No. 03-339

IN THE

# Supreme Court of the United States

JOSE FRANCISCO SOSA,
*Petitioner*,
v.
HUMBERTO ALVAREZ-MACHAIN, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICI CURIAE IN SUPPORT OF PETITIONER**

WALTER E. DELLINGER, III
PAMELA A. HARRIS
JOHN F. NIBLOCK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W
WASHINGTON, D.C. 20006
(202) 383-5300

DANIEL M. PETROCELLI
(*Counsel of Record)*
M. RANDALL OPPENHEIMER
MATTHEW M. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
LOS ANGELES, CA 90067
(310) 553-6700

*Counsel for Amici Curiae*

October 6, 2003

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

### CASES

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**

### CONSTITUTION AND STATUTES



### OTHER AUTHORITIES

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## INTRODUCTION

The National Foreign Trade Council, USA*Engage, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the United States Council for International Business respectfully submit this brief *amici curiae* in support of the petitioner in this case.[1] The petition raises important questions of first impression for this Court about the meaning and scope of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") – a statute that lay virtually dormant for two centuries, but that in the past two decades has served as basis for a flood of litigation in U.S. courts. Though initially such suits aimed to hold government officials liable for alleged violations of the law of nations, increasingly U.S. and multinational companies investing in developing nations are being made the target of ATS litigation. Often, such suits seek to hold private companies indirectly liable for human rights abuses by foreign governments, on the theory that by deciding to invest abroad, the companies aided and abetted or otherwise facilitated the acts of the host governments.

Lower courts struggling to interpret the ATS have come to dramatically different conclusions about its meaning. Although the plain language of the statute makes clear that it is simply a grant of jurisdiction, some courts have implied in it a private cause of action. Those courts that have implied a private cause of action have struggled to develop limiting principles, including defining what constitutes an actionable violation of the law of nations. The lower courts have taken

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent has been submitted to the Court.

starkly different approaches to these questions, resulting in great uncertainty for U.S. companies currently investing or operating in foreign countries, or considering future investments.

The decision below exemplifies two wrong turns made by some courts interpreting the ATS, and provides an ideal opportunity for this Court to bring clarity to an area of the law that for two decades has cried out for it. First, the Ninth Circuit erroneously read into the statute's jurisdictional grant a private cause of action. Second, in defining what constitutes an actionable violation of the law of nations under its implied cause of action, the Ninth Circuit relied on non-binding international declarations, unratified or non-self-executing treaties, and unreliable commentary. Days before the petition was filed in this case, the Second Circuit forcefully rejected reliance on such instruments as sources as for defining customary international law. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160-171 (2d Cir. 2003). The decision of the Ninth Circuit below raises serious separation of powers issues, and highlights the foreign policy concerns that underlie the vast majority of ATS cases. Clarifying the proper meaning and scope of the ATS not only will assist the United States in its overseas law enforcement efforts and war on terrorism – as set forth in the U.S. government's submission – it is of profound importance to *amici* and their member companies in today's global economy.

## INTEREST OF AMICI CURIAE

*Amici curiae* and their members have a vital interest in the issues raised by petitioner. Over the past decade, scores of U.S. and multinational companies have been sued under the ATS relating to their operations outside the United States. While some companies are alleged to have committed violations of the law of nations directly, more often plaintiffs have alleged that companies' overseas investments have aided and

abetted or otherwise facilitated human rights abuses by foreign governments. Not only do these lawsuits strain relations between the United States and the foreign governments who are the indirect targets of the litigation, they discourage foreign investment by U.S. companies. Because of the importance of these issues to *amici's* member companies, they seek leave to file this brief *amici curiae* in order to assist the Court in its consideration of the issues in this case.

The National Foreign Trade Council (the "NFTC") is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies.

USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. Chamber members transact business in all of the United States, as well as in large numbers of countries around the world.

The United States Council for International Business ("USCIB") is a trade association of approximately 300 global corporations, accounting firms, law firms, and business associations.

