No. 16-499

# In the Supreme Court of the United States

JOSEPH JESNER, ET AL.,
*Petitioners*

*v.*

ARAB BANK, PLC,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS AND INTERNATIONAL FEDERATION FOR HUMAN RIGHTS IN SUPPORT OF NEITHER PARTY

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* the Center for Constitutional Rights (CCR) and the International Federation for Human Rights (FIDH) are human rights organizations that have an interest in the proper assessment of accountability and redress for egregious human rights violations, particularly litigation under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 and claims against corporations.[1]

*Amici* maintain that domestic and international law unambiguously demonstrate that corporations are not categorically exempt from liability for egregious human rights violations under the ATS, as all courts of appeal other than the Second Circuit have held. *See, e.g., Flomo v. Firestone Nat. Rubber Co.,* 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). Such a finding is in accord with the principles of international human rights law that inform claims brought under the ATS, including the right to a remedy, accountability for violations, and non-discrimination and equal application of the law.

The same principles pertain in this case as in all cases in which corporations are defendants. Too many

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[1] Consents by both parties to the filing of *amicus curiae* briefs are on file with the Clerk of the Court. Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

corporations, whether through the extractive industries, military contracting, or other activities, have participated in severe human rights abuses. Even after this Court limited the reach of the statute in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), the ATS still provides an important mechanism to hold such entities accountable at law and provide redress to victims–a testament to the Framer's commitment to this nation's international legal obligations and respecting international law. *See, e.g. Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement").

*Amici*, however, also have extensive experience challenging the exploitation of claims of terrorism as a means to limit human rights. *See e.g., Rasul v. Bush,* 542 U.S. 466 (2004); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In pressing their claims throughout this litigation, petitioners often do not focus on the transcendent human rights values that inform the application of the ATS. Instead, Petitioners often speak of terrorism, defined in vague, overbroad terms, as a distinct harm, and one that entitles its victims to special treatment under the law. This approach risks preferencing remedies for those victims whose claims align with the political branches' often-inconsistent determinations of which acts of violence should be labeled "terrorism" and which organizations should be designated as "foreign terrorist organizations." *Amici* are concerned that the ATS will be narrowed or coopted as a tool to address vague and charged claims of asserted terrorism and to support

politicized campaigns against particularly disfavored groups.

Accordingly, *amici* write on behalf of neither party. *Amici* affirm the elementary requirement of corporate liability, particularly under general principles of law, but also underscore that the Alien Tort Statute, as a tool for vindicating human rights, should not be distorted through the prism of terrorism or material support; instead, the ATS should be affirmed as a tool to remedy violations of the law of nations as understood in the modern era: to aid in protecting the dignity and equality of all people, especially the most vulnerable victims of human rights atrocities, be they committed by state actors, individuals or corporate entities.

## SUMMARY OF ARGUMENT

The Alien Tort Statute is a vital tool for enforcing the law of nations, which in the modern era includes international human rights as a central area of attention. From *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), to *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and in the wake of *Kiobel*, ATS cases have largely focused on redressing egregious human rights violations. This focus accords with the development over the last half-century of a legal framework to promote and protect human rights, including meaningful enforcement mechanisms that remedy violations. The United States has played a central role in the development of this international human rights infrastructure and has itself undertaken human rights obligations vis-à-vis its own citizens and the international community as a whole.

Since the landmark decision in *Filártiga,* courts have adjudicated ATS claims in accordance with human rights law and principles. International human rights law has guided courts in determining the scope and definition of norms and informed courts' application of the right to a remedy. Moreover, the fundamental human rights principle of non-discrimination has served as touchstone in adjudicating law of nations violations. Although this Court limited the reach of the ATS to those claims that "touch and concern the territory of the United States…with sufficient force to displace the presumption against extraterritorial application" in *Kiobel*, 133 S. Ct. at 1669, it did not question the applicability of human rights principles to ATS claims.

The international community recognizes that to enforce human rights globally, corporations must be held accountable. In tandem with the rise of multinationals has been the development of an enhanced framework to regulate corporate conduct at the domestic and international levels and increased enforcement in the case of breaches. These developments demonstrate the existence of a general principle of law that corporations can be held accountable when they commit or are complicit in egregious human rights violations, with such accountability serving the purpose of preventing and redressing serious violations. Those principles do not preference remediation of only certain kinds of violations, such as "terrorism," even if such remediation would advance the interests of the State.

