Nos. 19-416, 19-453

IN THE

Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, *et al.*,

Respondents.

CARGILL, INC.,

Petitioner,

v.

JOHN DOE I, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

VINCENT LEVY
DANIEL M. SULLIVAN
DANIEL M. HOROWITZ
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151

SAMUEL ESTREICHER
Counsel of Record
NYU School of Law
40 Washington Sq. South
New York, NY 10012
(212) 998-6226
samuel.estreicher@nyu.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTERNATIONAL CASES

INTERNATIONAL STATUTES

INTERNATIONAL TREATIES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are professors of law who teach international law, foreign relations law, and federal jurisdiction at law schools, and have taught or written on the legal issues concerning the scope and application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *Amici* have a professional interest in the proper interpretation of the ATS, in view of its historical and legal context and the limited role of the federal courts in recognizing rights of action based on international law. A complete list of *Amici* is provided in the Appendix.

SUMMARY OF THE ARGUMENT

Congress enacted the ATS to accomplish a specific and limited purpose: "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018). *Amici* submit that the judgment below should be reversed because, for two distinct reasons, it erroneously recognized liability under the ATS beyond this narrow remit.

First, historical sources make clear that the ATS was designed to address only those private violations of the law of nations injuring aliens which—if the United States failed in its duty to provide a remedy—could result in diplomatic conflict or war. The claims that Respondents assert here involve no international

---

[1] Petitioners and Respondents have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

obligation of the United States and thus do not implicate the purpose for which the ATS was enacted. The alleged conduct occurred within the territory of Côte d'Ivoire and Petitioners are accused of aiding and abetting Côte d'Ivoire government officials in violating the law of nations. Just as in *Jesner*, then, allowing this case to proceed implicates no obligation of the United Sates and, rather than *avoiding* diplomatic conflict, is more likely to *cause* conflict with an important diplomatic partner of the United States.

Second, whether Respondents can advance an ATS claim against corporate defendants depends on whether they can establish, at a minimum, that "*international law* extends the scope of liability" for a violation of customary international law to corporations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004) (emphasis added). But there is no established international consensus extending liability to private corporations for violations of customary international law. The lack of such consensus is confirmed by the treatment of corporations in the Nuremberg Trials, other international military tribunals, and the absence of corporate or other entity liability in the Rome Statute establishing the International Criminal Court. Moreover, the evidence of international recognition of corporate liability that Respondents and their *amici* advanced in the proceedings below and other cases "falls far short of establishing a specific, universal, and obligatory norm of corporate liability." *Jesner*, 138 S. Ct. at 1401 (Plurality Op.).

ARGUMENT

I. CONGRESS ENACTED THE ATS TO ADDRESS TORT CLAIMS BY ALIENS, WHICH, IF LEFT UNREDRESSED, MIGHT GIVE OTHER COUNTRIES "JUST CAUSE" FOR WAR.

The First Congress enacted the ATS as a means of accomplishing a specific, practical goal essential to the vulnerable new republic: averting the "serious consequences in international affairs" that could ensue if the United States did not ensure that torts against foreign subjects, for example against visiting ambassadors, were "adequately redressed." *Sosa*, 542 U.S. at 715. The ATS was thus aimed only at the "narrow set of violations of the law of nations," *Jesner*, 138 S. Ct. at 1397 (quoting *Sosa*, 542 U.S. at 715), that implicated such diplomatic concerns.

A. This Court Has Not Recognized A Cause Of Action Under The ATS For Conduct That Does Not Implicate An International Duty Of The United States.

Although the parties frame the issues in this case as relating to extraterritoriality and whether corporations are "excepted" from otherwise-established liability under the ATS, a threshold question remains: whether the ATS authorizes U.S. courts to recognize a cause of action for conduct not involving an alleged breach *by the United States* of a duty owed to another state. This Court has never interpreted the ATS as recognizing such a cause of action. It has gone no further than to suggest in dicta in *Sosa* that it would not "close the door" to recognizing a cause of action to vindicate a yet-to-be-identified "narrow class of international norms." 542 U.S. at 729.

In *Sosa*, the Court rejected the claim of a Mexican national that his arbitrary arrest and detention in Mexico by other Mexican nationals—hired by a U.S. agency—violated the ATS. The Court held only that the grounds invoked by the plaintiff failed to satisfy the requirements of "definite content and acceptance among civilized nations" comparable to "the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. The Court did *not* hold that satisfying the "definite content and acceptance" requirements for the norm in question would be sufficient to state a cognizable ATS claim. To the contrary, the Court expressly contemplated additional limits on the statute's reach: "This requirement of clear definition is *not meant to be the only principle* limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action."[2] *Id.* at 733 n.21 (emphasis added); *see also id.* at 732 ("Whatever the ultimate criteria for accepting a cause of action [under the ATS] . . . .").

