No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,
v.
ROYAL DUTCH PETROLEUM CO., *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] The AFL-CIO is affiliated with the International Trade Union Confederation (ITUC), the main international body representing trade unions, and also works closely with the Solidarity Center, a non-profit organization that assists workers around the world in building democratic and independent unions.

This case concerns whether, pursuant to the Alien Tort Statute (ATS), 28 U.S.C. § 1350, aliens can hold corporations liable in U.S. courts for torts committed in violation of the law of nations. Through its affiliation with the ITUC and its work with the Solidarity Center, the AFL-CIO actively supports the rights of workers outside of the United States to organize unions, to bargain collectively with their employers, and to peaceably protest in support of their legitimate demands. Unfortunately, in some parts of the world, such efforts are often met with corporate-sponsored acts of illegal treatment and violence, including unlawful detention, torture, and, in the worst cases, extrajudicial killings. *See*,

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[1] Counsel for the petitioners and counsel for the respondents have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (ATS suit on behalf of Columbian union leaders tortured and murdered by Columbian corporations in collaboration with paramilitary forces). The AFL-CIO, therefore, has a strong interest in the proper interpretation of the ATS.

STATEMENT

The petitioners in this case are residents of Nigeria who claim that respondents Royal Dutch Petroleum Company, Shell Transport and Trading Company PLC, and Shell Petroleum Development Company of Nigeria, Ltd. – Dutch, British, and Nigerian corporations respectively – aided and abetted the Nigerian government in committing various violations of the law of nations, including extrajudicial killing and torture. Petitioners brought suit in the United States District Court for the Southern District of New York for various tort claims in violation of the law of nations pursuant to the ATS.

Respondents moved to dismiss the petitioners' suit on the basis that the specific violations of international law norms pleaded by petitioners were not actionable under the ATS pursuant to the rule set forth by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004): "[F]ederal courts should not recognize private claims under federal common law 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." The district court granted the respondents' motion to dismiss with regard to some claims (aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights to life, liberty, security, and association), while denying the motion to dismiss with regard to others (aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and

degrading treatment). *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463-67 (S.D.N.Y. 2006). The court then certified its entire order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Taking a different tack from the district court, the Second Circuit found it necessary to first "look to international law to determine whether a particular class of defendant, such as corporations, can be liable under the Alien Tort Statute for alleged violations of the law of nations," *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010), before determining whether the case could go forward, an approach the court based on its reading of international law and *Sosa*. Following this approach, the Second Circuit concluded that "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world," such that "it is not a rule of customary international law that we may apply under the ATS." *Id.* at 145. For this reason, "insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction." *Ibid.*

In contrast, in three ATS cases decided subsequent to this one, the D.C. Circuit, the Seventh Circuit, and the Ninth Circuit each concluded that corporations can be held liable for damages for torts in violation of the law of nations brought under the ATS. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, __ F.3d __, 2011 U.S. App. LEXIS 21515, *19 (9th Cir., Oct. 25, 2011) (*en banc*). The D.C. Circuit, for example, held that while "the substantive content of the common law causes of action that courts recognized

in ATS cases must have its source in customary international law," "federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law rather than customary international law." *Doe*, 654 F.3d at 41-42. Because "[t]he general rule . . . is that corporations, like individuals, are liable for their torts," *id.* at 48 (quoting *White v. Cent. Dispensary & Emergency Hosp.*, 99 F.2d 355, 358 (D.C. Cir. 1938)), the court concluded that corporations can be held liable for damages for torts committed in violation of the law of nations brought under the ATS.

This Court granted a writ of certiorari to resolve this circuit split.

SUMMARY OF ARGUMENT

Both the statutory text of the ATS and the historical context in which the law was enacted strongly suggest that whether a corporation can be held liable for damages for torts committed in violation of the law of nations should be determined by reference to common-law principles of vicarious liability, not international norms. As a general matter, corporations can be held liable for damages for torts committed by their agents under the common law and the same rule should apply for tort claims brought pursuant to the ATS.