These human rights principles must be applied in considering this case and the question presented. A grant of immunity from liability when the perpetrator

is a corporation will seriously undermine the human rights framework, which has accountability and redress — against all and for all – as a central feature of enforcement. Any limitation of "specific, universal and obligatory" norms approved in *Sosa*, 542 U.S. at 732, to a subset that may be perceived to achieve certain political ends, such as a limitation to claims of a vaguely defined "terrorism," *see United States v. Yousef*, 327 F.3d 56, 106 (2d. Cir. 2003) ("'terrorism' is a term as loosely deployed as it is powerfully charged"), conflicts with the U.S.'s obligation to provide a remedy for violations of customary international law that impinge the enjoyment of fundamental human rights.

*Kiobel* now stands as one gate-keeper for ATS claims, with the full impact of the "touch and concern" test, 133 S. Ct. at 1669, still being determined. [2] Any further limiting of ATS claims by (1) excluding corporations or limiting application to a sub-class of juridical entities such as financial institutions or (2) narrowing the class of norms to those related to "terrorism" or "national security"[3] would constitute an improper departure from the principles of international law that the ATS is intended to vindicate.

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[2] Indeed, there remain unanswered questions for consideration by the district court if remanded that could result in the dismissal of this action, including aiding-and-abetting liability and whether the claims "touch and concern" the United States with sufficient force to proceed. *See In re Arab Bank, PLC Alien Tort Statute Litig.,* 822 F.3d 34, 35 (2d Cir. 2016) (Jacobs, J., denying rehearing *en banc*). *See also id.* (Cabranes, J., denying rehearing *en banc*).

[3] *See* Brief of *Amicus Curiae* United States Senator Sheldon Whitehouse in Support of Petitioners, *Jesner v. Arab Bank*, No. 16-499 (Nov. 14, 2016) (Whitehouse Br.), and Brief of *Amici Curiae* Jack Bloom and Alpha Capital Holdings, Inc. in Support of Petitioners, *Jesner v. Arab Bank*, No. 16-499 (Nov. 14, 2016).

## ARGUMENT

### I. THE ATS MUST BE INTERPRETED AND APPLIED IN LINE WITH FUNDAMENTAL HUMAN RIGHTS PRINCIPLES.

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides federal courts with jurisdiction "over any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States."

The congressional grant of subject matter jurisdiction and enforcement authority to federal courts through the First Judiciary Act was not frozen in time. The landmark decision *Filártiga v. Peña-Irala* instructed that in adjudicating ATS claims, courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881.[4]

This Court affirmed that instruction in holding that the ATS recognizes a "modest number" of claims "based on the present-day law of nations" that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Sosa*, 542 U.S. at 724-25,

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[4] In *Filártiga*, the court recognized that certain violations are so egregious and so universally condemned that the deterrence and punishment of these acts is the responsibility of all: "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." 630 F.2d at 890, quoted with approval in *Sosa v. Alvarez-Machain,* 542 U.S. at 732.

732. It is axiomatic that courts must look to international law and practice, not simply U.S. statutory law, to determine which norms are actionable under the ATS. *See id. at* 733-738 (gauging detention claim against current state of international law by looking to international treaties, survey of national constitutions, jurisprudence from international tribunals and the Restatement (Third) of Foreign Relations Law, while rejecting 42 U.S.C. § 1983 as a basis for claim).

The United States explained in its *amicus curiae* brief in *Filártiga* that in "the present day," human rights law constitutes a central component of the law of nations:

> Customary international law evolves with the changing customs and standards of behavior in the international community. Early in this century, as a consequence of those changing customs, an international law of human rights began to develop. This evolutionary process has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.

Memorandum of the United States as *Amicus Curiae* at 6, No. 79-6090, 1980 WL 340146 (2d Cir. 1980).

As the recognition of fundamental human rights sharpened over the last half-century, so has the concept that international law requires that States provide accountability and redress for violations of universal principles and norms. *See* Donald F.