Further, the *Sosa* Court emphasized that recognition of any new category of ATS claims beyond the three "historical paradigms" identified by Blackstone (violation of safe conducts, infringement of the rights of ambassadors, and piracy) would be subject to a heavy burden of justification analogous to the constraints on recognizing implied rights of action or new federal common law. *See id.* at 725–28. And most recently in *Jesner*, the Court noted that "there is an ar-

[2] Other possible limitations the *Sosa* Court noted include that "the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals" and "case-specific deference to the political branches." *Id.* at 733 n.21.

gument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." 138 S. Ct. at 1403.

Although the Court in *Jesner* did not decide whether additional causes of action were authorized under the ATS, the Court underscored the high bar any new ATS cause of action would have to clear. In determining what that high bar is, the Court should be guided, at a minimum, by the purposes for which the ATS was enacted, as reflected in its text. As shown below, the statutory requirement that the conduct be "committed in violation of the law of nations or of a treaty of the United States" (28 U.S.C. § 1350) incorporates a particular understanding of what constitutes a violation of the law of nations. At the time of the ATS's enactment, such a violation required action (or inaction) by a state that caused it to default on *its* obligations to other countries. Thus, the ATS authorized a suit in tort *only* where the conduct itself triggered those obligations.

B. The ATS Was Enacted To Address Only Law-Of-Nations Violations That "Threatened Serious Consequences" For The Diplomacy Or Security Of The United States.

The ATS was not designed to reach all violations of the law of nations that might be committed against an alien. It was only the "narrow set of violations . . . threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS." *Sosa*, 542 U.S. at 715. Historical sources from before and around the time of the ATS's enactment confirm that the ATS reflects Congress's intensely practical purpose of "ensuring the availability of a federal forum where the failure to provide one

might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Jesner*, 138 S. Ct. at 1397.

1. For example, Blackstone emphasized that private infringements of safe-conducts—one of the historical paradigmatic law-of-nations violations—were a cause of international conflict because such offenses

> are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another; and such offences may, according to the writers upon the law of nations, be a just ground of a national war.

4 William Blackstone, *Commentaries on the Laws of England* (J. Andrews ed. 1899), at *68. Likewise, Emer de Vattel, author of *The Law of Nations* and possibly the leading authority on the subject relied on by the Founders, emphasized each nation's responsibility for providing redress for mistreatment of foreigners within that nation. Once a sovereign admits foreigners, Vattel wrote, "he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him." Emer de Vattel, *The Law of Nations*, bk. II, § 104, at 173 (J. Chitty ed. 1883) (1758).

This state responsibility included the obligation to provide a remedy against private subjects who committed torts undermining the state's obligation to protect foreign invitees. A sovereign that failed to provide a remedy "or to punish the offender, or finally, to deliver him up renders himself in some measure an accomplice in the injury, and becomes responsible for it." Vattel, bk. II § 77 at 163. And that failure could have severe consequences, including war, such that "the safety of the state, and that of human society, requires

this attention from every sovereign"—that it not "suffer the citizens to do an injury to the subjects of another state." *Id.*, bk. II, § 72 at 161.

2. In the United States, these responsibilities under the law of nations contributed powerfully to the perceived need for a stronger national government than existed under the Articles of Confederation, and, ultimately, to the enactment of the ATS. For example, the Continental Congress recognized the importance of providing a remedy for conduct interfering with the fledgling nation's obligations to other states. It also recognized its own impotence to do so. In 1781 it passed a resolution imploring the states to "provide expeditious, exemplary, and adequate punishment" for "the violation of safe conducts or passports, . . . or hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136–37 (G. Hunt ed. 1912). This resolution—a precursor to the ATS—confirms that "a private remedy was thought necessary for diplomatic offenses under the law of nations." *Sosa*, 542 U.S. at 724.

The call for a stronger national government resulting in the Constitution was in part a response to concerns about law-of-nations violations and the potentially severe consequences of leaving them unredressed. At the Constitutional Convention, James Madison questioned William Paterson as to whether the so-called New Jersey Plan for unicameral national governance would provide the means to prevent violations of the law of nations "which if not prevented must involve [the nation] in the calamities of foreign wars." 1 THE RECORDS OF THE FEDERAL CONVENTION

OF 1787, at 247 (M. Farrand ed. 1911). Madison further explained that "[a] rupture with other powers is among the greatest of national calamities . . . [and it] ought therefore to be effectually provided that no part of the nation shall have it in its power to bring them on the whole." *Id.*; *see also Jesner*, 138 S. Ct. at 1396–97 ("Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems.").

To similar effect, Edmund Randolph noted at the Convention that one of the principal defects of the Articles of Confederation was its inability to prevent infractions of the law of nations, raising the concern "that particular [American] states might by their conduct provoke war without control." THE RECORDS OF THE FEDERAL CONVENTION OF 1781, at 27. And John Jay explained in *The Federalist* No. 3, at 20: "It is of high importance to the peace of America that she observe the laws of nations . . . , and to me it appears evident that this will be more perfectly and punctually done by one National Government than it could be either by thirteen separate States, or by three or four distinct confederacies."