In the aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and, indirectly, much of the U.S. workforce. These same entities are also major players in the global economy. The *amici* are charged with representing the legal and policy interests of their members in matters of national import. They are regularly involved in litigation relating to international commerce and foreign policy issues. Such cases have included, for example, *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000), in which the NFTC brought suit with *amicus* support from the Chamber, the NAM, and USCIB, and *American Ins. Ass'n v. Garamendi,* 123 S. Ct. 2374 (2003), in which several of the groups filed *amicus* briefs.

## ARGUMENT

Over the past decade, the ATS has become a serious impediment to U.S. companies investing abroad. Foreign plaintiffs and the lawyers and organizations supporting them – often pursuing thinly disguised political agendas – have adopted the statute as a vehicle to embarrass foreign governments and to pressure U.S. companies to abandon foreign investments. In some cases, the ATS has been used to challenge private foreign investment that the political branches of the United States have explicitly condoned or encouraged.

These lawsuits normally raise highly charged allegations of human rights abuses or other violations of international law, generate considerable publicity, and involve enormous potential damages. The very existence of such lawsuits creates risk and poses a growing and significant obstacle to for-

eign investment by U.S. and multinational companies. Compounding the risk of suit is the uncertainty resulting from erroneous and conflicting decisions by lower courts interpreting the ATS. Not only is there fundamental disagreement about whether the ATS provides a private cause of action, courts have adopted radically different standards for determining what acts constitute violations of the law of nations, and who may be held accountable under the statute.

Twenty years ago, the D.C. Circuit noted that this area of the law "cries out for clarification by the Supreme Court." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, (D.C. Cir. 1984) (Edwards, J., concurring), *cert denied*, 470 U.S. 1003 (1985). Just weeks ago, the Second Circuit echoed this sentiment, noting that "the complex and controversial questions regarding the meaning and scope" of the ATS can only be resolved by this Court, or by Congress. *Flores*, 343 F.3d at 153. Now is the time for this Court to take up these urgent questions.

### A. The Questions Presented Are Of Exceptional Importance To The U.S. Business Community

The conflicting approaches taken by courts on the meaning and scope of the ATS have created tremendous risk and uncertainty for U.S. businesses investing and operating overseas. Over the past decade, foreign plaintiffs and their lawyers have invoked the ATS to sue scores of U.S. and multinational companies, attempting to hold them liable for their decisions to invest in developing nations around the globe, including, *inter alia*, Colombia, Ecuador, Egypt, Indonesia, Myanmar (Burma), Nigeria, Peru, Papua New Guinea, South Africa, and Sudan.[2] Often these suits seek to hold U.S. com-

[2] *See, e.g.*, *Flores*, 343 F.3d at 143 (alleging that pollution from mining company in Peru violated right to health and life); *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 2002 WL

panies liable for alleged violations of the law of nations by foreign governments, under various theories of secondary liability, including aiding and abetting, joint venture, conspiracy, and vicarious liability.

The ATS has also been invoked by plaintiffs and their counsel in an attempt to redress historical grievances. U.S. and foreign companies have been sued under the ATS by plaintiffs seeking reparations dating back to World War II, *see, e.g., Deutsch v. Turner*, 324 F.3d 692, 716 (9th Cir. 2003); reparations for the abuses of the apartheid regime in South Africa, *see, e.g., Digwamaje v. Bank of America, et al.*, No. 02 CV 6318 (JES) (S.D.N.Y. filed Aug. 2, 2002); and even reparations for pre-Civil War slavery in the United States. *See, e.g., In re African American Slave Descendants' Litigation*, MDL No. 1491 (CRN) (N.D. Ill., First Amended

