NO 09-7125 (Consolidated With Nos. 09-7127-cv; 09-7134-cv; 09-cv-7135)
ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VII, *et al.*,

***Plaintiffs-Appellees*,**

v.

EXXON MOBIL CORP., *et al.*,

***Defendants-Appellants/Cross-Appellants*.**

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), *amicus curiae* certifies:

(A) Parties and Amici: All parties, intervenors, and *amici* appearing in this Court are listed in the Answering Brief of Appellees/Cross-Appellants.

(B) Rulings Under Review: References to the rulings at issue appear in the Answering Brief of Appellees/Cross-Appellants.

(C) Related Cases: *Amicus curiae* is aware of no related cases. *Doe I* has previously been before this Court in *Doe* v. *Exxon Mobil Corp.*, 473 F.3d 345 (2007).

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GLOSSARY

ATS	Alien Tort Statute, 28 U.S.C. § 1350
Chamber	Chamber of Commerce of the United States of America
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
TVPA	Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as Note at 28 U.S.C. § 1350)

STATEMENT OF *AMICUS* INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") has a direct and substantial interest in the issues presented by these cases. The Chamber is the world's largest business federation, representing 300,000 direct members with an underlying membership of more than three million businesses and trade and professional organizations of every size, sector, and geographic region. Chamber members transact business around the world. They have been and may continue to be defendants in suits predicated on various theories of third-party liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as Note at 28 U.S.C. § 1350).[1] Accordingly, application of the ATS and TVPA to corporate defendants—either directly or through the imposition of aiding-and-abetting liability—is of immediate concern to the Chamber and its members.

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[1] These lawsuits have been filed against private companies in virtually every business sector. See Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendants-Appellees/Cross-Appellants, *Sarei, et al. v. Rio Tinto plc*, No. 00-cv-11695, at 2 n.1 (filed Dec. 16, 2009). In fact, more than 50 percent of companies listed in the Dow Jones Industrial Average have been named as defendants in ATS actions.

Lawsuits such as this one impose tremendous, irremediable burdens on defendants. The mere existence of such a lawsuit negatively impacts stock values and debt ratings. The lawsuits trigger expensive and burdensome international discovery—based on allegations that often prove false—and result in lengthy, costly, and unwieldy trials or "coerced" settlements. These lawsuits also impose high costs on investors by heightening the risks of doing business. They reduce the participation of potential foreign investors in the U.S., and they place U.S. companies operating overseas at a grave disadvantage—even businesses that engage in overseas activities as part of U.S. government political or economic strategy.

While the Chamber takes no position as to the factual allegations at issue here, it unequivocally and repeatedly has condemned violations of human rights such as torture and extrajudicial killing. But the question at bar is not whether such wrongs occurred. Rather, it is whether private plaintiffs can reach defendants who clearly fall outside the scope of the relevant law. International industry has long functioned without the looming specter of corporate liability under customary international law, governed instead by administrative and civil regimes specifically applicable to corporate entities. U.S. courts should not now disregard the standards of international custom-

ary law and clear statutory text in order to impose liability on corporations under the ATS and TVPA.

SUMMARY OF THE ARGUMENT

The Supreme Court has warned that U.S. laws should be extended abroad only with great caution. *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 728 (2004); cf. *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (reaffirming the strong presumption against expanding U.S. law to encompass extraterritorial conduct). Such caution is especially warranted in cases like these, where plaintiffs seek to extend the ATS to a class of defendants that falls squarely outside the scope of customary international law and, likewise, to stretch the TVPA to reach defendants that are plainly beyond the statute's express terms.

The ATS "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 542 U.S. at 712. It is a jurisdictional statute that does not provide a standalone cause of action.[2] That is, the scope of liability under the ATS is defined not by the statute but by customary international law itself. *Kiobel* v. *Royal Dutch Petroleum Co.*, Nos. 06-4800-cv, 06-4876-cv, 2010 WL

[2] The ATS provides that "[t]he 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.

