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 *AMICI CURIAE* BP AMERICA, CATERPILLAR, CONOCO PHILLIPS, GENERAL ELECTRIC, HONEYWELL, AND INTERNATIONAL BUSINESS MACHINES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are corporations that have extensive operations around the world.[1] BP America, Inc. (on behalf of the global group of BP companies), Caterpillar, Inc., ConocoPhillips Company, General Electric Company, Honeywell International, Inc., and International Business Machines Corporation are industry leaders in various business sectors, including energy, construction, transportation, health care, and information technology.

Amici strongly condemn human rights violations, and each company abides by its detailed corporate social responsibility policy. Yet many *amici* have been and may continue to be defendants in suits predicated on various expansive theories of liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, based on their operations—or those of their subsidiaries—in developing countries. Those suits impose severe litigation and reputational costs on corporations that operate in developing countries and chill further investment. *Amici* have a strong interest in ensuring that the ATS is applied in an appropriately circumscribed manner, consistent with its text and original purposes. And because plaintiffs may seek to bring ATS suits against corporate officers and directors even if the Court affirms the decision below on the issue of corporate liability, *amici* have a strong interest in ensuring

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

that the Court resolve the pendent issues of extraterritorial application and aiding and abetting liability that constitute the root causes of ongoing diplomatic tension.

SUMMARY OF ARGUMENT

For the reasons set forth in the Second Circuit's opinion and Respondents' brief, the Court should hold that there is no cause of action under the ATS against corporate entities. But regardless of how this Court resolves that issue, the judgment below should be affirmed because the ATS: (1) does not apply to extraterritorial conduct that occurred entirely in a foreign country; and (2) does not create a cause of action for civil aiding and abetting liability. Both issues are ripe for the Court's review. If corporate executives can still be sued for extraterritorial conduct or under broad aiding and abetting theories, a narrow ruling on corporate liability will not suffice to deter diplomatically problematic and investment-chilling lawsuits.

This Court has recognized that suits under the ATS pose a significant risk of interfering with United States foreign policy and create diplomatic friction. The Court accordingly has instructed the lower courts to proceed with great caution in their application of the ATS. Yet the lower courts have largely ignored that instruction, and ATS litigation has led to significant diplomatic disputes with foreign countries. The source of that friction is not the ATS in the abstract, but the ATS' extraterritorial application, as the United States explained to this Court in a 2008 amicus brief in *American Isuzu Motors v. Ntsebeza*, 553 U.S. 1028 (2008). In stark

contrast, the United States now ignores these ongoing diplomatic complaints and urges the Court to avoid resolving the root causes of that friction.

The United States' approach would frustrate the purpose of the ATS. Congress enacted the ATS to ease diplomatic conflicts caused by a perceived inadequacy of state-law remedies for violations of the law of nations occurring here. The ATS has been converted from a salve to an irritant by the lower courts' misguided extraterritorial application of the statute.

The Court should clarify that the ATS, silent about any extraterritorial effect, does not extend abroad. This Court has recently and emphatically reaffirmed that a federal statute may not be applied to wholly extraterritorial conduct unless the text of the statute clearly compels that result. Nothing in the sparse text of the ATS supports—much less *clearly* supports—extending the statute to alleged torts that occurred entirely within the borders of a foreign nation. Indeed, the history and purpose of the statute confirm that it is solely intended to provide a remedy for: (1) torts committed against aliens that occurred on U.S. soil; or (2) torts that occurred on the high seas, such as piracy, which are by definition outside the territorial jurisdiction of *any* nation. The ATS has no application whatsoever to alleged injuries—such as the ones at issue here—suffered by a foreign citizen on foreign soil.

Extraterritorial application of the ATS not only offends basic precepts of our own law, it also violates international law. Territorial jurisdiction is one of the basic building blocks of international law. It

serves to avoid confrontations between nations generated by conflicting and overlapping claims to jurisdiction. International law regards as illegitimate the assertion of jurisdiction over disputes that have no relation to the nation in which those disputes are adjudicated. The drafters of the ATS were well aware of the jurisdictional limits of international law, and those boundaries clearly informed the ATS' scope. Even in the criminal context, many nations—including the United States—regard as illegitimate the broad exercise of jurisdiction over events that occurred in another nation. It is thus hardly surprising that many countries—including close allies of the United States, such as the United Kingdom, Canada, and Australia—have repeatedly objected to ATS suits involving foreign conduct with no nexus to the United States.

The plaintiffs' claims should also be dismissed for the separate and independent reason that the ATS does not confer jurisdiction over claims involving civil aiding and abetting liability. As with extraterritoriality, a cause of action for civil aiding and abetting liability is not cognizable unless Congress has clearly indicated its intent to create such liability. The fact that *criminal* aiding and abetting liability may exist is irrelevant. Congress has indicated a general preference for aiding and abetting liability in the criminal sphere. A comparable indication of congressional intent is missing in the civil context, as is the critical check of prosecutorial discretion.

At a minimum, the Court should hold that the *mens rea* standard for civil aiding and abetting

liability under the ATS is *purpose*, rather than mere knowledge. A corporate defendant accused of aiding and abetting human rights abuses of a foreign government may not be held liable unless it acted with the purpose of causing those abuses.

ARGUMENT

I. EXTRATERRITORIAL APPLICATION OF THE ATS CAUSES DIPLOMATIC FRICTION, CONTRARY TO THE PURPOSE OF THE ATS

A. In *Sosa v. Alvarez-Machain*, this Court concluded that the ATS provides jurisdiction for federal courts to hear "a very limited category" of private claims "defined by the law of nations." 542 U.S. 692, 712 (2004). The Court admonished the lower courts to exercise "great caution" and restraint in expanding the scope of the ATS, explaining that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id*. at 727-28.

The lower courts largely have ignored that admonition. Courts instead have condoned lawsuits under the ATS brought by foreign plaintiffs against U.S. and foreign corporations for conduct committed by foreign governments in foreign countries. These suits have precipitated the very diplomatic friction the ATS and *Sosa* sought to avoid. Before this litigation, the U.S. government had filed more than a dozen briefs emphasizing that such suits complicate relations with other nations.