3. Thus, the Founders recognized that provoking foreign powers by failing to provide redress required by the law of nations posed real dangers to the young republic. They dealt with this issue through a number of constitutional and statutory mechanisms. *See Jesner*, 138 S. Ct. at 1396–97. In addition to the ATS, the Judiciary Act of 1789 addressed foreign relations concerns in several of its other provisions, including by giving original jurisdiction to (1) this Court (as envisioned in Article III) over cases by or against ambassadors and other public ministers; (2) district courts over admiralty and maritime cases; and (3) circuit

courts over alien diversity cases in which the amount in controversy exceeded $500. Judiciary Act of 1789 §§ 13, 9, 11, 1 Stat. at 78-80. Adopted the following year, the Crimes Act of 1790 made it a crime to violate "any safe-conduct or passport duly obtained and issued under the authority of the United States" or to "assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister." Crimes Act of 1790 § 28, 1 Stat. at 118. The Crimes Act also outlawed piracy.[3] *Id.* at § 8C, 113–14.

As confirmed by its history, the ATS does not make actionable all violations of customary international law committed by anyone, wherever they might occur. Instead, it applies only to those violations that the United States owes an international obligation to prevent or remedy.

C. Contrary To The Purpose Of The ATS, Recognizing A Cause Of Action Here Is More Likely To Cause Diplomatic Tensions Than To Avoid Them.

1. Respondents' claims in this case implicate no international obligation of the United States. The gravamen of the complaint is that cocoa farmers in Côte d'Ivoire (not parties to this action) utilized child slaves, including Respondents, and that Petitioners

[3] The 1795 opinion of Attorney General Bradford, 1. Op. Atty. Gen. 57, 57–59, is not to the contrary. That opinion concerned potential claims against Americans who participated in the French plunder of a British slave colony in Sierra Leone. Bradford does not explain why he believed the ATS was applicable. His view may well have been based on a violation of the 1783 treaty between the United States and Great Britain, in which case the incident fell within the treaties clause, rather than the law-of-nations clause, of the ATS. In any event, Britain made clear its view that a U.S. obligation was implicated.

aided and abetted Respondents' enslavement by providing "financial support" through indirect purchase of the product of the cocoa farmers and that Petitioners "d[id] little or nothing to stop the exploitation and abuse of child workers" in Côte D'Ivoire. Second Am. Compl. ¶¶ 32–69; J.A. 313–32. In so doing, Petitioners are alleged to have violated the law of nations. Notably, however, Respondents make no allegation that the United States has breached any international duty, which is reason enough to reject the existence of a cause of action under the ATS.

2. Nor have Respondents offered any basis for belief that a failure to extend the ATS to their claims could give rise to the type of serious diplomatic concerns that motivated the passage of the ATS. *See* Part I, B *supra*. To the contrary, Respondents' complaint makes clear that allowing their case to proceed, much like in *Jesner*, is more likely to *cause* diplomatic tensions than to avoid them.

According to Respondents' complaint, Petitioners' alleged actions were taken in concert with the Côte d'Ivoire government. Respondents allege that "several of the cocoa farms in Côte d'Ivoire from which Defendants source are owned by government officials . . . or are otherwise protected by government officials." Second Am. Compl. ¶ 50; J.A. 319–20. Respondents also assert that "Defendants' actions occurred under color of law and/or in conspiracy or on behalf of those acting under color of official authority, such that the injuries inflicted on these Plaintiffs as a result of the forced labor were inflicted deliberately and intentionally through the acts and/or omission *of responsible state officials*." *Id.* at ¶ 81; J.A. 338–39 (emphasis added); *see also id.* at ¶ 87; J.A. 340–41. In other words, Respondents allege that Petitioners' aided and abetted actions by Côte d'Ivoire government officials in Côte

d'Ivoire and ask a United States court to pass judgment on that conduct.

3. At the time of the ATS's enactment, it would have been well understood that the United States had no authority to interfere in the internal affairs of other nations. As Chief Justice John Jay wrote in *Henfield's Case*: "It is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction." 11 F. Cas. 1099, 1103 (C.C.D.P. 1793). To that end, "[i]t does not, then, belong to any foreign power to take cognizance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." Vattel, bk. II, § 55, at 155. Accordingly, under the law of nations at the time the ATS was enacted, there could be no redress in this country's courts for even obvious wrongs committed by another nation against its own citizens. *See United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847–48 (C.C.D. Mass. 1822) (Story, J.) ("No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy."). Indeed, interference with another nation's sovereign right to self-governance would itself have been viewed as a violation of the law of nations and potentially a just cause for war. *See* Vattel, bk. II, § 57, at 157 ("[A] sovereign has a right to treat those as enemies who attempt to interfere in his domestic affairs . . . .").