Neither of the principal rationales relied upon by the Second Circuit are persuasive. The fact that most international human rights norms – the international norms most frequently invoked by modern ATS plaintiffs – are primarily criminal in nature is irrelevant to whether corporations can be held liable for damages for torts committed in violation of the law of nations. Tort law routinely provides civil remedies for wrongful acts that may also incur criminal liability and corporations are routinely held vicariously

liable for damages for such torts, regardless of whether the corporation may also face criminal liability for the same acts. Nor does this Court's decision in *Sosa* require the result reached by the Second Circuit. Instead, *Sosa*'s analysis of the historical context in which the ATS was enacted suggests that whether a corporation can be held liable for damages for torts committed in violation of the law of nations should be determined by reference to common-law principles, not international norms.

ARGUMENT

1. The statutory text of the ATS indicates that whether corporations can be held liable for damages for torts committed in violation of the law of nations should be determined by reference to common-law principles, rather than international norms.

The ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute thus provides three limits on the types of claims that may be brought under the ATS:

(1) only "alien[s]," not citizens of the United States, may bring claims;

(2) "civil action[s] . . . for a tort only," not contract claims or other civil claims, are allowed; and

(3) only those tort claims that pertain to a "violation of the law of nations or a treaty of the United States" are permitted.

In contrast, nothing in the ATS limits the liability of corporations for damages for torts committed by their agents in violation of the law of nations. In the absence of any express statutory limit, the well-established meaning of the term "tort" and common-law principles of vicarious

liability strongly suggest that corporations may be held liable for damages for claims brought under the ATS.

A "tort," by definition, is "a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. Page Keeton et al., Prosser and Keeton on The Law of Torts (hereinafter, "The Law of Torts") § 1 (5th ed. 1984). The law of torts rests on the principle that "for every interference with a recognized legal right the law will provide a remedy." *Ibid.* (paraphrasing *Ashby v. White*, 2 Ld.Raym. 938, 92 Eng. Rep. 126 (1703) (Holt, C.J., dissenting)). Thus, by providing the federal courts with jurisdiction over the particular "civil wrong," W. Keeton, The Law of Torts, § 1, of a "tort . . . committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, the ATS necessarily required federal courts to "provide a remedy in the form of an action for damages," W. Keeton, The Law of Torts, at § 1.

That corporations are liable for torts committed by their employees or other agents follows from the well-established rule that "[a] principal is subject to direct liability to a third party harmed by an agent's conduct." Restatement (Third) of Agency § 7.03 (2006). For "[a] principal that is not an individual," such as a corporation, "[a]n organization's tortious conduct consists of conduct by agents of the organization that is attributable to it." *Id.*, cmt. c. In general, "corporate liability for torts . . . is vicarious liability imposed under *respondeat superior* or a similar doctrine." Reinier H. Kraakman, Vicarious and Corporate Civil Liability 669, in Encyclopedia of Law and Economics 3400 (B. Bouckaert and G. De Geest, eds., 1999).

As this Court has explained in a case concerning another important form of secondary corporate liability determined by the common law –whether a corporate parent can be held liable for its subsidiary's violation of federal

law: "[T]he failure of the [federal] statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). The same holds true in this case – the ATS's silence regarding a corporation's liability for damages for torts committed by its agents in violation of the law of nations is an insufficient basis to "abrogate [the] common-law principle" of vicarious liability.