Donovan and Anthea Roberts, The Emerging Recognition of Universal Civil Jurisdiction, 100 Am. J. Int'l L. 142, 142 (2006) ("Modern international law takes as a fundamental value the condemnation and redress of certain categories of heinous conduct."). The global community developed a system of laws that bind the actions of states themselves, government officials and non-state actors,[5] and established institutions and bodies to monitor and enforce human rights at the international[6] and national level.[7]

Since *Filártiga* acknowledged the international recognition of fundamental human rights and the critical role for courts in ensuring respect for those

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[5] *See, e.g.,* Charter of the United Nations, 59 Stat. 1051, T.S. No. 993 (1945); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

[6] *See, e.g.,* U.N. Human Rights Council (intra-governmental body promoting and protecting human rights globally); U.N. Committee against Torture (monitoring implementation of CAT); Special Procedures of the Human Rights Council (independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective).

[7] *See, e.g.,* National Human Rights Institutions established pursuant to the Paris Principles, available at http://nhri.ohchr.org/EN/Contact/NHRIs/Pages/Global.aspx; U.S. Department of State Country Reports on Human Rights Practices, available at https://www.state.gov/j/drl/rls/hrrpt/; U.S. Department of State Bureau of Democracy, Human Rights and Labor available at https://www.state.gov/j/drl/index.htm ("Promoting freedom and democracy and protecting human rights around the world are central to U.S. foreign policy.").

rights, 630 F.2d at 890, the ATS has been an important vehicle to enforce international norms and redress violations.[8] In the nearly forty years since *Filártiga*, courts around the country have continued the tradition of permitting suits against state actors, *see, e.g.*, *Hilao v. Marcos* (*In re Estate of Marcos*), 25 F.3d 1467 (9th Cir. 1994); non-state actors, *see, e.g.*, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2016); and corporations, *see, e.g.*, *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *In re Xe Servcs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009). In so doing, the ATS has been a vehicle to pursue redress for torture and war crimes (*Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516 (4th Cir. 2014)), forced labor (*Rodriguez Licea v. Curacao Drydock* Co., 584 F. Supp. 2d 1355 (S.D. Fla. 2008)), medical experimentation (*Abdullahi v. Pfizer*, *Inc.*, 562 F.3d 163 (2d Cir. 2009)) and persecution (*Sexual Minorities Uganda v Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013)), among other international law violations.

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[8] Indeed, in *Filártiga*, the United States asserted that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Br. United States as Amicus Curiae, at 22-23.

Congress affirmed the important role played by the ATS when, in enacting the Torture Victim Protection Act, 28 U.S.C. § 1350, note (TVPA), it confirmed that the ATS "has other important uses [beyond redressing torture and extrajudicial killing] and should not be replaced." S. Rep. No. 102 -249 at 4-5 (1991). *See also* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America at ¶¶ 79, *id.* at 81, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), *available at* http://www.state.gov/j/drl/rls/45738.htm..

In the wake of *Kiobel*, a number of cases have been dismissed that previously would likely have proceeded. *See, e.g., Adhikari v. Kellogg Brown Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), *petition for cert. filed,* No. 16-1461 (June 2, 2017) (dismissing trafficking claims against U.S. contractor on "touch and concern" grounds); *Cardona v. Chiquita Brands, Int'l Inc.*, 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015) (dismissing torture claims against U.S. corporation on "touch and concern" grounds); *Sexual Minorities Uganda v. Lively*, 2017 U.S. Dist. LEXIS 85836 (D. Mass. June 5, 2017) (dismissing crime against humanity/persecution claim against U.S. citizen for failing "touch and concern" test). While its reach has been narrowed, the ATS continues to play a modest, but important role in vindicating human rights. *See, e.g., Al Shimari v. CACI*, 758 F.3d 516 (4th Cir. 2014); *Doe v. Exxon Mobil Corp.,* 2015 U.S. Dist. LEXIS 911007 (D.D.C. 2015). As an instrument for providing access to justice, adjudication of ATS claims are rooted in and reflect basic principles of international human rights law, including the principle of non-discrimination and equal justice. *All* victims of human rights violations have a right under international law to an effective remedy and reparations. This right is guaranteed in the Universal Declaration of Human Rights, and codified in treaties ratified by the United States.[9]