4. Even today, when international law is understood to include certain limits on the power of governments over their own citizens, allowing American courts to assert authority over such claims would "raise risks of adverse foreign policy consequences,"

Sosa, 542 U.S. at 728, while serving none of the purposes of the ATS. Indeed, Côte d'Ivoire is an important diplomatic partner of the United States in sub-Saharan Africa. The United States views Côte d'Ivoire, in light of American and international investment in that nation, as a potential "bulwark against religious extremism and support [for] U.S. efforts to promote democratic institutions, regional stability, and counter the spread of terrorism." Dep't of State, *U.S. Relations with Cote D'Ivoire Bilateral Relations Fact Sheet* (Dec. 4, 2018), *available at* https://www.state.gov/u-s-relations-with-cote-divoire/.

Rather than recognize a cause of action here, the Court must exercise "judicial caution under *Sosa* [and] guard[] against our courts triggering serious foreign policy consequences, and instead defer[] such decisions, quite appropriately, to the political branches." *Jesner*, 138 S. Ct. at 1407 (internal quotation marks and modifications omitted); *see generally*, Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169 (2020). Indeed, it should be borne in mind that the ATS has not been amended in relevant part since 1789. And its key language, *i.e.*, "the law of nations," is a phrase that is no longer in use, even among international law scholars. It is for Congress, should it decide to do so, to address human-rights violations through specific legislation, while also providing for other issues that might bear on diplomatic concerns: for example, a plaintiff's need to exhaust local remedies; comity abstention; and the scope and occasion for, if any, entity liability. *See, e.g.*, *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. 107-197, 116 Stat. 721, (Jun. 25, 2002); *see also Jesner*, 138 S. Ct at 1403 ("The political branches, not the Judiciary, have

the responsibility and institutional capacity to weigh foreign-policy concerns.").

II. PRIVATE CORPORATIONS CANNOT BE SUED UNDER THE ATS.

Respondents' claims against these corporate defendants fail for an independent reason. There is no international consensus with respect to the liability of private corporations for international wrongs.[4]

A. Corporate Liability Under The ATS Requires, At A Minimum, Consensus Under International Law That Private Corporations Should Be Liable For Violations Of The Law Of Nations.

1. Whether the ATS authorizes corporate liability in an appropriate case is, in the first instance, governed by international law.[5] *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010) (Cabranes, J.) (*Sosa* "requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations." (emphasis in original)); *Jesner*, 138 S. Ct. at 1400–1402 (Plurality Op.) (noting that "[t]here is considerable force and weight to the position articulated by Judge Cabranes," but declining to resolve

[4] This case deals only with the lability of private corporations for such wrongs. Where corporations are acting as agents of a state, the relevant considerations may differ.

[5] Even then, whether a cause can proceed is subject to other limiting principles this Court has recognized, including the limited authority of federal courts to create new causes of action in lieu of legislation, and the need to minimize the "risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 741; *see also Jesner*, 138 S. Ct. at 1402–03, 1406–07.

"whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations"). The notion that the principle of corporate liability in domestic laws can be borrowed to establish corporate liability as a matter of international law is contrary to the text of the ATS. The statute, after all, provides jurisdiction only over torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. If international law does not establish—without resort to domestic law—that a defendant corporation is responsible for committing an international wrong, then no "tort [has been] committed in violation of the law of nations." *Id.*

2. *Sosa* confirms this principle. In *Sosa*, the Court held that the ATS did not directly create a cause of action, 542 U.S. at 712–14, but that Congress, in passing the ATS, tacitly acknowledged federal courts' authority to recognize causes of action for "the modest number of *international law violations* with a potential for personal liability at the time." *Id.* at 724 (emphasis added). And in recognizing the potential for claims beyond the three historical paradigms, the *Sosa* Court still required any cause of action "based on the present-day law of nations to rest on *a norm of international character accepted by the civilized world*." *Id.* at 725 (emphasis added). In other words, neither the ATS nor *Sosa* authorize federal courts to create common law liability for conduct by a particular defendant that does not violate international law.

This limitation makes good sense. After all, "international law is distinct from domestic law in its domain as well as its objectives." *Jesner*, 138 S. Ct. at 1401 (Plurality Op.).

3. Respondents conceded below that the ATS requires violation of a specific, universal international-law norm but maintain that the question of who or what can violate that norm is a remedial question governed by local law. No. 10-56739, Dkt. 15, at 13–17 & n.5 (9th Cir. June 24, 2011). But the Court cannot confine its inquiry to whether the prohibition on the alleged conduct—in isolation—is a well-accepted "norm" under international law because "identifying . . . a norm [of international law] is only the beginning of defining a cause of action." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013). Respondents must also show that "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." *Sosa*, 542 U.S. at 732 n.20 (emphasis added). Respondents cannot make that showing here because, as argued in the next section, there is no international consensus regarding corporate liability for violations of international law.