The underlying common-law rationales for corporate vicarious liability support this conclusion. The primary rationale for the common-law principle holding a corporation vicariously liable for the acts of its agents is "the deterrent effect of the award of [] damages," *i.e.*, to "encourage employers to exercise closer control over their servants for the prevention of outrageous torts." W. Keeton, The Law of Torts, at § 2. "[A] regime of purely personal liability will lead firms to take too little care and to initiate too much risky activity or misconduct. By contrast, principals who are vicariously liable and face the full expected cost of tort damages will seek to control their agents to ensure optimal precautionary measures." R. Kraakman, Vicarious and Corporate Civil Liability, at 670-71. That is, "[w]hen it is thoroughly understood [by corporations] that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before." *Goddard v. Grand Trunk Railway*, 57 Me. 202, 224 (Me. 1869).

Of equal significance, vicarious liability provides an incentive for corporate responsibility by requiring corporations "to internalize the costs of misconduct that accompany their productive activity," thus "bring[ing] the private

costs of production into line with the social costs." R. Kraakman, Vicarious and Corporate Civil Liability, at 671. In other words, tort law requires corporations to "accept the burdens that go with the benefits of its operation" in circumstances where the "risks are more or less typical or characteristic of the activity even when no negligence can be shown." Dan B. Dobbs et al., The Law of Torts § 426 (2d ed. 2011). As Judge Friendly famously explained, the notion of "*respondeat superior* . . . rests . . . in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

In sum, by creating a "civil action . . . for a tort . . . committed in violation of the law of nations," 28 U.S.C. § 1350, without expressly exempting corporations from liability for damages for such torts when they are committed by the corporation's agents, the ATS's statutory text strongly suggests that common-law rules of vicarious liability, not international norms, should determine corporate liability under the ATS.

2. The historical context of the enactment of the ATS fully supports the conclusion that corporations can be held vicariously liable for damages for torts committed by their agents in violation of the law of nations.

As this Court concluded in *Sosa*, the ATS, which was enacted by the First Congress as part of the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77,[2] "was intended as jurisdictional in the sense of addressing the power of the courts

[2] In its original form, the ATS provided that the newly-created federal district courts "shall [] have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9(b), 1 Stat. 77.

to entertain cases concerned with a certain subject," 542 U.S. at 714, namely, tort suits seeking recovery for damages caused by violations of the law of nations or a treaty of the United States. In so holding, this Court specifically rejected the contention that "the ATS was intended . . . as authority for the creation of a new cause of action for torts in violation of international law." *Id.* at 713.

That conclusion is relevant here because the fact that the ATS was intended only to provide federal court jurisdiction over a "handful of international law *cum* common law claims," *id.* at 712, rather than to "creat[e] . . . a new cause of action," *id.* at 713, means that these "international law *cum* common law claims" preexisted the enactment of the ATS. In other words, the law of nations – which "was part of the law of England and, as such, of the American colonies," and "[w]ith independence . . . became part of the law of each of the thirteen States," Restatement (Third) of the Foreign Relations Law of the United States pt. 1, Ch. 2, Introductory Note (1987) – was enforceable at common law in state courts by means of a cause of action for a tort.

In the pre-*Erie* era in which the ATS was enacted, a state court faced with such a claim undoubtedly would have applied established common-law principles of vicarious liability that, like the law of nations itself, "w[ere] at the time part of the so-called general common law." *Sosa*, 542 U.S. at 739 (Scalia, J., concurring).[3] Under this "gen-

[3] Unlike our modern conception of separate categories of state, federal and international law, the "general common law" of the pre-*Erie* period was considered "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," *Sosa*, 542 U.S. at 725 (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) – that is, a unitary body of law encompassing all common-law subjects, including the law of nations, and applied by courts of all jurisdictions.

eral common law," the settled rule was that "for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." *The Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 210 (1858) ("At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety.").

The Second Circuit's interpretation of the ATS – as requiring courts to "look to international law" as an *external* source of legal rules "to determine whether a particular class of defendant, such as corporations, can be liable under the Alien Tort Statute for alleged violations of the law of nations," *Kiobel*, 621 F.3d at 149 – is, therefore, anachronistic. As this Court repeatedly recognized in the pre-*Erie* era, "[i]nternational law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (same). The First Congress, in extending federal court jurisdiction over preexisting "international law *cum* common law claims," *Sosa*, 542 U.S. at 712, then, obviously intended that federal courts – like state courts before them – look to the common law to determine whether a corporation – or any other juridical entity or organization – could be held liable for a tort committed by its agent in violation of the law of nations.