Nonetheless, the United States now urges the Court to rule "narrow[ly]" on the issue of whether corporations are proper defendants under the ATS, and to ignore the broader, more troubling aspects of lower courts' ATS jurisprudence. Br. for the United States as Amicus Curiae ("U.S. Br.") at 6. That proposed course would do little to ameliorate foreign governments' concerns about the expanding scope of ATS liability, which has turned the federal judiciary into an international civil court to remedy wrongs anywhere in the world.

Two legal issues common in ATS litigation and present here—extraterritorial application of the statute and aiding and abetting liability—cause repeated diplomatic disagreements and inhibit international commerce. Those issues are what drive the most diplomatically problematic ATS suits. The resulting diplomatic friction is contrary to the original purpose of the ATS to redress violations of international law that "threaten[] serious consequences in international affairs" of the United States. *Sosa*, 542 U.S. at 715; *see also id.* at 761 (Breyer, J., concurring) (questioning "whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

Curtailing ATS lawsuits against corporations by affirming the decision below will help rein in the expanding scope of ATS liability. But the Court should not stop at an incomplete solution that fails to address the root causes of the extraordinary diplomatic friction caused by ATS lawsuits—namely,

the application of the ATS to allegedly tortious acts that occur in foreign countries, whether through direct acts or more commonly through allegations that corporate agents have aided and abetted the conduct of foreign governments.

B. This case exemplifies the sprawling geographic reach of the ATS post-*Sosa* and the resulting interference with U.S. foreign relations. Here, Nigerian plaintiffs seek to hold Dutch, British, and Nigerian corporations liable for aiding and abetting acts allegedly committed by the Nigerian government against its own citizens in Nigeria. Plaintiffs in this and numerous other ATS cases use ATS lawsuits against "corporations as proxies for what are essentially attacks on [foreign] government policy." Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 102, 107.

Foreign governments view ATS suits that impugn their own actions or the actions of their nationals to be unlawful infringements on their sovereignty. In the past decade, the governments of Australia, Canada, China, Colombia, El Salvador, Germany, Israel, Papua New Guinea, South Africa, Switzerland, and the United Kingdom have lodged protests with the State Department or filed briefs objecting to the extraterritorial application of the ATS, including in cases involving *amici* as defendants.[2] For example, U.S. allies have criticized U.S. courts' "infringement in the conduct of foreign

[2] A partial compilation of these objections is included at Appendix A and http://www.courtappendix.com/kiobel/protests.

relations"[3] and "interfere[nce] in the jurisdiction of [foreign] courts"[4]—actions that "transgress thereby the sovereignty . . . and the will of [their] people."[5] The United Kingdom and Australia have emphasized that merely limiting the number of actionable norms under the ATS is insufficient to assuage these concerns because "even if narrowly construed, the ATS remains a source of excessive extraterritorial jurisdiction."[6]

The State Department has for years expressed to courts its concern that ATS litigation involving conduct in other countries interferes with U.S. foreign relations.[7] *See*, *e.g.*, Letter from Legal

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[3] Diplomatic Note from Canada to United States (Jan. 14, 2005), at 2, attached to United States Statement of Interest, *Presbyterian Church of Sudan v. Talisman Energy*, No. 01-9882 (S.D.N.Y. Mar. 15, 2005).

[4] Letter Brief of German Government at 3, *Balintulo v. Daimler A.G.*, No. 09-2778 (2d Cir. Oct. 8, 2009).

[5] Br. of El Salvador as Amicus Curiae at 1, *Carranza v. Chavez*, 130 S.Ct. 110 (2009) (No. 08-1467); *id.* at 2 ("The decision of the Sixth Circuit impugns El Salvador's sovereignty, contradicts international authority, and undermines El Salvador's democracy.").

[6] Br. of United Kingdom and Australia as Amici Curiae in Support of Motion for Rehearing En Banc at 2, *Sarei v. Rio Tinto*, Nos. 02-56256, 02-56390 (9th Cir. May 25, 2007).

[7] "[F]oreign governments do not see the ATS as an instance of the United States constructively engaging with international law. Quite the opposite: we are regarded as something of a rogue actor." John B. Bellinger, III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 2008 Jonathan I. Charney Lecture in International

Adviser William H. Taft, IV to Principal Deputy Assistant Attorney General Daniel Meron (Feb. 11, 2005), filed with United States Statement of Interest, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01-9882 (S.D.N.Y. Mar. 15, 2005) ("The Department of State shares . . . Canada's concerns about the difficulties that can arise from an expansive exercise of jurisdiction by the federal courts under the ATS.").[8]

The Departments of Justice and State have confirmed that diplomatic tension caused by extraterritorial application of the ATS "can and already has led to a lack of cooperation on important foreign policy objectives." Supp. Br. for United States as Amicus Curiae at 16, *Doe v. Unocal*, Nos. 00-56603 *et al.* (9th Cir. Aug. 25, 2004) ("U.S. *Unocal* Br.").

The "laundry list" of foreign government protests also "shows that something is palpably awry in the modern ATS juggernaut. The problem stems in large part from extension of the ATS to conduct occurring in foreign lands." *John Doe VIII v. Exxon*

Law, 42 Vand. J. Transnat'l L. 1, 8 (2009) (remarks of then-State Department Legal Adviser, who is undersigned counsel, explaining the "diplomatic costs" of ATS litigation).

[8] *See also* Letter from Legal Adviser William H. Taft, IV to Acting Assistant Attorney General Daniel Meron, at 2, filed with United States Statement of Interest, *Doe v. Qi*, No. 02-0672 (N.D. Cal. Aug. 4, 2004) (explaining that the Chinese government "has vigorously protested these suits at the highest levels, has declined on at least one occasion to send officials to the United States due to fear that they will be harassed and has threatened not to send officials in the future").