3611392, at *7-11 (2d Cir. Sept. 17, 2010). And the scope of customary international law is defined by international law itself; it does not permit liability for any defendant who might otherwise be liable under one State's domestic laws.

Customary international law, in turn, consists of "only those norms that are 'specific, universal, and obligatory'" in the "relations of States *inter se*." *Kiobel*, 2010 WL 3611392, at *3, 25 (quoting *Sosa*, 542 U.S. at 732). It does not recognize—and has never recognized—corporate liability for the kinds of conduct at issue here. The international human-rights and war-crimes norms that are typically involved in ATS suits (and that are involved here) do not extend liability to corporations. Accordingly, under *Sosa*'s requirement that a purported norm of international law must be universally accepted and definite before it can provide a cause of action under the ATS, corporations cannot be held liable in suits such as these. Cf. *Sosa*, 542 U.S. at 728 (in the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations," courts must exercise "great caution in adapting the law of nations to private rights."). Nor is there room for the creation of a cause of action under the ATS from federal common law.

Similarly, this court should recognize the absence of international consensus on civil aiding-and-abetting liability and thus the absence of ATS liability for corporations under such a theory. Permitting such secondary liability would allow a simple end run around the *absence* of corporate liability in international law. Doing business in or having commercial relationships with people in countries with questionable human rights records is insufficient reason to impose aiding-and-abetting liability.

Any attempt to assert corporate liability under the TVPA should likewise be rejected. As is plain on the face of that statute, it applies only to "individuals"—by which Congress clearly intended to exclude corporations—and it extends only to perpetrators themselves, not to aiders and abettors. The evidence of Congressional intent confirms that liability is limited to natural persons. The district court was correct to dismiss these claims.

Not only is the imposition of liability legally unsound under any of appellants' theories, but the practical consequences of imposing corporate liability in a case such as this—whether directly or through a theory of secondary liability—would be severe. The modern business world is increasingly—and inexorably—international, and American businesses routinely engage in operations across the world, often as part of (and at the behest of) a government-sponsored policy of economic engagement in those countries.

Subjecting these businesses to liability in U.S. courts for wrongs committed by foreign regimes imposes massive, unfair burdens and threatens to undermine U.S. government foreign policy initiatives. One would expect a clear congressional statement that it intended to impose such costs; here, all available evidence points to the opposite conclusion.

ARGUMENT

I. Corporations Cannot Be Held Liable Under Customary International Law

Liability may be imposed under the ATS only where the defendant has violated "the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The "law of nations" comprises a body of laws that have "been accepted as such by the international community of states," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987), and that are therefore recognized as "specific, universal, and obligatory" norms of customary international law. *Sosa*, 542 U.S. at 732. Corporate liability is *not* recognized as such a norm.[3]

A. The Scope Of Liability Must Be Defined By International Law

Sosa posed but did not directly answer the question whether "international law extends the scope of liability for a violation of a given norm to the

[3] There is no international agreement directly imposing liability on corporations for the conduct alleged here.

perpetrator being sued, if the defendant is a private actor such a corporation or individual." 542 U.S. at 732 n.20. As the Second Circuit recently explained, "[t]hat language requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Kiobel*, 2010 WL 3611392, at *8; *id*. at *7 ("international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."); *id.* at *8 ("the subjects of international law are determined by international law, and not individual States.").

As a preliminary matter, it is insufficient to observe that corporate liability is a long-standing principle of our *domestic* law. The mere fact of "[o]ur recognition of a norm of liability as a matter of *domestic law* . . . cannot create a norm of customary international law." *Kiobel,* 2010 WL 3611392, at *2. Even a legal norm that is found in "most or even all" States will not necessarily be considered a norm of customary international law. *Id*. "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]." *Filártiga* v. *Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). In short, corporate liability can ex-

ist under the ATS if and only if a norm of corporate liability exists under *international law*.