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[9] *See, e.g.,* Universal Declaration of Human Rights (UDHR), art. 8, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"); Convention Against Torture, art. 14 (requiring States

Petitioners and certain *amici* imply in this litigation that their claims are entitled additional solicitude from the courts because they involve allegations of terrorism and because the political branches amply support that anti-terrorism framework. But it is contrary to the very notion of international human rights, with its core commitments to equality and non-discrimination,[10] for the right to a remedy to turn on politics and power. [11] Such a result is a real risk in this case, if the Court accepts the invitation by certain *amici* to limit claims to those that align with the political branches "terrorism"

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to provide "an enforceable right to fair and adequate compensation"); ICCPR, art. 2(3). *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on Remedy), G.A. Res. 60/147, U.N. Doc. A/Res/60/147 at sec. I, ¶ 2(b) & (c) (Dec. 16, 2005), (requiring States to provide "fair, effective and prompt access to justice" and "adequate, effective, prompt and appropriate remedies, including reparation").

[10] *See, e.g.*, ICCPR, arts. 4, 26. *See also* Basic Principles on Remedy at ¶ 12 (victims must have "equal access to an effective judicial remedy as provided for under international law").

[11] Various doctrines, including international comity, sovereign or common law immunity and act of state, are regularly considered in ATS cases. Application of these doctrines can raise separation of powers concerns, particularly when the defendant is a U.S. government official, *see, e.g., Rasul v Myers*, 512 F.3d 644 (D.C. Cir. 2008), or involves conduct of a U.S. ally and U.S. foreign policy, *see, e.g., Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007), or when the Executive Branch provides its views such as through a Suggestion of Immunity or amicus brief urging dismissal. *See, e.g., Matar v. Dichter*, 563 F.3d 9 (2d. Cir 2009); *c.f.,* Beth Stephens, Judicial Deference and the Unreasonable Views of the Bush Administration, 33 Brooklyn J. Int'l L. 773 (2008).

framework.[12] The principle of non-discrimination on the basis of nationality, religion, race, ethnicity, gender, sexual orientation and gender identity or other status must apply to adjudication of ATS claims. It cannot be that victims' ability to vindicate their rights turns on the perpetrator's identity (whether natural or juridical persons on the one hand, or national, religious or other status on the other), rather than the legality of the conduct at issue. *All* who are alleged to have committed egregious human rights violations in a well-pled complaint must be judged by the same legal standard.

This requires that States treat similarly situated victims—and defendants—equally, with legal principles rather than *inter alia* nationality, religion or political opinion determining one's access to justice. *See* Basic Principles on Remedy, ¶ 25 (application of the Principles "must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception").

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[12] *See United States v. Yousef,* 327 F.3d at 97 (finding "customary international law currently does not provide for the prosecution of 'terrorist' acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism"); *see also id.* at 107-08 ("Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that 'one man's terrorist is another man's freedom fighter.' We thus conclude that the statements of Judges Edwards, Bork, and Robb [in *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984)] remain true today, and that terrorism--unlike piracy, war crimes, and crimes against humanity--does not provide a basis for universal jurisdiction.").

In the context of this case, *amici* urge the Court to undertake its assessment of corporate liability as a whole, in accord with general principles of law, and affirm that corporations can be held liable for the full panoply of international norms and claims that satisfy *Sosa* and *Kiobel*. Any limitations to either the form of corporate entity, *i.e.*, financial institutions, or to the politically malleable concept of terrorism contravenes the international human rights principles that animate ATS claims in the modern era.

## II. GENERAL PRINCIPLES OF LAW AFFIRM THE VIABILITY OF THE ATS TO ADDRESS SERIOUS HUMAN RIGHTS VIOLATIONS BY CORPORATIONS.