Of course, post-*Erie*, a "civil action . . . for a tort . . . committed in violation of the law of nations," 28 U.S.C. § 1350, is a matter of federal common law, rather than general common law. *Sosa*, 542 U.S. at 729-30. Accordingly, a federal court faced with a claim brought

under the ATS today would look to federal common law to determine tort remedies and liability. *Id.* at 726. *Cf.*, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (applying "the [] common law of agency" to fashion a federal common-law rule of vicarious liability for supervisory harassment under Title VII); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) (interpreting § 301 of the Labor Management Relations Act as "authoriz[ing] federal courts to fashion a body of federal law for the enforcement of [] collective bargaining agreements"). As we explained in the previous section, it is indisputable that, pursuant to ordinary common-law principles of vicarious liability, corporations can be held liable for damages for torts committed by their agents in violation of the law of nations.

3. Disregarding both the ATS's statutory text and the historical context of the ATS's enactment, the Second Circuit concluded that both international law and this Court's decision in *Sosa* dictate that corporations cannot be held liable under the ATS. Neither rationale is persuasive.

Many widely-recognized modern international law norms concern "acts so maleficent that criminal punishment would be an appropriate sanction for the actors." *Flomo*, 643 F.3d at 1019. Contrary to the Second Circuit, the existence of these norms *supports* the recognition of a tort remedy under the ATS, even where the norms are criminally-enforceable against natural persons but not against corporations. It is precisely such "maleficent" acts that constitute "actionable violations of customary international law – which is to say violations that all countries are deemed to have a legal obligation to take appropriate action against," *ibid.*, or, in the words of *Sosa*, "universal and obligatory norms," 542 U.S. at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

There is nothing novel about tort law borrowing a standard of conduct from criminal law in order to provide a victim with a civil remedy. "A single act" can, of course, "constitute both a crime and a tort." D. Dobbs, The Law of Torts, at § 4. "For example, if a defendant beats a person, he is almost certainly committing a crime for which the state can prosecute and punish. He is also committing a tort, for which the injured individual may sue and recover compensation." *Ibid.* The same rule applies when, pursuant to the ATS, an alien brings a suit in U.S. court seeking damages for a violation of an international human rights norm that would carry a criminal penalty in an international forum.

That is illustrated by the fact that the three paradigmatic norms of international law that were actionable at the time the ATS was enacted – "violation of safe conducts, infringement of the rights of ambassadors, and piracy" – also constituted "offenses against the law of nations addressed by the *criminal* law of England." *Sosa*, 542 U.S. at 715 (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)) (emphasis added). This fact did not prevent the First Congress from vesting the federal courts with jurisdiction over tort suits seeking a civil remedy for the same violations.

In fact, the Second Circuit has acknowledged that "individuals within . . . corporations" – *i.e.*, the agents of corporations – *can* be held liable under the ATS for torts committed in violation of international human rights norms for which only criminal, not civil, penalties are available in international fora. *Kiobel*, 621 F.3d at 145. As the D.C. Circuit explained, the fallacy of the Second Circuit's logic is that "[i]f the absence of a universally accepted rule for the award of civil damages against corporations means that U.S. courts may not award damages against a corporation, then the same absence of a univer-

sally accepted rule for the award of civil damages against natural persons must mean that U.S. courts may not award damages against a natural person." *Doe*, 654 F.3d at 55 (quoting *Kiobel*, 621 F.3d at 152-53 (Leval, J., concurring)). Yet, as this Court's decision in *Sosa* makes clear, this is not the case.