B. Customary International Law Does Not—And Has Never—Subjected Corporations To Liability For International Human Rights Violations

The standard for discerning the existence of a rule of customary international law is exacting: A principle will qualify only if it is "specific, universal, and obligatory"; "accepted by the civilized world"; and "defined with a specificity comparable to" international law cognizable at common law. *Sosa,* 542 U.S. at 725, 732; see also *Kiobel*, 2010 WL 3611392, at *21 (to be customary international law a rule must be "specific, universal, and obligatory" and "accept[ed] among nations of the world in their relations *inter se*."); *Flores* v. *S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (only principles that states "universally abide by, or accede to" "out of a sense of legal obligation and mutual concern" will be actionable). No such norm of corporate liability exists. Indeed, numerous courts have recognized that, with rare and limited exceptions, international law applies only to sovereign nations, not to private actors like corporations. See, *e.g.*, *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 447-48 (2nd Cir. 2000) (stating the general rule and suggesting that the main exceptions are war crimes, genocide, the slave trade, airplane hijacking, and piracy); *Tel-Oren* v. *Libyan Arab Repub-*

lic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (same). Moreover, since World War II, the international community has convened five tribunals to adjudicate major violations of international human rights law. These tribunals constitute the best evidence of state practice with regard to corporate criminal liability. Nearly all dealt (or will deal) directly with crimes committed by or with the aid of businesses, but *none* have recognized corporate liability.[4]

1. Customary international human rights law historically has not imposed liability on corporations

Past state practice makes clear that, in international fora, corporations may not be held liable. As the *Kiobel* court explained:

> From the beginning, . . . the principle of individual liability for violations of international law has been limited to natural persons—not "juridical" persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it.

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[4] Treaties can also serve as the basis for binding customary law, but only in those rare circumstances "when such agreements are" both (1) "intended for adherence by states generally" (not simply by signatories), and (2) "in fact widely accepted." RESTATEMENT (THIRD) § 102(3); see also *Mora* v. *New York*, 524 F.3d 183, 202 (2d Cir. 2008) ("If contracting States-parties wish to impose upon themselves legal obligations that extend not only to each other, but to all individual foreign nationals, we would ordinarily expect expression of these obligations to be unambiguous."). No treaty is relied on in the instant case. And in any event, corporate liability is completely absent from the treaty-based regimes addressing the kind of conduct at issue here.

2010 WL 3611392, at *2. This is the clear lesson of the World War II military tribunals.

The Nuremberg Principles foreclosed the existence of corporate liability for violations of the law of nations. See *The Nuremberg Trial (United States* v. *Goering)*, 6 F.R.D. 69, 110 (1946) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."); *Kiobel*, 2010 WL 3611392, at *13-15. The charter of the Nuremberg Tribunal, which was established to try leaders of the German high command for war crimes and other atrocities, did not include corporate liability even though corporations were alleged to have participated in these atrocious acts. See *Kiobel*, WL 3611392, at *13 ("the effect of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization.") (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 10, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279); see generally Jonathan A. Bush, *The Prehistory of Corporations And Conspiracy In International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1239-40 (2009).

That omission was not inadvertent. Although there was a strong desire to hold accountable those who had financed or profited from the Nazi regime, *id.* at 1105, the organizers explicitly rejected proposals to hold corporations liable, *id*. at 1156. Instead, the Allies' policy was to charge only individual directors and officers for their personal conduct. *Kiobel*, 2010 WL 3611392, at *14-15; see, *e.g.*, *United States* v. *Krupp*, 9 Trials of War Criminals 1327 *et seq.*; *United States* v. *Flick*, 6 Trials of War Criminals 1187 *et seq.* It is thus clear that, at the time of the Nuremberg trials, corporate liability was not recognized as a "'specific, universal, and obligatory' norm of customary international law." *Kiobel*, 2010 WL 3611392, at *15.

The International Military Tribunal in Tokyo, which addressed war crimes in the Far Eastern theater of World War II, likewise was limited. See Charter of the International Military Tribunal for the Far East (Tokyo Charter) art. 5, Jan. 19, 1946, as amended Apr. 26, 1946, T.I.A.S. No. 1589. There is no evidence that corporate liability was contemplated, and not even individual business leaders were charged with international crimes. Thus, neither of the two most formative historical precedents for evaluating the scope of customary international law provides any support—let alone the widespread evidence *Sosa* requires—for corporate criminal liability.