B. There Is No International Consensus That Private Corporations May Be Liable For Violations Of Customary International Law.

Corporate liability for international wrongs is not a well-established principle of customary international law. There has been no consistent practice or consensus of the world's nations—as required by *Sosa*—imposing liability on private corporations for international law violations. While various international bodies have recently discussed the possibility

(even the desirability) of an international code of conduct for business activities, a motivating premise of these discussions is that no such law presently exists.[6]

The absence of an international consensus on the question of corporate liability for international wrongs is apparent, even from the principal authorities the Court of Appeals, Respondents, and their *amici* relied on below.

1. The Nuremberg Trials.

While the Nuremberg trials spurred recognition of liability of natural persons for certain violations of international law, those trials did not impose liability on *corporations*. This is despite the fact that many corporations and other businesses aided the war crimes committed by Nazi Germany and its allies.

The Nuremberg adjudicative machinery was established by Article 6 of the Charter of the International Military Tribunal (Oct. 6, 1945), which provided that the Tribunal had the power "to try and punish persons who . . . , whether as individuals or members of organizations," committed certain crimes. 81 U.N.T.S. 286 (1951). Whether as unaffiliated individuals or as members of organizations, the accused were natural persons, not legal entities. To be sure, the Charter provided for declaring and proving that "the group or organization of which the individual was a member was a criminal organization." *Id.* at art. 9, 81 U.N.T.S. at 290. But the effect of such a declaration

---

[6] *See, e.g.*, Int'l Comm. of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations* 3 n.7 (2010), *available at* https://www.icj.org/wp-content/uploads/2012/09/South-Africa-access-to-justice-corporations-thematic-report-2010.pdf (describing "controversy as to the existence of liability for corporations under international law").

was to make membership in such an organization a punishable offense—not enterprise liability based on *respondeat superior*. *See id.* at art. 10 (recognizing "the right to bring individuals to trial for membership [in the criminal organization]").

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

The treatment of I.G. Farben also cannot serve as a precedent for corporate liability for a violation of customary international law. It is true that I.G. Farben and other companies that functioned as instrumentalities of the Nazi regime were stripped of their assets and dissolved. But, as Control Council Law No. 9 makes clear, these companies were dissolved pursuant to an action of the military occupation of Germany, not as adjudication of criminal liability of customary international law:

> In order to insure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war po-

> tential, the Control Council enacts as follows: All plants, properties and assets of any nature situated in Germany which were . . . owned or controlled by I.G. Farbenindustrie . . . are hereby seized by and legal title thereto is vested in the Control Council.

Control Council Law No. 9, Preamble & Art. I (Nov. 30, 1945); *see also* Control Council Law No. 57 (Sept. 6, 1947) (providing for the "Dissolution and Liquidation of Insurances Connected with the German Labour Front," a Nazi organization). Indeed, the plurality opinion in *Jesner* recognized that the "United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben" but that "Farben itself was not held liable." 138 S. Ct. at 1400.

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

> 99. The general rule . . . is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the [International Military] Tribunal were very definite on the question. . . . "That international law imposes duties and liabilities upon individuals, as well as upon States," said the judgment of the Tribunal, "has long been recognized." It added: "Crimes against international law are committed *by men, not by abstract entities*, and only by punishing individuals who commit such crimes can the provision of international law be enforced."

Vol. II, *1950 Yearbook of the International Law Comm'n* 374 (2005 rep.) (emphasis added) (quoting 1 *Trial of the Major War Criminals before the International Military Tribunal* 223 (1947)).

2. Other International Criminal Tribunals.

The lack of any international consensus for corporate liability for violations of international law is also reflected in the statutes conferring jurisdiction on international criminal tribunals. For example, the statutes for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda both confer jurisdiction on those tribunals to try individuals only. *See* Statute of the International Crim. Trib. For the Former Yugoslavia, S.C. Res. 827, Art. 7(1), U.N. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Art. 6(1), U.N. S/RES/955 (Nov. 8, 1994).

Consider also the recent judgment of the UN's Special Tribunal for Lebanon regarding the assassination of former Lebanese Prime Minister Rafik Hariri. *See Prosecutor v. Ayyash*, Stl-11-01/T/TC (U.N. Sp. Tr. for Lebanon Aug. 18, 2020). While the Tribunal had jurisdiction over four individuals who were members of Hezbollah, the Tribunal's jurisdiction did not extend to Hezbollah, the entity itself. *See id.* at 15 ("The Special Tribunal was established to prosecute individuals for the crimes within its jurisdiction.").

3. The Rome Statute.

Similarly, the Rome Statute establishing the International Criminal Court ("ICC") makes clear that its jurisdiction is limited to "Individual criminal responsibility." Rome Statute of the Int'l Crim. Ct., 2187 U.N.T.S. 38544, art. 25 (July 17, 1998) ("The Court

shall have jurisdiction over natural persons pursuant to this Statute."). The decision to limit the ICC's mandate to natural persons reflected considerable disagreement among the signatory state over the issue of entity liability:

> The decision whether to include "legal" or "juridical" persons within the jurisdiction of the court was controversial. The French delegation argued strongly in favour of inclusion since it considered it to be important in terms of restitution and compensation orders for victims. . . . [T]he [French] proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, *there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems*.