Because the substantive law applied under the ATS is international law, it is appropriate to look to international law principles to address the question of corporate liability.[13] International law, and specifically general principles of law,[14] affirms that the corporations can be held liable for law of nations

[13] *Amici* agree with the United States that "[i]nternational law informs, but does not control, the exercise of [federal court's 'residual common law discretion.'" Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 10-1491 (Dec. 21, 2011) (U.S. *Kiobel* Br.*)* at 7, citing *Sosa*, 542 U.S. at 738. *See id.* at 31 ("holding corporations accountable if they violate the law of nations is consistent with international law").

[14] General principles of law are recognized as one of the authoritative sources of international law. *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993, art. 38(1). *See also* ICCPR, art. 41(1)(c)(invoking general principles in relation to domestic exhaustion).

violations.[15]

General principles "belong to no particular system of law, but are common to them all," being the "fundamental principles of every legal system. …[m]unicipal law thus provides evidence of the existence of a particular principle of law." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* 390, 392 (2006) As such, general principles are commonly derived by employing a comparative law analysis. *See, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 287-88 (1933). *See also United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 (1820) (conducting a survey of "doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law" on the definition of piracy).

A review of developments at the national and international level demonstrate that with the rise of transnational business enterprises, and concomitant denials of fundamental rights as a result of those operations, a clear principle crystallizes that corporations can be held legally responsible for egregious conduct, including conduct constituting a specific breach of a universal and obligatory norm under international law.[16] While the mechanisms and

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[15] General principles have been employed in ATS litigation. *See, e.g.*, *Doe v. Exxon Mobile Corp.*, 654 F.3d at 54 (finding a general principle "becomes international law by its widespread application domestically by civilized nations."); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) (looking to general principles to decide exhaustion of domestic remedies requirements).

[16] *See, e.g.*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector*

laws under which such accountability is rendered may vary across legal systems—including civil, criminal and administrative penalties,[17] the common core remains constant: corporations must respect human rights and be held liable when they fail to do so. Indeed, ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by such abuses is a vital part of a State's duty to protect against business-related human rights abuse. *See* Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework United Nations, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/17/31 (2011), Principle 25 & Commentary.

All legal systems recognize the liability of

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*Liability for Grave Breaches of International Law: A Survey of Sixteen Countries*, FAFO, 2006, *available at* https://www.biicl.org/files/4364_536.pdf (seeking to achieve some geographic diversity and represent different legal systems, examining corporate liability in Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom, and the United States); Clifford Chance, Corporate Liability in Europe (2012) https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf (examining corporate liability in twelve European countries).

[17] Proceedings in civil law countries often allow for victims to seek damages from a defendant as part of a criminal case, a practice highlighted by Justice Breyer in his discussion of international comity in *Sosa*. 542 U.S. at 762-63.

corporations.[18] *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (1983); *see also Exxon*, 654 F.3d at 53 (finding that "[l]egal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood").

In both civil and common law countries, legal actions against corporations for egregious conduct, including in the context of transnational or extraterritorial operations, have been increasing. *See, e.g., Lubbe v. Cape Plc,* [2000] 1 WLR 1545 (H.L.) (appeal taken from Eng.) (claims for damages of over 3,000 miners who claimed to have suffered as a result of exposure to asbestos and its related products in the English defendant corporation Cape's South African mines); *Flores v. BP Exploration Co. (Colom.),* Claim No. HQ08X00328 [Filed Dec. 1, 2008] EWHC (QB) (complaint against BP in Colombia for serious environmental harm with devastating impact on the local population); *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) *(South Afr.)*; *Jabir et al. v. KiK Textilien und Non-Food GmbH*, 7 O 95/15 (Landgericht Dortmund) *(Ger.)* (case on behalf of Pakistani textile factory laborers addressing supply chain liability of German retailing company for death of relatives and physical injury); *FIDH / LDH / Gurman and others v X, Tribunal de Grande Instance de Paris (*case against French surveillance technology company Amesys for complicity to torture in respect of material supplied to Libyan regime used in repression of civilian population) (*Fra.*)*;*

[18] Corporate personhood is recognized in all legal systems. *See Case Concerning The Barcelona Traction, Light & Power Co*. (Belg. v. Spain), 1970 I.C.J. 3, 38-39 (Feb. 5).