2. Modern international criminal tribunals do not have jurisdiction over corporations

Modern international practice has not recognized create corporate liability, either. "[A]s new international tribunals have been created, the customary international law of human rights has remained focused not on abstract entities but on the individual men and women who have committed international crimes universally recognized by the nations of the world." *Kiobel*, 2010 WL 3611392, at *3. Thus, "international tribunals [since Nuremburg] have continually declined to hold corporations liable for violations of customary international law." *Id.* at *15-17; see, *e.g.*, Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 6, 32 I.L.M. 1192, 1194 (1993) (restricting jurisdiction to natural persons); Statute of the Int'l Criminal Tribunal for Rwanda, art. 5, 33 I.L.M. 1602, 1604 (1994) (same).

Consistent with these limited jurisdictional grants, prosecutions targeting business conduct have been brought only against *individual* business leaders for personal conduct. See, *e.g.*, *Prosecutor* v. *Musema*, No. ICTR-96-13-T, Judgment and Sentence, ¶ 895 (Jan. 27, 2000) (concluding that the defendant directly influenced his employees to commit war crimes); *Prosecutor* v. *Nahimana, Barayagwiza, & Ngeze*, No. ICTR 99-52-

T, Judgment and Sentence, ¶¶ 8-10 (Dec. 3, 2003) (holding newspaper and radio station operators liable for directly inciting ethnic violence).

The International Criminal Court (ICC) likewise has jurisdiction over only natural persons. Rome Statute of the Int'l Criminal Court, art. 25(1), adopted July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Corporate liability was specifically proposed by the drafters of the Rome Statute; that proposal was rejected, however, because the parties concluded that there were not "universally recognized common standards for [private entity] liability; in fact, the concept is not even recognized in some major criminal law systems." Kai Ambos, Article 25: Individual criminal responsibility, *in* Commentary on the Rome Statute of the International Criminal Court 475, 477-78 (Otto Triffterer ed., 1999); see also *Kiobel*, 2010 WL 3611392, at *3.

The ICC's founders recognized that, because certain countries do not themselves permit the prosecution of corporations, allowing prosecutions before the ICC would have distorted the balance between national sovereignty and international jurisdiction. As Swedish Foreign Minister Per Saland observed, the question of corporate criminal liability:

> deeply divided the delegations [at Rome]. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its in-

> clusion, which would have had far-reaching legal consequences for the question of complementarity. . . . Eventually, it was recognized that the issue *could not be settled by consensus* in Rome . . . .

THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 199 (Roy S. Lee ed., 1999) (emphasis added). Thus, "modern international tribunals make it abundantly clear that, since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to ripen into a universally accepted norm of international law." *Kiobel*, 2010 WL 3611392, at *17 (quotation marks and alteration omitted).

At bottom, customary international law "has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." *Id*. at *3 Because international law "has *never* extended the scope of liability to a corporation," *id.*, and because *Sosa* requires plaintiffs invoking the ATS to prove the existence of a "universal" norm of international law, 542 U.S. at 728, it follows that there is no corporate liability under the ATS.

C. There Is No Federal Common Law Cause Of Action Against Corporations Available Under The ATS

Appellants argue—as did Judge Leval in his concurring opinion in *Kiobel*—that "federal common law provides the cause of action," Appellants' Br. at 33. Appellants misapprehend the Supreme Court's instruction

in *Sosa* that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. Rather, the ATS permits U.S. courts to exercise jurisdiction over claims brought by aliens; it does not create a cause of action for them independent of the requisite violation of customary international law. See *Kiobel*, 2010 WL 3611392, at *23 ("the ATS merely permits courts to recognize a remedy (civil liability) for heinous crimes universally condemned by the family of nations against individuals already recognized as subjects of international law."). As explained above, no such norm exists.