---

31063976 (9th Cir. Sept. 18, 2002), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (alleging that minority investor in gas pipeline aided and abetted forced labor and other abuses by Myanmar military); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging that private company collaborated in torture, enslavement, war crimes, and genocide by government of Sudan); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (alleging that private companies are liable for human rights violations of Nigerian government); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (alleging that pollution caused by defendants in Peru and Ecuador violated the law of nations); *Bigio v. Coca-Cola Co,*, 239 F.3d 440 (2d Cir. 2001) (alleging that Coca-Cola violated law of nations by knowingly purchasing property illegally seized by Egyptian government); *Sarei v. Rio Tinto, plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (alleging that private mining enterprise cooperated with government of Papua New Guinea to displace villages, cause environmental damage and commit other abuses and war crimes); *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C. filed June 20, 2001) (alleging that Exxon is liable for human rights abuses committed by Indonesian military); *Digwamaje v. Bank of America, et al.*, No. 02 CV 6318 (JES) (S.D.N.Y. filed Aug. 2, 2002) (alleging that private companies that invested in South Africa are liable for abuses of former apartheid regime).

Complaint filed June 17, 2003) (suing banks, insurance companies, railroads, tobacco companies and textile companies under the ATS for alleged connections to slavery or the slave economy).

1. The increasing numbers of ATS actions brought against U.S. companies with regard to their overseas investments pose significant risks. The threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. ATS claims can be riskier for companies than other litigation. It is often difficult or impossible to join other parties, including the foreign sovereigns whose acts are ultimately being challenged. Evidence necessary for the defense of ATS claims is often located abroad and may be inaccessible. *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (noting inaccessibility of evidence implicating foreign government's role in alleged violations). In addition, U.S. companies are placed at a competitive disadvantage in the global marketplace. Non-U.S. companies that are not subject to the personal jurisdiction of U.S. courts do not need to factor into their investment decisions the risk of ATS litigation.

In addition to the investment risks created by the mere existence of ATS litigation, companies face enormous uncertainty regarding the scope of claims under the ATS. For example, in the decision below, the Ninth Circuit determined what could constitute an actionable violation of the law of nations by relying on international instruments that are non-binding, non-self-executing or that the United States has never ratified.[3] In *Flores*, the Second Circuit expressly re-

[3] The Ninth Circuit relied on the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess, U.N. Doc. A/810 (1948) ("Universal Declaration"); the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966) ("ICCPR"); the American Convention on Human Rights, Nov. 22, 1969, 9

jected these instruments as sources of customary international law. 343 F.3d at 161-72. To have federal courts attempt to discover the content of the law of nations is inconsistent with the Constitution's delegation to Congress the power "to determine, through legislation, what international law is and what violations of it ought to be cognizable in U.S. courts." *Al-Odah v. United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring). The uncertainty resulting from courts' efforts to determine the content of the law of nations enormously complicates the factors that all U.S. companies must consider in deciding to invest in foreign nations.

2. As noted in the briefs filed by petitioner and the United States in this case, the willingness of some courts to read a private cause of action into the ATS and to define expansively actionable violations of the law of nations raises significant foreign policy concerns. This is true for cases involving parties as well as governments. As this court recognized last term, "claims between even nominally private entities have become issues in international diplomacy." *American Ins. Ass'n. v. Garamendi*, 123 S. Ct. 2374, 2387 (2003).

For example, in an action currently pending against Exxon relating to human rights abuses by the Indonesian military, the U.S. Department of State cautioned the district court that Indonesia's negative reaction to the litigation "could impair co-

---

I.L.M. 673 ("American Convention"); and the Restatement (Third) of the Foreign Relations Law of the United States (1987). *Alvarez-Machain v. United States*, 331 F.3d 604, 620-22 (9th Cir. 2003). The Universal Declaration is non-binding and expresses "principles that are boundless and indeterminate." *Flores*, 343 F.3d at 161. The ICCPR, is non-self-executing. *Id.* at 163 n. 35. The Restatement is unreliable evidence of customary international law. *See United States v. Yousef*, 327 F.3d 56, 99 n.31 (2d Cir. 2003). The Senate has never ratified the American Convention.