Mobil, 654 F.3d 11, 78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

C. In light of numerous diplomatic objections, the United States in 2008 asked this Court to end ATS suits that "challeng[e] the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments." Br. for United States as Amicus Curiae at 5, *Am. Isuzu Motors v. Ntsebeza*, No. 07-919, 2008 WL 408389 (Feb. 11, 2008) ("U.S. *Ntsebeza* Br."). "Such lawsuits," the United States explained, "inevitably create tension between the United States and foreign nations." *Id.*

In *Ntsebeza*, the United States argued that a court of appeals decision authorizing ATS claims against corporations for aiding and abetting a foreign state's activities outside the United States "represents a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially." U.S. *Ntsebeza* Br. at 5. The United States criticized the lower court's disregard for the "serious risks to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy." *Id.* at 18. The United States cited as evidence of the "international friction," *id.* at 14, diplomatic protests filed by Germany, South Africa, Switzerland, and the United Kingdom. *See id.* at 1a-14a.

The United States had argued in numerous prior briefs that the extraterritorial application of the ATS for aiding and abetting the acts of a foreign government represents a "vast expansion of liability that would interfere with the Executive's conduct of foreign policy," Br. of United States as Amicus Curiae at 3, *Mujica v. Occidental*, Nos. 05-56056 *et al*. (9th Cir. Mar. 17, 2006), and that "the recognition of [extraterritorial] claims would directly conflict with Congress' purpose in enacting the ATS, which was to reduce diplomatic conflicts." Br. of United States as Amicus Curiae at 12, *Sarei v. Rio Tinto*, Nos. 02-56256 *et al*. (9th Cir. Sept. 28, 2006).

In contrast, the United States in this case urges the Court to rule "narrow[ly]," and ignore the broader issues at the root of this diplomatic tension. U.S. Br. at 6. That course should be avoided. While corporate liability remains an important and contentious issue in many ATS suits, resolution of the extraterritorial reach of the ATS and its application to aiding and abetting claims would go further in providing much-needed clarity to lower courts about the properly limited scope of the statute.

There is no obstacle to this Court resolving these pendent issues. Respondents raised the aiding and abetting issue below, and thus may defend the judgment on that basis, "whether or not [it] was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), "provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982); *accord*

Whitley v. Albers, 475 U.S. 312, 326 (1986). The decision below was a complete victory for the defendants, so the relief could not be expanded. And, as Respondents explain, whether the ATS can be applied to extraterritorial conduct is a question of jurisdiction that is properly before the Court. *See* Respondents' Br. 53.

Resolution now also makes prudent sense. The ATS is applied extraterritorially in almost every suit brought under that statute, and aiding and abetting liability is the key to litigating the conduct of foreign governments otherwise immunized from direct suit. Multiple circuits have considered and ruled on both issues.[9] A narrow resolution of this case would lead to continued diplomatic friction, as plaintiffs seek out new "proxies" (perhaps corporate directors and officers[10]) by which to continue challenging the conduct and policies of foreign governments.

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[9] *See, e.g.*, *Sarei v. Rio Tinto*, 2011 WL 5041927, at *3-7, *54-68 (9th Cir. Oct. 25, 2011), *cert. pending*, No. 11-649; *Doe VIII*, 654 F.3d at 20-32, 74-81; *Presbyterian Church of Sudan v. Talisman Energy,* 582 F.3d 244 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

[10] *See Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 149 (2d Cir. 2010) ("Nothing in this opinion limits or forecloses suits under the ATS against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law.").

II. THE ATS DOES NOT APPLY TO PURELY EXTRATERRITORIAL CONDUCT

The ATS should not be interpreted to reach extraterritorial conduct. The Second Circuit noted that this issue remains an open question,[11] and—whether or not corporations can be held liable under the ATS—this Court should affirm on the alternative ground that the ATS does not apply extraterritorially against corporations or anyone else.

A. Federal Statutes Are Presumed to Apply Only to U.S.-Based Conduct

1. Congress unquestionably has "the authority to enforce its laws beyond the territorial boundaries of the United States," but "[w]hether Congress has in fact exercised that authority . . . is a matter of statutory construction." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*").

As this Court recently and emphatically reaffirmed, Congress "ordinarily legislates with respect to domestic, not foreign matters." *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2877 (2010). It is well established that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco*, 499 U.S. at 248 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). "When a statute gives no *clear indication* of an extraterritorial application, it has none." *Morrison*,

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[11] *See Kiobel*, 621 F.3d at 117 n.10 (declining to address "several other lurking questions, including whether the ATS applies 'extraterritorially'").

130 S.Ct. at 2878 (emphasis added); *see also Aramco*, 499 U.S. at 248 ("[U]nless there is the affirmative intention of the Congress, clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic matters.") (citation omitted).

This is nothing new. This Court has applied a presumption against extraterritoriality for essentially its entire existence. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (holding that it "would be an unjust interpretation of our laws" to give them "a meaning . . . at variance with the independence and sovereignty of foreign nations"); *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808) (holding that "the legislation of every country is territorial," and that "the pacific rights of sovereignty must be exercised within the territory of the sovereign"). The Court has also made clear that the presumption applies in "*all cases*," in order to "preserv[e] a stable background against which Congress can legislate with predictable effects." *Morrison*, 130 S.Ct. at 2881 (emphasis added).

There are compelling reasons for the application of this longstanding canon of construction. The presumption against extraterritorial application of federal statutes "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; *cf. Sosa*, 542 U.S. at 727-28 ("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," and "should be undertaken, if at all, with great caution"). Foreign

governments are presumptively capable of remedying misconduct that occurs within their borders, and—absent some express indication to the contrary—it is reasonable for courts to "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 164 (2004); *see also id.* (the presumption against extraterritorial application "helps the potentially conflicting laws of different nations work together in harmony").