Kai Ambos, *Article 25*, *in* BECK ET AL., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 477–78 (2d ed. 2008).

Other good reasons have been offered to limit the jurisdiction of international criminal tribunals to natural persons. For one, corporations across the globe enjoy different degrees of governmental support for their operations. Indeed, some corporations may be no more than extensions of their foreign state sponsors, which could lead to inconsistent regulation, or at least significant tensions, between states that are principal

funders of corporations and states where corporations conduct separate business activities. *See* Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW, 6 (5th ed. 1998, reprinted 2001) ("[I]t will not always be easy to distinguish corporations which are so closely controlled by governments as to be state agencies, with or without some degree of autonomy, and private corporations not sharing the international law capacity of a state.").

The absence of settled international law on corporate liability for international wrongs is reflected in the debates during the drafting of the Rome Statute. One widely discussed draft included jurisdiction over juridical entities, including private corporations. But liability was conditioned on a simultaneous criminal conviction of a natural person "who was in a position of control" of the entity and was acting on behalf of and with the explicit consent of the entity. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 150–51 (M.T. Kamminga and S. Zia-Zarifi, eds. 2000). Such requirements are far more onerous than U.S. domestic practices regarding corporate criminal liability. But even this restrictive text was dropped by the drafters of the Rome Statute due to an inability to satisfy all delegations' "queries about this innovative use of international criminal law." *Id.* at 157.

Federal courts considering ATS claims against private corporations have encountered a similar problem when considering plaintiffs' claims against parent companies' subsidiaries. In the *South Africa Apartheid Litigation*, for instance, plaintiffs sought to hold the parent companies liable on a theory of alter ego

and agency. 617 F. Supp. 2d 228, 270 (S.D.N.Y. 2009). As the court in that case acknowledged, the utter lack of international standards for "piercing the corporate veil" required the court to rely instead on federal common law. As the court put it, "the international law of agency has not developed precise standards to apply in the civil context." *Id.* at 271.

The lack of "precise standards" under international law is exactly what warrants rejection of Respondents' attempt to extend the ATS to corporations. Resorting to federal common law to determine principles of *international* law runs contrary to the ATS and to *Sosa*. The very necessity of such "gap filling" throws in sharp relief the innumerable practical obstacles of applying an "international law of agency" to derive an "international law of corporate liability" when no such law exists in the agreed upon, binding practice of nations.[7]

C. Isolated Examples Of Corporate Liability Do Not Establish A Consensus.

Given (i) the continuous international tradition from the post-war period to the present of limiting liability for violations of customary international law by non-state actors to individuals; (ii) the range of views regarding whether corporate liability should be included in the Rome Statute; (iii) the absence of "universally recognized common standards for corporate liability"; and (iv) the absence of the very concept in "some major criminal law systems," the liability of corporate defendants cannot be considered a universally supported rule of sufficient specificity and consensus to satisfy the requirements of *Sosa*. Moreover, there is

---

[7] *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 391–93 (2010).

a dearth of international-law precedents indicating the scope and occasion for corporate liability for the acts of its agents. Accordingly, allowing corporate liability under the ATS would inevitably require selective borrowings from U.S. domestic law to adjudicate violations of international law.

That said, it is not our position that international law completely bars corporate liability for international wrongs or that there have never been instances of corporate liability for international wrongs. The point, instead, is that such instances "fall[] far short of establishing a specific, universal, and obligatory norm of corporate liability," as *Sosa* requires. *Jesner*, 138 S. Ct. 1401 (Plurality Op.).

1. Corporate Liability Under Early United States Law.

As a general matter, in the early United States, corporations could sue and be sued, but whether they could be sued *in tort* was an open question at least until the 1820s—over three decades after passage of the ATS. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 U.C.L.A. L. Rev. 641, 648 (1989) ("[I]n the early nineteenth century there was real doubt as to whether corporations were generally vulnerable to liability in tort.").

One reason to exempt corporations from tort liability was technical—the requisite writs of *capias* and *exigent* did not lie against a corporation. In addition, the notion of "trespass presupposes 'a *personal* act of which the corporation is incapable in its collective capacity.'" *Id.* at 649, quoting 1 S. Kyd, *A Treatise on the Law of Corporations* 223 (1793). Accordingly, employers were generally free of liability for torts committed by employees because it was "suggested that an action brought directly against the tortious employee 'will

answer the purpose of bringing the victim's right to a judicial determination.'" *Id.*

The limitations on corporate liability in tort in early U.S. law suggest that corporate tort liability was "probably [not] on [the] minds of the men who drafted the ATS." *Sosa*, 542 at 715.