operation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to Judge Louis F. Oberdorfer of July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C. filed June 20, 2001). Similarly, the government of South Africa has objected to lawsuits in U.S. courts seeking to hold companies liable under the ATS for investing in South Africa during the Apartheid regime. *See* Declaration of Justice Minister Pennuel Mpapa Maduna, July 11, 2003, at 8, *In re South African Apartheid Litig.*, MDL No. 1499 (S.D.N.Y.) (noting that such lawsuits are an affront to South Africa's sovereignty and interfere with its own reconciliation efforts).[4]

Ironically, although many ATS lawsuits are brought under the guise of concern for human rights, the "free-wheeling" interpretation of law of nations adopted by the Ninth Circuit and other courts in ATS cases, *Al-Odah*, 321 F.3d at 1148 (Randolph, J., concurring), actually deters investment by the very companies that are most likely to adhere to high standards and responsible conduct in their operations. U.S. companies are among the most exemplary global corporate citizens, but they can be driven out of the countries that could most benefit from their example and the economic advantages their presence brings. That missed opportunity for all may result in prolonging, not ameliorating, the oppressive conditions that activists and ATS plaintiffs rightly oppose.

---

[4] The British government has also expressed to the United States its "concerns over the extra-territorial use of the Alien Tort Statute" in the apartheid reparations cases. *See* Ministerial Statement of Minister for Trade and Investment Mike O'Brien, July 15, 2003, *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030715/wmstext/30715m05.htm#30715m05.html_sbhd3 .

### B. Review Is Necessary To Resolve Whether The ATS Creates A Private Right of Action, An Issue On Which Courts Are Divided

The ATS was originally enacted in 1789 as part of the first Judicial Code. The Judicial Code set forth the various categories of suits over which the federal courts would have exclusive and concurrent jurisdiction. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 76-77 (1789).[5] As part of the Judicial Code, the ATS operates solely to vest federal courts with jurisdiction over certain types of claims; it does not also create a private cause of action. *See Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) (Judicial Code provisions jurisdictional only); *Al-Odah*, 321 F.3d at 1146-47 (Randolph, J., concurring) (ATS jurisdictional only); *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring) (same); *Jones v.*

[5] Section 9 of chapter 20, in which the original version of the Alien Tort Statute is found, provides that the federal district courts "shall have . . . cognizance of" certain classes of cases. Specifically, that section provides exclusive federal "cognizance" of: "all crimes and offences that shall be cognizable under the authority of the United States . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted"; "all civil causes of admiralty and maritime jurisdiction"; "all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States"; and "all suits against consuls or vice-consuls, except for offences above the description aforesaid." It also provides "cognizance, concurrent with the courts of the several States " of "all causes where an alien sues for a tort only in violation of the laws of nations or a treaty of the United States" and of "all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." *Id.* As used in the 1789 Act, the term "cognizance" clearly meant "jurisdiction," as has been clarified by subsequent amendments substituting that term. *See, e.g.*, 28 U.S.C. § 1350 (2000).

*Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989) ("Section 1350 merely serves as an entrance into the federal courts and in no way provides a cause of action to any plaintiff.").

1. This construction of the ATS is the only one consistent with the statute's plain meaning. The ATS, now codified at 28 U.S.C. § 1350 (2000), 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.

On its face, the language expressly does one thing and one thing only: it vests courts with jurisdiction over a certain class of cases – torts committed in violation of the law of nations or a treaty of the United States. It does not explicitly go further to create a cause of action. Nor can one properly infer an implied cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (express clues in statutory text necessary to the conclusion that Congress has implicitly created a private cause of action).

In accordance with this plain meaning, similarly worded statutes have been held to be jurisdictional only, not also to give rise to private rights of action. *See, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (jurisdictional provision of Securities Exchange Act of 1934); *United States v. Testan*, 424 U.S. 392, 398 (1976) (Tucker Act); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 452 (1852) (admiralty jurisdiction statute). For example, section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2000), provides that "[t]he district courts . . . shall have exclusive jurisdiction of violations of" the securities laws of the United States. Tasked with interpreting the scope of that language – nearly identical to the language used in the ATS –

this Court was quite clear in holding that it merely "grants jurisdiction to the federal courts," but "creates no cause of action of its own force and effect." *Touche Ross*, 442 U.S. at 577. Thus, just as here, "[t]he source of plaintiffs' rights must be found, *if at all*," in a substantive provision of law, not in the jurisdictional statute itself. *Id.* (emphasis added).