Those diplomatic concerns apply with even greater force where, as here, the crux of the plaintiffs' claims involves alleged misconduct by a foreign government or its agents. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government has transgressed those limits." *Sosa*, 542 U.S. at 727; *see also United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns."). Here, for example, any ruling in favor of the plaintiffs would require an American court to pass judgment on the conduct of the Nigerian government and its military with respect to events that occurred wholly within

Nigeria, potentially raising numerous diplomatic concerns.[12]

2. Applying these principles, this Court has repeatedly refused to construe ambiguous statutes as having extraterritorial application. The critical inquiry in each case was not the identity of the defendant, but the location where the alleged misconduct occurred.

Just two Terms ago, the Court held that Section 10(b) of the Exchange Act applied only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities," and thus did not extend to claims of securities fraud brought by Australians who purchased those securities from an Australian bank. *Morrison*, 130 S.Ct. at 2884-85. Similarly, in *Aramco*, the Court concluded that Title VII should not be construed to reach claims against an American corporation for alleged discrimination that occurred in Saudi Arabia. *Aramco*, 499 U.S. at 247-49. And in *New York Central Railroad v. Chisholm*, 268 U.S. 29 (1925), the Court held that a railroad worker who was injured in Canada, just 30 miles

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[12] This Court has recognized that "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather*, 246 U.S. 297, 304 (1918) (internal quotation marks omitted); *cf. Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.").

from the U.S. border, could not bring a claim for benefits under the Federal Employers Liability Act ("FELA") because the statute "contains no words which definitively disclose an intention to give it extraterritorial effect." *Id.* at 31; *see also Hoffmann-La Roche*, 542 U.S. at 164-72 (holding that the Sherman Act does not apply to anticompetitive conduct by foreign companies that affects only foreign purchasers); *McCulloch v. Sociedad Nacional de Honduras*, 372 U.S. 10, 20-21 (1963) (finding "no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag").

The fact that a statute makes some boilerplate reference to "foreign commerce" or "aliens" is insufficient to demonstrate that Congress intended it to apply to *actions* or *conduct* that occurred in a foreign country. For example, the FELA applies to common carriers engaged in "interstate or foreign commerce," 45 U.S.C. § 51, yet this Court held in *Chisholm* that the statute does not reach railroad accidents that actually *occurred* in Canada. *See* 268 U.S. at 31. The National Labor Relations Act also contains broad language that refers to "foreign" commerce, 29 U.S.C. § 152(6), but the Court concluded that this language was insufficiently "specific" to rebut the presumption against extraterritorial application of federal statutes. *McCulloch*, 372 U.S. at 19; *see also Hoffmann-La Roche*, 542 U.S. at 164-65 (holding that the Sherman Act does not apply to conduct that caused "independent foreign harm," even if there is some effect on domestic purchasers).

When Congress *does* intend for a statute to apply extraterritorially, it uses unmistakably clear language. For example, the Foreign Corrupt Practices Act prohibits foreign companies listed on an American stock exchange from "corruptly do[ing] any act *outside the United States* in furtherance" of the bribery of a foreign official. 15 U.S.C. § 78dd-2(i)(1) (emphasis added). Similarly, the Torture Victim Protection Act ("TVPA") grants jurisdiction over claims for torture and extrajudicial killing that were committed "under actual or apparent authority, or color of law, of any foreign nation." P.L. 102-256, § 2(a) (1992), *codified at* 28 U.S.C. § 1350, note. These statutes show that Congress chooses its words carefully when it intends for a statute to reach conduct that occurred within a foreign nation.[13]

B. Nothing in the Text or Purpose of the ATS Suggests that Congress Intended the Statute to Apply to Alleged Torts that Occurred Abroad

1. 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. Nothing in that rather cryptic 33-word sentence supports—much less *clearly*

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[13] Although a finding that the ATS does not apply to torts inside other countries would abrogate the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and similar ATS decisions against foreign government officials, suits against such officials for torture and extrajudicial killing may now be brought under the TVPA, which Congress enacted in 1992.

supports—extending the statute to alleged torts that occurred wholly within the borders of a foreign nation.

The word "alien" does not signal Congress' intent to apply the statute extraterritorially. *See Aramco*, 499 U.S. at 254-55 (holding that Title VII did not apply extraterritorially even though aliens were "included in the statute's definition of employee"). Congress may have chosen the word "alien" in order to *require* that an ATS plaintiff have a nexus to the United States. *See* Black's Law Dictionary (9th ed. 2009) (defining "alien" as "[a] person who resides *within the borders of a country* but is not a citizen or subject of that country" (emphasis added)). Similarly, the ATS' reference to a "violation of the law of nations" defines the types of claims that those aliens may bring. But since the law of nations protects aliens in this country, that phrase does not remotely suggest that aliens may seek relief in U.S. courts for alleged wrongs that occurred in a foreign country halfway around the world.

The history of the ATS reveals no "indication of a congressional purpose to extend its coverage," *Aramco*, 499 U.S. at 248, to extraterritorial conduct. To the contrary, the First Congress enacted the ATS in response to two highly publicized torts against foreign ministers that were committed *on U.S. soil*. In the "Marbois Affair" of 1784, the Secretary of the French Legion was assaulted on a street in Philadelphia. *See Sosa*, 542 U.S. at 716-17. Three years later, a constable entered the Dutch ambassador's home in New York City and arrested one of his servants. *Id.*; *see also Doe VIII*, 654 F.3d at 77 (Kavanaugh, J., dissenting). Both of these

domestic incidents violated international law norms regarding the rights of ambassadors, and generated significant diplomatic friction with France and the Netherlands. *Id.* Yet, under the Articles of Confederation, the federal government "lacked authority to remedy or prevent violations of the law of nations." *Id.* at 76.