Of course, corporate liability under American domestic law has changed considerably, but even so it is hardly automatic. For example, whether a particular federal law encompasses corporate liability still often requires litigation to resolve. *See, e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (private corporations providing halfway houses under contract with the Federal Bureau of Prisons were not subject to an implied cause of action for Fourth Amendment violations because corporate liability would shift the focus away from "the individuals directly responsible for the alleged injury"). And when Congress provided a cause of action for human rights violations in the Torture Victim Protection Act, it declined to provide for any form of corporate or organizational liability. Torture Victim Protection Act of 1991, 106 Stat. 73 (Mar. 12, 1992); *Mohamed v. Palestinian Auth.*, 566 U.S. 449 (2012). That fact alone "is all but dispositive of the present case." *Jesner*, 138 S. Ct. at 1404 (Plurality Op.).

2. Suits Against The British East India Company.

Decisions involving the British East India Company also do not offer a clear precedent for holding modern private corporations liable for violations of international law. The British East India Company reflected aspects of both a private company and a sovereign. It had some of the same rights of private persons, but it also exercised monopoly power and sovereign

authority over extensive territory. *See, e.g.*, *Nabob of the Carnatic v. East India Company*, 30 Eng. Rep. 391, 401 (H.L. 1791) ("[B]y the law and municipal constitution of this country the Company having a right to make war for the defence and melioration of their trade, are advised, that they being armed by the charters and municipal authority of this country with that power, stand[s] in all respects relating to the exercise of it in the same condition as if sovereigns.").

Given the British East India Company's dual character—private company and sovereign—the decisions involving it are more akin to evolving decisional law in England and the United States gradually lifting official immunities to allow governments to be sued for certain conduct, usually by means of suit against the government agents personally,[8] while shielding other conduct from liability. These decisions provide scant guidance as to whether the ATS authorizes suits against private corporations for violations of customary international law.

3. "Pirates, Inc." And In Rem Suits In Admiralty.

There has been considerable emphasis by those arguing for corporate liability under the ATS that if piracy was indeed a "paradigm" offense in enacting the ATS, it is highly unlikely that Congress would

---

[8] *See generally*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch.4 (1965). In this regard, we note that a case relied on by Respondents below, *The Case of the Jurisdiction of the House of Peers, between Thomas Skinner, Merchant, and the East-India Company*, 6 State Trials 710 (H.L 1666), the judgment of the House of Lords for Skinner was overturned by the House of Commons on jurisdictional grounds and vacated by King Charles II. *Id.* at 727–28.

have intended to exclude a corporation funding piratical conduct from the ATS's reach. But, as made clear at the Nuremberg Trials, and this Court's decision in *Malesko*, if the focus of the law is on establishing personal responsibility for the wrongdoing of individuals, the introduction of corporate or enterprise liability may be thought to dilute the condemnatory effect of the law. *See* Part II.B.1 *supra*; *Malesko*, 534 U.S. at 69 ("To the extent aggrieved parties had less incentive to bring a damages claim against individuals, the deterrent effects of the *Bivens* remedy would be lost." (internal quotation marks omitted)).

In any event, piracy differed from the other paradigm offenses because the proceedings were in rem, and thus "operated as a fine against the principals, those who had directly violated international law." Eugene Kontorovich, *A Tort Statute, With Aliens and Pirates*, 107 Nw. U. L. Rev. Colloq. 100, 111 (2012). "Modern corporate liability, by contrast, seeks to impose costs on diffuse absentee shareholders, who do not exercise direct control over the international law violations of their corporate agents." *Id.*

The limitations of in rem piracy suits demonstrate their inadequacy as precedent to establish corporate liability as an international norm under the ATS. While the personal innocence of a ship owner was no defense to condemnation, liability for piracy was capped at the value of the condemned ship, unlike the modern tort principles that include enterprise liability and full compensation for victims. *Id.* at 112–113.

4. Corporate Liability In The EU And Related Countries.

Cherry-picked examples of other nations extending criminal liability to corporations in certain situations are also not reliable precedents to establish a

broad international consensus of corporate liability for international law violations. To the contrary, a closer look reveals a lack of uniformity among the world's nations.

A 2012 study funded by the European Commission compared the treatment of corporate criminal liability across the EU member states and concluded that the "landscape is shattered": "Although there is a clear tendency in favour of corporate criminal liability, it is not generally accepted." VERMEULEN, ET AL., LIABILITY OF LEGAL PERSONS FOR OFFENCES IN THE EU, 9 (2012). The study noted that 5 EU member states—Bulgaria, Germany, Greece, Latvia, and Sweden—did not provide for corporate criminal liability at all. Other commentators have noted that "[n]ot even the intellectual Anglo-Saxon world can, at any way, be said to be solidly undivided on corporate criminal liability." ANTONIO FIORELLA, CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS VOL. II: TOWARDS A COMMON MODEL IN THE EUROPEAN UNION, 61–62 (Jovene ed. 2012).

