are* within the jurisdiction of the district and circuit courts of the United States ….") (some emphasis added). This narrow category of extraterritorial application of the ATS does not warrant abandoning the presumption altogether as to conduct within a foreign nation. Accord U.S. *Ntsebeza* Br. 13.

Second, a statute should be interpreted in compliance with international law, that is, "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (citing, *inter alia*, *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)). To be sure, there may be limited categories of conduct that qualify for "universal jurisdiction" and thus may be prosecuted by any nation regardless where the conduct occurs. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 404. But this concept (including its scope) is highly controversial, as evident from the frequent objections lodged in ATS cases (including this one) by foreign governments that it is improper for a U.S. court to exercise jurisdiction over conduct that occurred entirely within the foreign country's borders. See *Doe VIII*, 654 F.3d at 77-78 (collecting examples); U.S. *Ntsebeza* Br. 14 (same); J.A. 128-31. See generally Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv.

Int'l L.J. 183, 190 (2004) (piracy did not come within universal jurisdiction because of its heinousness, and therefore reliance on the heinousness of piracy to support universal jurisdiction over new offenses is misplaced).

In short, just as this Court has no "congressional mandate to seek out and define new and debatable violations of the law of nations," *Sosa*, 542 U.S. at 728, such as norms of corporate liability for the offenses alleged by Petitioners here, this Court should not construe the ATS to apply to conduct occurring within foreign nations absent a clear mandate from Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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