To address this problem, the Framers vested the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls." U.S. Const., art. III, § 2. The First Congress, in turn, enacted the ATS as part of the Judiciary Act of 1789 in order to ensure appropriate redress for aliens injured *in the United States* in violation of international law.[14] As this Court has explained, "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Sosa*, 542 U.S. at 720. In enacting the ATS, "offenses against ambassadors" were "[u]ppermost in the legislative mind." *Id.*

There is no indication whatsoever that Congress was concerned about torts that occurred on foreign soil. Indeed, in an opinion letter issued in 1795, Attorney General William Bradford noted that, insofar as "the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the

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[14] While the clear initial purpose of the ATS was to *avoid* diplomatic conflict with foreign nations based on events occurring here, the recent phenomenon of applying the statute to extraterritorial conduct has had precisely the opposite effect. *See supra*, at 5-13.

actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. 57, 58 (1795). The problem that led to the enactment of the ATS "was not that some faraway wrongdoer might violate the law of nations in some other country, but that violations had occurred and would occur within the United States that could, if unremedied, cause diplomatic or military hostility by other nations." *Sarei v. Rio Tinto*, --- F.3d ---, 2011 WL 5041927, at *55 (9th Cir. 2011) (Kleinfeld, J., dissenting). In sum, "[i]t would be very odd to think that the Congress of 1789 wanted to create a federal tort cause of action enforceable in U.S. court for, say, a Frenchman injured in London." *Doe VIII*, 654 F.3d at 77 (Kavanaugh, J., dissenting).[15]

The history of the ATS shows some intent to provide a remedy for victims of piracy. *See Sosa*, 542 U.S. at 715, 720. That context is *sui generis*, however, because it involves offenses that—by definition—do not occur within the borders of *any* nation. On the high seas, "all nations have a common right, and exercise a common sovereignty." *The Apollon*, 22 U.S. at 371. Thus, the ATS "quite sensibly may be interpreted to extend to conduct on the high seas but not to conduct in foreign countries." *Doe VIII*, 654 F.3d at 79 (Kavanaugh, J.,

[15] In light of this history, it is unsurprising that the only two reported ATS decisions in the decades following the statute's enactment involved events that took place on U.S. soil or in U.S. territorial waters. *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795).

dissenting).[16] Attorney General Bradford recognized this distinction in his 1795 opinion letter, noting that "crimes committed on the high seas *are* within the jurisdiction of the district and circuit courts of the United States," but acts that "took place in a foreign country" are not. 1 Op. Att'y Gen. at 58.

2. The D.C. Circuit and Ninth Circuit have each held, in deeply divided decisions, that the ATS does, in fact, apply to alleged torts that occurred in a foreign nation. *See Sarei*, 2011 WL 5041927, at *3-*5 (holding that the ATS "is not limited to conduct occurring within the United States or to conduct committed by United States citizens"); *Doe VIII*, 654 F.3d at 20-28. Neither decision is persuasive.

In *Sarei*, the Ninth Circuit found that the ATS contained the requisite indicia of extraterritorial application based simply on its references to "aliens" and the "law of nations." 2011 WL 5041927 at *4. That is not a faithful reading of *Morrison* or a faithful application of the presumption against extraterritorial effect. As explained above, the history of the ATS confirms that Congress intended to provide a remedy for torts against aliens that occurred *in the United States*. The reference to the "law of nations" simply defines the legal standards under which those claims will be evaluated.

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[16] *See also Sarei*, 2011 WL 5041927, at *63-*64 (Kleinfeld, J., dissenting) (explaining that piracy "is a *sui generis* exception to the presumption against extraterritoriality" because "no state has sovereignty over the high seas, so any state may act against pirates without violating the sovereignty of any other").

The D.C. Circuit and the Ninth Circuit also concluded that the ATS must have extraterritorial application because "Congress expressly intended to include claims of piracy within the ambit of the [statute]." *Sarei*, 2011 WL 5041927, at *3-*4; *see Doe VIII*, 654 F.3d at 21-22. But, as noted above, the piracy context is unique. Providing a remedy for universally condemned conduct on the high seas, like providing a remedy for diplomatic affronts occurring here, eases diplomatic relations. Extending the statute further to foreign soil is categorically different and creates, rather than eases, such tensions. *See Doe VIII*, 654 F.3d at 79 (Kavanaugh, J., dissenting).

Finally, the D.C. Circuit held that, in applying the presumption against extraterritoriality, "the calculus can change where a U.S. citizen is a cause of the harm." *Id.* at 27. This Court, however, has never drawn such a distinction. To the contrary, this Court applied the presumption with full force in *Morrison*, *Aramco*, and *Chisholm*, even though U.S. citizens or corporations were defendants in each of those cases. *See Morrison*, 130 S.Ct. at 2875 (defendants included executives of a U.S. mortgage servicing company); *Aramco*, 499 U.S. at 247 (defendants were "two Delaware corporations"); *Chisholm*, 268 U.S. at 30 (defendant was "the New York Central Railroad").

* * *

Nothing in the text, purpose, or history of the ATS comes close to rebutting the well-established presumption against extraterritorial application of federal statutes. The ATS—which was carefully

crafted to provide a remedy for aliens injured on U.S. soil or the high seas—has no application to alleged injuries suffered by foreign citizens that occurred in a foreign nation as a result of a foreign government's conduct.

C. Extraterritorial Application of the ATS Contravenes International Law

The presumption against extraterritoriality is buttressed by the complementary principle that statutes should not be interpreted to regulate foreign persons or conduct if their prescriptions would conflict with principles of international law. *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 143 (2005) (Ginsburg and Breyer, JJ., concurring); *Hartford Fire Ins. v. California*, 509 U.S. 764, 815 (1993) (Scalia, O'Connor, Kennedy, and Thomas, JJ., dissenting) (applying this doctrine to jurisdictional limits). The exercise of jurisdiction in this case would violate international law.

1. The extraterritorial application of the ATS exceeds international law's "permissible limits of a state's jurisdiction," 1 Oppenheim's International Law 456 (9th ed. 1996) (Sir Robert Jennings & Sir Arthur Watts, eds.), by "infring[ing] the principles of non-intervention, and the sovereign equality of states." *Id.* at 476. "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations." Sir Ian Brownlie, Principles of Public International Law 287 (6th ed. 2003); *see also* U.N. Charter art. 2(1).