In any event, federal common law cannot support the claim urged under the ATS here. Congress is authorized to "define and punish . . . Offences against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10. Thus, congressional action is required before international law may be incorporated into U.S. domestic law. See *Al-Bihani* v. *Obama*, 619 F.3d 1, 18 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing *en banc*) ("[C]ourts and scholars generally agree that federal common law must be authorized in some fashion by the Constitution or a federal statute.") (citing Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 856 (1997); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986) (a court "must point

to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule"); Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964) (federal common law limited to "areas where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end")). Here, Congress has not authorized the creation of federal common law providing for the liability of corporations under these circumstances.[5] In fact, Congress has directly addressed claims for torture and declined to provide for corporate liability. "[C]reating a federal command (federal common law) out of 'international norms,' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts." *Sosa*, 542 U.S. at 743 (Scalia, J., concurring).

[5] In *Sosa*, the Supreme Court explained that Congress intended the creation of federal common law pertaining to a narrow and limited subset of claims: only "violation of safe conducts, infringement of the rights of ambassadors, and piracy" were "probably on minds of the men who drafted the ATS with its reference to tort." 542 U.S. at 715; see also Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (arguing that the ATS was intended to redress only those torts committed by private actors (including aliens) that had a United States sovereign nexus—not for international law violations committed by any person in any place.)

1. The lone domestic statute to address torture, the TVPA, does not allow a cause of action against corporations for torture

It is well settled that "federal common law has been preempted as to every question to which [a] legislative scheme 'spoke directly,' and every problem that Congress has 'addressed.'" *Connecticut* v. *American Elec. Power Co., Inc.*, 582 F.3d 309, 374 (2d. Cir. 2009) (quotations marks and citation omitted). And "it is not as though Congress has been silent on the question of torture or war crimes." *Saleh* v. *Titan Corp*, 580 F.3d 1, 16 (D.C. Cir. 2009). The TVPA was passed specifically "to fulfill the [Geneva] Convention's mandate that ratifying nations take action to ensure that torturers are held legally accountable for their actions." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002); see also 18 U.S.C. §§ 2340-2340A (establishing criminal penalties for persons present in the United States who commit or conspire to commit torture outside U.S. territory). Indeed, *Sosa* specifically identified the TVPA as establishing "'an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." 542 U.S. at 728 (quoting H.R. REP. NO. 102-367, pt. 1, at 3 (1991)).

It would be inappropriate to craft a federal-common-law cause of action where a federal statute (the TVPA) already addresses the types of

claims raised by appellants—let alone to create a federal-common-law cause of action directly at odds with that statute. And it would be passing strange if the ATS—a jurisdictional statute—were used to create a federal-common-law remedy against corporations in the face of Congress's express exclusion of such a cause of action in the TVPA. As this Circuit has explained, through the TVPA "Congress provided a cause of action whereby U.S. residents could sue foreign states for torture but did not—and we must assume that was a deliberate decision—include as possible defendants either American government officers or private U.S. persons, whether or not acting in concert with government employees." *Saleh*, 580 F.3d at 16. Likewise, Congress expressly limited liability under the TVPA to "individuals"—excluding corporations. See Part III, *infra*; 28 U.S.C. § 1350, note § 2(a) (imposing liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture"); *Bowoto* v. *Chevron Corp.*, No. C 99-02506-SI, 2006 WL 2604591, at *2 (N.D. Cal. Aug. 22, 2006) ("Congress intended only that the TVPA reach natural persons, not corporations."). Federal courts must refrain from exercising their common law power to create an alternative remedy for the same misconduct addressed by the TVPA when Congress has specifically provided a cause of action for such violations and has delineated how such

claims are to proceed. Cf. *Sosa*, 542 U.S. at 727 ("a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.").

Moreover, if the ATS were interpreted as creating federal-common-law causes of action regardless of the absence of such an action under customary international law, the TVPA would be rendered meaningless as to aliens. No plaintiff would plead a cause of action under the TVPA, which contains additional limitations and requirements (such as exhaustion of remedies), if those statutory obstacles could be avoided simply by invoking a common law cause of action under the ATS. And because the ATS applies only to suits by aliens and the TVPA governs actions by aliens *and citizens*, reading a cause of action against corporations into the ATS would give aliens a cause of action as a matter of federal common law that Congress did not grant to citizens. It is difficult to imagine that Congress intended such an absurd result.