Likewise, there is no merit to the Second Circuit's repeated contention that footnote 20 of *Sosa*, 542 U.S. at 732 n. 20, "requires that we look to *international law* to determine [] jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Kiobel*, 621 F.3d at 127 (emphasis in original).

Footnote 20 of *Sosa* merely explains that in "determin[ing] whether a norm [of international law] is sufficiently definite to support a cause of action," "[a] related consideration 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," 542 U.S. at 732 & n. 20. The clear meaning of this passage is that "consideration [of] whether international law extends the scope of liability for a violation of a given norm to . . . a private actor," *ibid.*, is relevant only to the determination of whether, as a matter of substantive tort law, the international norm at issue supports a cause of action under the ATS against a private actor as opposed to a state entity.

This understanding of the passage is strongly reinforced by the explanatory citations – "Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)," *Sosa*, 542 U.S. at 732 n. 20 – that follow it. In *Tel-Oren*, the question at

issue was whether international law "incorporate[d] torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law," 726 F.2d at 792 (Edwards, J., concurring), *i.e.*, "whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility," *id.* at 795. Similarly, in *Kadic*, the question presented was whether "norms of international law . . . bind only states and persons acting under color of a state's law, not private individuals." 70 F.3d at 239. In neither case did the court of appeals distinguish between different types of private actors, *i.e.*, treat "a corporation" and "an individual" differently for purposes of determining whether a norm of international law applies to the conduct in question. Rather, both courts were concerned only with distinguishing between private and public actors.

As a result, once the determination is made that "international law extends the scope of liability for a violation of a given norm to . . . a private actor," *Sosa*, 542 U.S. at 732 n. 20, international law drops out of the analysis. That is because, as concerns matters of vicarious liability, it is the common law, not international law, that determines "the identity of the persons to whom that [tortious] conduct is attributable." *Kiobel*, 621 F.3d at 128.

4. Both the substantive rule of *Sosa* and common-law principles of vicarious liability play distinct gatekeeping roles in limiting what claims may be brought against corporations under the ATS. As a result, although as a general matter corporations can be held liable for damages for torts committed by their agents in violation of the law of nations, as a practical matter the law places two significant limits on such claims.

In particular, *Sosa*'s definition of the type of substantive claims that may be brought under the ATS – only those claims that "rest on a norm of international charac-

ter accepted by the civilized world and [are] defined with a specificity comparable to the features of the 18th-century paradigms," 542 U.S. at 725 – significantly limits the causes of action that be brought under the ATS against any defendant, including corporations. *See*, *e.g.*, *Sosa*, 542 U.S. at 738 (holding that ATS claim for illegal detention "violates no norm of customary international law so well defined as to support the creation of a federal remedy").

Even if a particular tort claim brought under the ATS meets the *Sosa* test, common-law tort rules of vicarious liability and other common-law limits on secondary corporate liability limit recovery against corporations in many circumstances. *See*, *e.g.*, Restatement (Third) of Agency § 7.07 (no liability for employer where tort committed by employee falls outside scope of employment). *See also Kiobel*, 621 F.3d at 194 (Leval, J., concurring) (concluding that petitioners failed to plead facts sufficient to show that under "general principle[s] of corporate law" Royal Dutch Petroleum and Shell Transport – the Dutch and British parent corporations of Shell Petroleum Development Company of Nigeria – were responsible for the acts of their Nigerian subsidiary).

In sum, in determining whether a corporation is liable for damages for a tort committed by its agent, the same rules of vicarious liability apply whether the "civil wrong," W. Keeton, The Law of Torts, at § 1, is defined by U.S. law or by the law of nations. That is because, although the ATS effectively incorporates a small number of "actionable international norms" into our federal law, *Sosa*, 542 U.S. at 729, the contours of the "civil action . . . for a tort . . . committed in violation of the law of nations," 28 U.S.C. § 1350, recognized by the ATS remain a matter of federal common law.

CONCLUSION

The Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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