International law regards as illegitimate the assertion of jurisdiction over disputes that have no relation to an adjudicating State. The grounds on

which jurisdiction may be asserted are "parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction *a sufficiently close connection* to justify that state in regulating the matter *and perhaps also to override any competing rights of other states*." 1 Oppenheim's International Law at 457-58 (emphasis added). One obvious source of connection is territoriality, *see id*. at 458, which is why the extraterritorial application of the ATS is problematic from both an international law and domestic law perspective.

These principles regarding the limits of each country's jurisdiction were well-established when Congress enacted the ATS in 1789. The legal historian Emmerich de Vattel explained that "the jurisdiction of the nation in [its] territories" requires each state "to take cognizance of the crimes committed, and the differences that arise in that country. Other nations ought to respect this right." Emmerich de Vattel, 1 *The Law of Nations*, bk II, § 84 at 147-48 (Newberry 1759). Thus, "[i]n 1789, adjudication of . . . disputes [between foreign citizens for acts occurring in foreign countries] not only was *not* required by the law of nations, but in fact would have stood in tension with the principles of territorial sovereignty described by Vattel." Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 484 (2011).

Founding-era courts did not even consider cases, like this one, in which a foreign plaintiff sued a foreign defendant based on foreign conduct. "[N]o case will be found in the whole course of English

jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court." *Molony v. Dows*, 8 Abb. Prac. 316, 329-30 (N.Y. Sup. Ct. 1859). "The absence of all authority in England upon such a point is almost as conclusive as an express adjudication denying the existence of such a right." *Id*. at 330.

The drafters of the ATS understood the jurisdictional limits of international law, and those boundaries informed the scope of the ATS. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (statutes must be construed to comply with international law whenever "possible"); *accord Hoffmann-La Roche*, 542 U.S. at 164. "[T]he rules and limitations prescribed by" the law of nations govern the interpretation of statutes because those principles "were in the contemplation of the parties who framed and the people who adopted the Constitution." *Miller v. United States*, 78 U.S. (11 Wall) 268, 316 (1870) (Field, J., dissenting). Moreover, the mere assertion of jurisdiction over events arising within another nation's borders "could have been perceived as an intrusion on the territorial sovereignty of other nations—a perception that the First Congress almost certainly wished to avoid." Bellia & Clark, *supra*, at 546.

2. The same international principles of constrained jurisdiction hold true today. A state may exercise jurisdiction only over (1) conduct that takes place within its territory; (2) conduct of its nationals; and (3) foreign conduct that has or is intended to have substantial effect within its

territory or is directed against its security. *See generally* 1 Oppenheim's International Law at 456-78; Brownlie, *supra*, at 308-10; Restatement (Third) of Foreign Relations Law § 402 (1987). The present case satisfies none of these jurisdictional criteria.[17]

Some academics also assert that courts may have universal criminal jurisdiction over so-called *jus cogens* violations (such as torture or genocide) as a fourth basis for jurisdiction. But many states, including the United States, continue to regard the broad exercise of universal criminal jurisdiction as illegitimate.[18]

Whatever the status of universal *criminal* jurisdiction, it does not support the purported universal *civil* jurisdiction exercised by some courts under the ATS. As the governments of Australia and the United Kingdom explained to this Court in December 2011, international law has "never

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[17] An amicus supporting Petitioners suggests that limitations on prescriptive jurisdiction are inapplicable here because federal courts are merely "adjudicat[ing]" international claims. Br. of EarthRights Int'l at 37 n.21. But international law recognizes "no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other." Brownlie, *supra*, at 308 (footnote omitted).

[18] The United States recently stated that "even if" international law permits the exercise of universal criminal jurisdiction over a narrow set of crimes, such jurisdiction requires "due consideration of the jurisdiction of other states." *United States Submission to the United Nations on Scope of Universal Jurisdiction* at 3, 4 (May 4, 2010), http://www.state.gov/documents/organization/179206.pdf.

included" grounds for "universal *civil* jurisdiction." Br. of Australia and United Kingdom as Amici Curiae at 8, *Rio Tinto v. Sarei*, No. 11-649 (U.S. filed Dec. 28, 2011) (emphasis added). "International law does not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum state." Aide Memoire from the Gov't of Switzerland, App'x C to U.S. *Ntsebeza* Br. at 8a.

Even when a state theoretically *could* exercise jurisdiction, it does not follow that the state always *may* exercise that jurisdiction. "[T]he sufficiency of grounds for jurisdiction is an issue normally considered relative to the rights of other states and not as a question of basic competence." Brownlie, *supra*, at 297-98. In other words, even if the exercise of jurisdiction is permissible, a nation "should defer to [another] state if that state's interest is clearly greater." Restatement § 403(3); *id*. cmt. a ("There is wide international consensus that the links of territoriality or nationality, . . . while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction.").

Multiple states may, of course, have jurisdictional interests implicated by the same acts. Significantly for ATS suits, territoriality remains "the primary basis for jurisdiction." 1 Oppenheim's International Law at 458. "[E]ven if another state has a concurrent basis for jurisdiction, its right to exercise it is limited if to do so would conflict with the rights of the state having territorial jurisdiction." *Id*. "Any other application of a state's domestic law abroad is considered a violation of international law; states are supposed to respect each other's exclusive

authority to regulate behavior within their territorial boundaries." *Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1280 (2011).

By applying the ATS in civil cases involving foreign conduct, U.S. courts have "increasingly flouted" the jurisdictional limits of international law. *Id.* The repeated objections of foreign states provide the best evidence that extraterritorial application of the ATS "extend[s] United States jurisdiction beyond the limits well established and widely [recognized] under customary international law." Letter from Dominick Chilcott, British Embassy to Secretary Condoleezza Rice (Jan. 30, 2008), App'x B to U.S. *Ntsebeza* Br. at 3a-4a. More pointedly, "the ATS creates differences with other sovereigns whose courts exercise civil jurisdiction on the primary basis recognized by international law—that is, territorial jurisdiction—and which are politically and legally responsible for dealing with a particular situation." Br. of Australia and United Kingdom as Amici Curiae, *supra* p. 28, at 10.