2. There is no "color of law" cause of action available against corporations under the ATS

Appellants argue that corporations can be held liable under the ATS to the extent that they acted "under color of law." Appellants' Br. at 44-45. The ATS does not provide for "color of law" actions against corporations; it

certainly does not create a right of actions analogous to that in *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Appellants' claims here fail even the two-step inquiry to determine whether a "color of law" remedy exists under typical circumstances. *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). First, courts ask "whether any alternative, existing process for protecting the interest [at issue] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id*. If no such "alternative" exists, courts then "weigh [the] reasons for and against the creation of a new cause of action," while "pay[ing] particular heed . . . to any special factors counseling hesitation." *Al-Zahrani* v. *Rumsfeld,* 684 F. Supp. 2d 103, 111 (D.D.C. 2010) (quotation marks omitted).

For claims brought under the ATS, "*Bivens* provides perhaps the closest analogy," and a heightened burden should apply. *Sosa*, 542 U.S. at 743 (Scalia, J., concurring). The Supreme Court expressly has held that a *Bivens* action cannot be entertained against a private corporation. *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001). *Malesko* held that the reasoning of *Bivens* could not be extended to confer a right of action against the corporation that ran the correctional center in which the plaintiff was injured. As particularly relevant here, the Court explained that *Bivens* was intended to

deter "*individual* federal officers" from committing constitutional violations. *Id*. at 70 (emphasis added); see also *id*. at 70 ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual* officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an *individual* officer's unconstitutional conduct.") (emphasis added). And "[w]here such circumstances are not present, the Court has consistently rejected invitations to extend *Bivens*." *Id*. at 62; *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.") (quotation marks omitted).

Courts should be especially hesitent to extend a *Bivens*-like remedy where, as here, doing so "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation." *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009); see also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) ("the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.").

II. Liability For Aiding And Abetting Is Not Available Under The ATS

In the alternative, appellants argue that the defendants should be held liable for actions of the Indonesian government under a theory of secondary liability—*i.e.*, that Exxon aided and abetted the Indonesian government's alleged international law violations. This argument must fail; customary international law does not provide for civil aiding-and-abetting liability. Moreover, judicial recognition of a federal-common-law cause of action for aiding and abetting is precluded by *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which held that the availability of aiding and abetting should not be assumed, and by the lack of contrary guidance from Congress on this issue. See generally *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) ("Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.").

A. There Is No Consensus On Civil Secondary Liability In International Law

The ATS does not explicitly authorize claims predicated on secondary liability. See Curtis A. Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 929 (2007) ("Whether corporations should be liable for aiding and abetting violations of

customary international law is an issue that will need to be addressed in the first instance by the political branches."). Nor is such liability available under norms of customary international law, which "never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J. concurring).

Virtually no historical evidence suggests that civil aiding-and-abetting principles were widespread when the ATS was enacted. See *Central Bank of Denver*, 511 U.S. at 181 ("[t]he doctrine of [civil accessorial liability] has been at best uncertain in application" and its common-law antecedents were "'largely confined to isolated acts of adolescents in rural societies'") (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983)). Principles of third-party liability did not enter the international legal discourse meaningfully until the end of World War II and were confined to criminal, not civil, liability. *The Nuremberg Trial (United States* v. *Goering*), 6 F.R.D. 69 (Int'l Military Tribunal at Nurnberg 1946)

Nor can aiding-and-abetting liability arise under the guise of federal common law. As *Sosa* makes clear, a federal common law claim must be analyzed at a high level of specificity and must have achieved widespread

international acceptance. See *Sosa*, 542 U.S. at 725, 736, 738. Courts have disagreed as to whether even international *criminal* law norms of aiding and abetting are sufficiently well-defined and accepted to satisfy *Sosa*'s first step. Compare *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 264-84 (2d Cir. 2007) (Katzmann, J., concurring), *with id.* at 319-23, 330-33 (Korman, J., concurring and dissenting). There is certainly nothing approaching the requisite consensus as to *civil* aiding and abetting liability. *Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.").