The logical consequence of interpreting the ATS to create private rights also demonstrates the defects inherent in such an interpretation, as the Ninth Circuit itself recognized in *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992 ("*Marcos I*"). On its face, the ATS allows an alien to sue for violations of the "law of nations" as well as "treaties of the United States." 28 U.S.C. § 1350 (2000). Thus, if the language of the ATS supplies an independent right of action for "violation[s] of the law of nations," it must also supply an independent right of action for "violation[s] of . . . a treaty of the United States."[6] But this cannot be. Such a reading would make all U.S. treaties self-executing, an "anomalous result" that is incompatible with settled law. *Marcos I*, 978 F.2d at 503; *see also Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring) (the conclusion that the ATS supplies an independent right of action for treaty violations "stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect

---

[6] Judge Bork has correctly and succinctly noted this necessary consequence:

> [S]ection 1350 provides jurisdiction for tort actions alleging violations of the 'law of nations' and 'treaties of the United States.' No process of construction can pry apart those sources of substantive law; in section 1350, they stand in parity. If . . . section 1350 not only confers jurisdiction but creates a private right of action for any violation of the 'law of nations,' then it also creates a private cause of action for any violation of the 'treaties of the United States.'

*Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring).

in this little-noticed statute").

Furthermore, no other provision of the first Judicial Code has been construed to create a private right of action. As this Court noted in *Montana-Dakota*, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." 341 U.S. at 249.

2. Reading a private cause of action into the ATS is, in any event, foreclosed by the Constitution. Under the Constitution, it is not for the courts to define violations of the law of nations. An explicit textual provision of the Constitution assigns to Congress the right to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Such explicit constitutional assignments of power to the three distinct branches of government are not aspirational. Rather, as the fundamental means by which the Constitution attempts to ensure proper balancing to achieve a democratic government, textual powers assigned to a particular branch may not be shifted from one branch to the other. *See Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998). Where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define" "just how [governmental] powers are to be exercised," the constitutional procedures must be followed with precision. *INS v. Chadha*, 462 U.S. 919, 945 (1983); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (where an explicit textual provision exists, "the balance" between the branches "already has been struck by the Constitution itself").

Thus, Congress may not delegate to the judiciary its textually assigned power to "define and punish . . . Offenses against the Law of Nations," and the statute should be interpreted to avoid such an unconstitutional construction. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932) (statutes to be

construed to avoid raising serious constitutional questions where such a construction reasonably available).

Furthermore, under the Constitution, international relations are vested exclusively in the political branches. The ATS should not be construed in a manner that will require courts to stand in judgment of foreign nations for any and all alleged violations of international law. Rather, such sensitive political questions should be left in the hands of the political branches. "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al-Odah*, 321 F.3d at 1148 (Randolph, J. concurring). Permitting the judiciary to assess which international law or treaty violations should give rise to a private cause of action – rather than limiting such causes of action to those select few that Congress has determined will positively enhance relations with foreign countries – has inherent potential to negatively impact foreign relations.

This Court should take the opportunity presented by this case to declare once and for all that the ATS does not provide a private cause of action.

### C. If The ATS Creates A Cause Of Action, Review Is Necessary To Resolve The Appropriate Standards By Which To Measure Violations Of The Law Of Nations, An Issue On Which Courts Are Divided

Having read a cause of action into the ATS, the Ninth Circuit and other courts have been "forced to invent limiting principles" not justified by the language of the statute, in determining what violations of the law of nations are actionable. *Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring). For example, the Ninth Circuit has declared that only violations of "specific, universal, and obligatory" international norms give

rise to a cause of action under the ATS. *Alvarez-Machain*, 331 F.3d at 612 (citation omitted). As Judge Bork notes, such limitations "come[] out of nothing in the language of section 1350. According to that statute, jurisdiction exists as to any tort in violation of the law of nations." *Tel-Oren*, 726 F.2d at 820.