Members of the International Court of Justice likewise have criticized the extraterritorial application of the ATS by U.S. courts, observing that "[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally." *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 77 (Feb. 14, 2002) (Joint Sep. Op. of Higgins, Kooijmans, & Buergenthal, JJ.).

3. Consistent with these limiting principles of international law, the ATS is best understood as a measure by the First Congress to "ensure adequate 'vindication of the law of nations,'" caused by "incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system." *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring) (quoting *Sosa*, 542 U.S. at 717). Indeed, the "unifying feature" of the paradigmatic offenses considered by the enacting Congress—piracy, safe passage, and offenses against ambassadors—"is that their punishment protects and facilitates the system of international relations arising out of the Westphalian view of national sovereignty, particularly with respect to the avoidance and termination of war." *Id.* at 1098. *Accord Sarei*, 2011 WL 5041927, at *54-57 (Kleinfeld, J., dissenting). This understanding of the ATS "avoid[s] unreasonable interference with the sovereign authority of other nations." *Hoffmann-La Roche*, 542 U.S. at 164.

A narrow resolution of this case on the issue of corporate liability would not reduce diplomatic friction or protect the United States' "status or welfare." *Sarei*, 2011 WL 5041927, at *57 (Kleinfeld, J., dissenting). Quite the contrary: to countenance extraterritorial application of the ATS here would vest U.S. courts with "jurisdiction over all the earth, on whatever matters we decide are so important that all civilized people should agree with us." *Id.* at *54. That outcome would be incompatible with both international law and the intent of the First Congress.

III. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE ATS FOR AIDING AND ABETTING LIABILITY

This Court should also affirm the judgment below on the alternative basis that the ATS does not support a cause of action for aiding and abetting.[19] At a minimum, the Court should hold that, in order to recover under an aiding and abetting theory, an ATS plaintiff must show that the defendant acted with a specific *purpose* to bring about the abuse of human rights.

Aiding and abetting liability is the other key driver of the diplomatic tension caused by extravagant extensions of the ATS by lower courts. The ability to call into question the conduct of foreign governments and foreign officials immune from direct suit by the simple expedient of alleging corporate agents have aided and abetted the foreign nation's human rights violation is highly attractive to those interested in seeking financial recovery or in seeking to make a point about the conduct of foreign nations.

A. The ATS Does Not Provide for Aiding and Abetting Liability

The creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor. While Congress has enacted a general aiding and abetting statute applicable to all federal

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[19] The United States has previously advanced this argument before this Court. *See* U.S. *Ntsebeza* Br. at 8-11.

criminal offenses, *see* 2 U.S.C. § 2, it has not enacted any comparable provision for civil aiding and abetting liability. That omission is hardly surprising. In the criminal context, prosecutorial discretion can help divide the sheep from the goats. But there are no comparable checks on private litigants' ability to bring civil aiding and abetting claims. *See Sosa*, 542 U.S. at 727 (judicial caution required because a private cause of action under the ATS "permit[s] enforcement without the check imposed by prosecutorial discretion"); *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008) (noting that, in the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78t(e), Congress "directed prosecution of aiders and abettors by the SEC," but did not provide for private civil liability). To the contrary, in the civil context, considerations of who can pay or who is immune can overwhelm considerations of whether the degree of assistance merits punishment.

This Court accordingly has held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994); *see also id.* (noting that "Congress . . . has taken a statute-by-statute approach to civil aiding and abetting liability"). Because Congress has been "quite explicit in imposing civil aiding and abetting liability"—and because any recognition of civil aiding and abetting liability is a "vast expansion of federal law"—courts may not recognize

an aiding and abetting cause of action in the absence of "congressional direction to do so." *Id.* at 183. That rule applies with even greater force where, as here, the expansion of civil liability would raise significant "risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728.

The ATS' sparse text includes no "congressional direction" to federal courts to recognize civil aiding and abetting liability. As with the extraterritorial application of the statute, that should be the end of the matter. *See*, *e.g.*, *Freeman v. DirecTV*, 457 F.3d 1001, 1004-05 (9th Cir. 2006) (rejecting civil aiding and abetting liability under the Electronic Communications Privacy Act because the statute applied only to a "person or entity providing an electronic communication service," and did not mention secondary liability). Congress knows how to provide for civil aiding and abetting liability, but simply did not do so in the ATS.

The Second Circuit and D.C. Circuit nonetheless concluded that plaintiffs can bring a civil aiding and abetting claim under the ATS. *See Doe VIII*, 654 F.3d at 28-32; *Khulumani*, 504 F.3d 254. In so holding, both courts relied exclusively on purported norms of international law regarding *criminal* aiding and abetting liability. For example, the courts relied on principles drawn from the Nuremberg war crimes tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. *See Doe VIII*, 654 F.3d at 30-32; *Khulumani*, 504 F.3d at 270-79 (Katzmann, J., concurring). As explained above, however, this Court has drawn a bright-line distinction between

criminal and civil aiding and abetting liability, and has made clear that the existence of criminal liability does not support creation of a civil cause of action. *See Central Bank*, 511 U.S. at 182.

Judge Hall also suggested that there was "no bar" to aiding and abetting liability under the ATS because there was "inconclusive evidence of Congress's intent to include or exclude aiding and abetting liability." *Khulumani*, 504 F.3d at 288 n.5 (Hall, J., concurring). But fully accepting Judge Hall's premise, the opposite conclusion follows. Under *Central Bank*, if the evidence of congressional intent is "inconclusive," the statute must be construed as excluding, not including, civil aiding and abetting liability.