B. Civil Aiding And Abetting Liability Is Disfavored Even Under Domestic Law

Not only does civil aiding and abetting liability lack a firm historical footing in international law, it is also disfavored as a matter of federal law. In *Central Bank of Denver*, the Supreme Court held that, even "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*." 511 U.S. at 182 (emphasis added).

That presumption is even stronger when there is no express statutory cause of action, because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727. And where doing so would have *international* ramifications, courts should tread more lightly still. As *Sosa* explained, because of the danger of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," there is a "high bar" to recognizing "new private causes of action for violations of international law." *Id*. at 695; *Saleh*, 580 F.3d at 16 ("The judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches."); *Sanchez-Espinoza*, 770 F.2d at 209 ("the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.").

In short, "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Sosa*, 542 U.S. at 727-28. Here, numerous foreign policy considerations caution against the creation of a new cause of action for aiding and

abetting. For example, developing countries with questionable or poor human rights records often are targeted for U.S. constructive engagement policy. The prospect of aiding-and-abetting liability will discourage companies from doing business in such countries and undermine these efforts—and undermine the foreign affairs decision-making that is constitutionally vested in the other branches of government. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-15 (2003); see also Part IV, *infra*.

III. The TVPA Does Not Provide A Cause Of Action Against Corporations

"[T]he plain language of the TVPA does not allow for suits against a corporation." *Bowoto* v. *Chevron Corp.*, No. 09-15641, 2010 WL 3516437, at *6 (9th Cir. Sept. 10, 2010). The legislative history confirms the plain meaning of the statute—*i.e.*, that Congress did not intend for corporations to be subjected to liability under the TVPA. Reading corporate liability into the TVPA would be completely unjustified, and it would have the same negative consequences as it would for the ATS. See Part IV, *infra*.

A. The Plain Text Of The Statute Applies Only To Natural Persons

The TVPA "establishe[s] a civil action for recovery of damages from *an individual* who engages in torture or extrajudicial killing." Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as Note at 28 U.S.C. § 1350) (empha-

sis added). As most courts to have considered the statute have held, the TVPA does not provide for corporate liability. *Bowoto*, 2010 WL 3516437, at *7 (collecting cases).[6] Rather, "[t]he TVPA's liability provision provides that only an 'individual' may be held liable under the Act." *Id*.

The plain meaning of the term "individual" does not typically include a corporation. *E.g.*, WEBSTER'S COLLEGIATE DICTIONARY 593 (10th ed. 1986) (an "individual" is "a particular being or thing as distinguished from a class, species, or collection . . . a single human being as contrasted with a social group or institution."). Through its use of the word "individual," the statute itself demonstrates that Congress "did not intend for the TVPA to apply to corporations." *Id*. at *7. Indeed, the TVPA uses "individual" in a way that clearly limits its meaning to natural persons, referring to "individuals" as both torturers and torture victims, when it is clear that corporations cannot be torture victims. *Id*. at *8 ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.") (quotation marks omitted). Any lingering doubt about the congressional purpose behind the use of "individual"

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[6] The Ninth Circuit in *Bowoto* recognized that its decision conflicted with the Eleventh Circuit, *id.* (citing *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-52 (2005)), but noted that the defendants in that case had not challenged corporate liability, "and the Eleventh Circuit did not explain its reasoning on the issue."

should be quelled by the Dictionary Act, by which Congress "has directed courts to presume the word 'individual' in a statute refers to natural persons and not corporations." *Id*. at *7 (citing 1 U.S.C. § 1 and explaining that the Act "speaks of 'corporations' and 'individuals' as distinct terms, and we must therefore presume those terms have different meanings.").