The decision below held that under the law of nations there is a "clear and universally recognized norm prohibiting arbitrary arrest and detention." *Alvarez-Machain*, 331 F.3d at 620. However, in reaching this conclusion, the Ninth Circuit relied on nonbinding U.N. resolutions and unratified or non-self-executing treaties. *Id.* Similarly, another panel of the Ninth Circuit relied on "recently-promulgated" standards of "ad hoc" international criminal tribunals to hold that corporations can be held civilly liable for aiding and abetting acts by foreign sovereigns. *Doe v. Unocal*, 2002 WL 31063976 at ** 24, 28 (9th Cir. Sept.18, 2002) (Reinhardt, J., concurring), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003). As noted above, the Ninth Circuit's approach to identifying actionable violations of the law of nations under the ATS stands in direct conflict with the approach recently articulated by the Second Circuit in *Flores*, 343 F.3d at 160-172, which emphatically rejected reliance on such documents or ad hoc tribunals as authoritative sources of international law.

In addition to leading to confusing or unpredictable standards, attempts by the Ninth Circuit and other courts to read the ATS to include evolving standards of international law is an impermissible exercise of judicial authority. In interpreting other, parallel provisions of the Judiciary Act, this Court has held that the statute's grant of jurisdiction extends only to those causes of actions recognized at the time of the enactment. For example, this Court recently reaffirmed that the Judiciary Act vests the federal courts with equity jurisdiction only insofar as that jurisdiction existed in 1789. *See Grupo*

*Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). In so holding, the Court reversed the Second Circuit's holding that the federal judiciary had jurisdiction over an equitable remedy that had not existed at the time the statute was originally enacted. In so doing, the Court rejected the "evolving standards" rationale that courts of appeals have similarly adopted in the context of the ATS.

Under the jurisdictional grant of the ATS, the federal courts have jurisdiction only over offenses against the "laws of nations" as that concept existed in 1789. Clearly, at that time, the "law of nations" recognized at least a limited class of violations, such as a violation of safe-conducts, infringement of an ambassador's rights, and piracy. *See* 4 William Blackstone, *Commentaries* 69 (Clarendon Press 1765-1769).

But just as clearly, the ATS's grant of jurisdiction over violations of the "law of nations" did *not* include arbitrary arrest or detention, or modern-day notions of international human rights law. At the time it was originally enacted, the "law of nations" vested rights *not* in individuals, but in nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964). The notion that international law protected individual rights did not come into existence until the mid- to late twentieth century – a century and a half after the ATS was enacted.[7] The 1789 Congress could not have intended, when it granted jurisdiction over cases involving a violation of the "law of nations," that jurisdiction would encompass causes of actions involving violations of individual rights.

The nature of rights existing under the "law of nations"

---

[7] *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 79-80 (2000) (discussing traditional international law); *id.* at 85-86 (discussing new international law).

makes it unsurprising that for two centuries the ATS was not understood to empower courts to entertain cases involving violations of individual rights. To interpret the scope of jurisdiction in a manner contrary to the clear understanding of the framers of a two-hundred-year-old statute – and then to imply a cause of action from that statute where one does not clearly (or even obliquely) exist – would turn on their head the principles that courts are obliged to follow when they interpret statutes. *See Sandoval*, 532 U.S. at 286. The ATS did not vest the district court with jurisdiction over the claims asserted in this case, or in the current wave of cases against private companies for their overseas investments.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WALTER E. DELLINGER, III
PAMELA A. HARRIS
JOHN F. NIBLOCK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
WASHINGTON, D.C. 20006
(202) 383-5300

DANIEL M. PETROCELLI*
M. RANDALL OPPENHEIMER
MATTHEW M. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
LOS ANGELES, CA 90067
(310) 553-6700

*Attorneys for Amici Curiae*

October 6, 2003

**Counsel of Record*