B. At a Minimum, Plaintiffs Must Plead that the Defendant Acted with the Purpose of Violating International Law

Even if the Court concludes that the ATS supports a cause of action for civil aiding and abetting liability, the Court should make clear that "the *mens rea* standard for aiding and abetting liability in ATS actions is *purpose* rather than knowledge alone." *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009) (emphasis added); *but see Doe VIII*, 654 F.3d at 39 (rejecting the Second Circuit's "purpose" standard in favor of a more-lenient "knowledge" standard).

As Judge Leval explained, "for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a

reasonable inference that the defendant acted with a purpose of bringing about the abuses." *Kiobel*, 621 F.3d at 188 (Leval, J., concurring in the judgment). There is no international consensus "for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." *Talisman Energy*, 582 F.3d at 259; *see also Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (concluding that a defendant may be held liable for aiding and abetting, but only if he acted "with the purpose of facilitating the commission of that crime").

There are good reasons for applying a heightened standard of *mens rea* for aiding and abetting claims under the ATS. When American corporations or their foreign subsidiaries do business in developing countries, it is often unavoidable that they will have contacts with government or military entities in those countries. But that fact provides no basis for holding the *company* liable for alleged wrongdoing by the foreign government or military. For example, where a company "requires protection in order to be able to carry out its operations, its provision of assistance to the local government in order to obtain the protection, even with knowledge that the local government will go beyond provision of legitimate protection . . . does not without more support the inference of a purpose to advance or facilitate the human rights abuses." *Kiobel*, 621 F.3d at 193-94 (Leval, J., concurring in the judgment).

Indeed, the official foreign policy of the United States often encourages commercial interaction with still-developing nations, in the hope of promoting change from within the system. For example, the

United States has long encouraged "[c]onstructive economic engagement" with China, even as it seeks to encourage greater political freedom in that country. *See* U.S. *Unocal* Br. at 12-13. A purpose-based standard of *mens rea* will ensure that multinational corporations operating in developing nations are not faced with billion-dollar ATS claims based solely on their subsidiaries' incidental contacts with a government or military entity that has been accused of violating international law.

CONCLUSION

For each of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 3, 2012

APPENDIX

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Appendix A

Foreign Government Submissions

The documents listed below are available at: http://www.courtappendix.com/kiobel/protests

Date	Document
7/15/2002	Letter from Soemadi Djoko M. Brotodiningrat, Ambassador, Embassy of the Republic of Indonesia, to Richard L. Armitage, Deputy Secretary, U.S. Department of State.
9/27/2002	Statement by the Chinese Government on Anonymous Persons v. Liu Qi Case, *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (Nos. C 02-0672, C 02-0695).
10/3/2002	Notice of Filing of Original Statement by the Chinese Government, *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (Nos. C 02-0672, C 02-0695).
7/11/2003	Declaration of Penuell Mpapa Maduna, *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (No. 02 MDL 1499).

1/23/2004	Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485).
2/25/2004	Diplomatic Note VRE-CEC No. 3866 from the Ministry of Foreign Relations for the Republic of Colombia, to the U.S. Ambassador in Colombia.
3/12/2004	Diplomatic Note VRE-CEC No. 12785 from the Ministry of Foreign Relations for the Republic of Colombia, to the U.S. Ambassador in Colombia.
1/14/2005	Diplomatic Note UNGR0023 from the Embassy of Canada, to the U.S. Department of State.
6/15/2005	Diplomatic Note No. 145/VI/05/05/DN from the Embassy of the Republic of Indonesia, to the U.S. Department of State.
10/14/2005	Brief of the Republic of South Africa as Amicus Curiae Supporting Affirmance, *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-cv, 05-2326-cv).

2/6/2006	Letter from Daniel Ayalon, Ambassador, State of Israel, to Nicholas Burns, Under-Secretary for Political Affairs, U.S. Department of State (Declaration of Jean E. Kalicki at Exhibit A), *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270).
5/25/2007	Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae Supporting Defendants-Appellees'/Cross-Appellants' Motion for Rehearing En Banc, *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (Nos. 02-56256, 02-56390).
12/2007	Aide Memoire from the Government of Switzerland, to the U.S. Department of State (Brief for the United States as Amicus Curiae Supporting Petitioners at Appendix C), *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

12/13/2007	Diplomatic Note No. 126/2007 from the Embassy of the United Kingdom and the Embassy of the Federal Republic of Germany, to the U.S. Department of State (Brief for the United States as Amicus Curiae Supporting Petitioners at Appendix D), *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).
12/13/2007	Note Verbale 168/07 from the Embassy of the Federal Republic of Germany and Embassy of the United Kingdom, to the U.S. Department of State (Brief for the United States as Amicus Curiae Supporting Petitioners at Appendix E), *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).
1/30/2008	Letter from Dominick Chilcott, Embassy of the United Kingdom, to Condoleezza Rice, Secretary of State, U.S. Department of State (Brief for the United States as Amicus Curiae Supporting Petitioners at Appendix B), *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

2/8/2008	Diplomatic Note Ref: BL1/USA/3/A24.29 from the Embassy of the Republic of South Africa, to the U.S. Department of State (Brief for the United States as Amicus Curiae Supporting Petitioners at Appendix A), *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).
4/23/2008	Brief of the Republic of El Salvador as Amicus Curiae Supporting Appellant, *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (No. 06-6234).
5/28/2009	Brief of the Republic of El Salvador as Amicus Curiae Supporting Petitioner, *Carranza v. Chavez*, 130 S. Ct. 110 (2009) (No. 08-1467).
10/8/2009	Letter Brief of the Embassy of the Federal Republic of Germany, *Balintulo v. Daimler AG*, No. 09-2778-cv (2d Cir.).

12/16/2009	Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae Supporting Defendants-Appellees/Cross-Appellants, *Sarei v. Rio Tinto PLC*, --- F.3d ---, 2011 WL 5041927 (9th Cir. 2011) (Nos. 02-56256, 02-56390, 09-56381).
12/28/2011	Motion for Leave to File Brief and Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioners on Certain Questions in Their Petition for a Writ of Certiorari, *Rio Tinto PLC v. Sarei*, No. 11-649 (U.S.).