B. Legislative History Confirms That Congress Intended The TVPA To Exclude Corporations

The relevant legislative history confirms that Congress intentionally excluded corporate liability from the TVPA. The bill introduced in 1987 would have created a cause of action against any "person" who subjected another to torture. See *Bowoto*, 2010 WL 3516437, at *8 (citing The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417, 100th Cong. 82, 85 (1988)). The subsequent substitution of "individual" for "person" was explicitly done in order to "make it clear [the Committee was] applying [the Act] to individuals and *not to corporations*." *Id.* (emphasis added). What is more, both the House and Senate Reports accompanying the final version of the TVPA stated that only individuals could be sued, emphasizing that foreign states and their entities could not. S. REP. NO. 102-249 at 4 (1991); H.R. REP. NO. 102-367 (1991).

IV. Imposing Liability On Corporations Through The ATS Or TVPA Would Be Harmful For American Business Interests

Not only would this court's imposition of corporate liability violate clear international consensus and congressional policymaking authority, but it also would have serious adverse consequences for American businesses operating in the global marketplace. In any event, it is far from clear that allowing courts to impose liability for doing business with a foreign regime—where the executive and legislative branches have declined to do so—would achieve the human rights goals such litigation typically trumpets.

These lawsuits impose large costs on American businesses and, in turn, shareholders and consumers. The mere filing of an ATS case has a negative impact on stock values and debt ratings. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 WORLD POLY. J. 60, 63 (2004). Discovery in corporate ATS cases is particularly extensive and burdensome because liability turns on the relationship among many corporate groups scattered around the globe, as well as those firms' relationship with a government. The trial of these unwieldy matters is equally costly. This, in turn, leads to "coerce[d] settlement[s]." *Khulumani*, 504 F.3d at 295 (Korman, J., dissenting).

ATS lawsuits raise the cost of doing business abroad. The prospect of such suits causes uncertainty and unpredictability for American companies operating overseas. It potentially raises the cost of investments, which may be charged higher risk-insurance premiums necessary for overseas investments. And it causes foreign corporations to fear that if they make U.S. investments they can be roped into ATS suits for their non-U.S. activities. Foreign companies are threatened by ATS suits even if their investments were made with the permission of the United States Government. Indeed, the U.S. Government often has advocated a strategy of calibrated economic engagement in dealings with certain governmental regimes that fall short of ideal human rights standards. In fact, engagement by private businesses is often the primary means through which governments can advance economic engagement agendas. But government assurances and guidelines governing corporate conduct mean little to businesses—and to potential investors—if they face the possibility of ruin at the hands of a single U.S. jury. The possibility of such legal proceedings often dissuades potential international partners from participating in U.S. ventures at all.

These lawsuits also have the effect of putting U.S. businesses at a disadvantage relative to foreign competitors. See Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339,

370-73 (2008). U.S. courts are the only ones in the world that permit plaintiffs to sue corporations for extraterritorial business activity based on international law-based, civil causes of action, see GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 46 (2003), and a plaintiff alleging an overseas tort in a U.S. court can obtain personal jurisdiction over an American corporate entity more easily than a foreign one. See *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.9 (1984) (an American corporation can be sued in the state of its headquarters and in every other state where it has "continuous and systematic" contacts). The end result is that foreign activity by U.S. corporations is potentially subject to ATS scrutiny, whereas the vast majority of foreign business activity by non-U.S. corporations is not. This asymmetry is harmful to U.S. competitiveness abroad, and it may reduce global economic welfare as well. "If plaintiffs can extract substantial amounts from U.S. defendants by alleging their complicity in such acts and persuading (or threatening to persuade) a jury that the U.S. defendant was somehow involved, the result may simply be a shift of business opportunities from U.S. firms to their less efficient competitors with little effect on the level of objectionable behavior." Sykes, *supra*, at 372.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the lower court's dismissal of the ATS and TVPA claims.

Date: November 12, 2010

Respectfully Submitted.

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1. This brief complies with the type-volume limitations set forth in this Court's Order of June 8, 2010, because this brief contains 6951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 12, 2010, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 12, 2010

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