Unsurprisingly, the Governments of the United Kingdom and the Netherlands have previously argued to this Court there is no international-law consensus on corporate civil liability either. "[C]ustomary international law simply does not support a finding by this Court," those Governments contended, "that corporations would be liable *as a matter of international* law when they engage in conduct that would be a violation of customary international law if done by a state." Br. of the Gov'ts of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v. Royal Dutch Petrol. Co.*, 10-1491, at 9 (Feb. 3, 2012).

The lack of uniformity among EU and Anglo-American legal systems undermines the relevance of any one-off examples of corporate liability that Respondents or their *amici* might offer.

5. International Convention On The Financing Of Terrorism.

A final example advanced by proponents of corporate liability under the ATS is the International Convention for the Suppression of the Financing of Terrorism. As the *Jesner* plurality noted, this treaty "imposes an obligation on 'Each State Party' 'to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity' violated the Convention." *Jesner*, 138 S. Ct. at 1401 (Plurality Op.) (citing International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U.N.T.S. 232). The plurality rightly rejected the relevance of the Convention because, "by its terms," the Convention "imposes its obligations only on nation-states 'to enable' corporations to be liable in certain circumstances under domestic law." *Id.*

More could be said. In 2002, Congress had already codified the United States' obligations under the Convention. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. 107-197, 116 Stat. 721, (Jun. 25, 2002); 18 U.S.C. § 2339C. While the 2002 statute created a civil penalty against "any legal entity located within the United States or organized under the laws of the United States" that violates the statutory prohibition against financing terrorism, the penalty may be recovered by

the U.S. government *only* and provides no private action for damages. *See id.* at § 2339C(f).[9]

In sum, the Convention contradicts, rather than supports, the case for an international consensus to hold corporations generally liable for law-of-nations violations.[10]

* * *

There was no international law consensus in 1789, and there is none today, that private corpora-

---

[9] Moreover, the implementation statute for the Financing of Terrorism Convention does not reflect the U.S. common law principle of *respondeat superior* – that the corporation is liable for the torts of its employees committed in the course of employment even in the absence of ratification or specific authorization – but requires as a condition of entity liability that "the person responsible for the management or control of that legal entity has, in that capacity, committed" the offense. 18 U.S.C. § 2339C(f); Samuel Estreicher, *Taking Treaty-Implementing Statutes Seriously, in The Restatement and Beyond: The Past, Present, and Future of the Foreign Relations Law of the United States*, ch.3 (Paul B.Stephan & Sarah H. Cleveland eds., Oxford University Press, 2020).

[10] Rather than stretching a 1789 enactment to reach corporations that were not generally suable in this country at the time, and that are not suable on a theory of *respondeat superior* even today in many countries (at least in the absence of a prior criminal judgment), Congress can certainly deal with the issue of corporate responsibility for specified international wrongs. Section 2339C, discussed above, is one such example. Another example is 18 U.S.C. § 2333(a), which authorizes a civil action for U.S. nationals injured by "an act of international terrorism," as specifically defined in 18 U.S.C. § 2331, committed, planned or authorized by a "foreign terrorist organization," as specifically designated by the Secretary of State under the Immigration and Nationality Act, 8 U.S.C. § 1189, and aiders and abettors of such organization in that act.

tions are suable for violations of customary international law. Accordingly, Respondents cannot maintain a cause of action against Petitioners under the ATS.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

SAMUEL ESTREICHER
Counsel of Record
NYU SCHOOL OF LAW
40 Washington Sq. So.
New York, NY 10012
(212) 998-6226
samuel.estreicher@nyu.edu

VINCENT LEVY
DANIEL M. SULLIVAN
DANIEL M. HOROWITZ
HOLWELL SHUSTER &
GOLDBERG LLP
425 Lexington Ave.
New York, NY 10017
(646) 837-5151

September 8, 2020 *Counsel for Amici Curiae*

APPENDIX*

Amici consist of the following professors:

1. **Samuel Estreicher** is the Dwight D. Opperman Professor of Law at New York University School of Law.

2. **Kenneth Anderson** is Professor of Law at Washington College of Law, American University.

3. **Eugene Kontorovich** is Professor of Law at George Mason University Scalia Law School, and director of its Center for the Middle East and International Law.

4. **Julian Ku** is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University.

5. **John O. McGinnis** is George C. Dix Professor in Constitutional Law at Northwestern University School of Law.

6. **Jide Okechuku Nzelibe** is the Benjamin Mazur Summer Research Professor of Law at Northwestern University Pritzker School of Law.

---

* Institutional affiliations are noted only for the purpose of identification. This brief does not purport to represent the views of any person or institution other than *Amici*.

7. **Michael D. Ramsey** is Professor of Law and Faculty Director of International and Comparative Law Programs at the University of San Diego School of Law.