*Fidelis A. Oruru v Royal Dutch Shell*, *plc* (*Neth.*), District Court of the Hague, 30 Jan 2013, *available at*: https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vsshell-oil-spill-goi; *Garcia v. Tahoe Resources Inc. (Can.)*, 2017 BCCA 39 (a suit by Guatemalan protestors against Tahoe for negligence and battery resulting from a shooting by security personnel at Tahoe's mine). *See also Chandler v Cape plc* [2012] EWCA Civ 525 (Court of Appeal of England and Wales addressing the availability of damages for a tort victim from a parent company, in circumstances where the victim suffered industrial injury during employment by a subsidiary company); Criminal complaint against parent company Nestlé AG for subsidiary's involvement in killing of trade unionist in Colombia, AZ 1A 2012 425, public prosecutor's office Vaud & Zug (*Switz.*).

Indeed, many cases involving transnational activity brought under domestic law look quite similar to the fact-patterns that arise in ATS cases. *See Prosecutor v TotalFinaElf et al.*, [Court of Cassation] March 28, 2007 PAS. No. P.07.0031.F (2007) (*Belg.*) (brought by Myanmar residents in Belgium against the French oil company, Total, arising out of the same pipeline construction project at issue in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002)); *Dagi v. BHP*, (1997) 1 VR 428 (*Austl.*) (suit in the Supreme Court of Victoria, Australia by 30,000 natives of Papua, New Guinea, against a mining company for damages to their lands); *Union Carbide Corporation v. Union of India* (1991) 4 S.C.C. 584; A (*India*) (case filed by residents of Bhopal, India, against the Union Carbide Company for extensive injuries and loss of life arising from the release of toxic gases from a chemical plant); *Hiribo*

*Mohammed Fukisha v. Redland Roses Limited* [2006] eKLR Civil Suit 564 of 2000 (*Kenya*) (case filed in Kenya in which tort law provided the remedy for serious bodily harm caused by exposure to hazardous chemicals when spraying herbicides and pesticides); *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (Can. Ont. Sup. Ct.) (three related suits by Guatemalan women, the widow of a murder victim, and a survivor of a shooting, against HudBay and its subsidiaries for claims of negligence resulting in *inter alia* death and gang rapes); *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (a suit by Eritrean refugees against Nevsun for, *inter alia*, torts in violation of customary international law resulting from allegations of slave labor at Nevsun's mine in Eritrea).

Likewise, the United States government is unequivocal that non-state actors, and specifically corporations, can be held liable for international law violations. See U.S. *Kiobel* Br. at 22-32; *see also* U.S. Statement of Interest in *Kadić v Karadžić*, at 5.

These developments at the national level dovetail with the consistent, and increasingly concrete effort at the international level, to strengthen the regulatory framework for transnational business operations. The first significant effort was the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises - Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). In 2011 the U.N. Human Rights Council adopted "The Guiding Principles on Business and Human Rights," which outline the respective duties and responsibilities

of States to "protect" human rights, and business enterprises to "respect" human rights. *See* Guiding Principles. The Guiding Principles set forth the "need for rights and obligations to be matched to appropriate and effective remedies when breached." *Id.*, General Principles. Notably, the "Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men." *Id*, at General Principles.[19]

In 2015, the UN Human Rights Council passed Resolution 26/9 which established the United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. UN Human Rights Council Res. 26/9, UN Doc A/HRC/26/L.22/Rev.1 (June 25,

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[19] The Guiding Principles are rooted in international law, principles of State responsibility in public international law and human rights law:

> States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse…. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency." Guiding Principles, Principle 1, Commentary.

2014).[20]

Regional systems have likewise responded with codifications of obligations on businesses with respect to human rights and transnational operations.[21] For example in Europe, it has been codified that corporations domiciled in any member State of the European Union can be sued for torts that occur outside the jurisdiction of the home-State pursuant to the European Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Articles 2 and 60.[22] Council

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[20] A global civil society movement supports and has engaged with the Open-Ended Working Group process, while also advocating for enhanced regulation of corporate conduct at the national level. *See, e.g.*, Treaty Alliance, *available at* http://www.treatymovement.com/.

The United Nations High Commissioner on Human Rights has also increased attention on this issue. *See, e.g., See, e.g.,* Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, A Report Prepared for the Office of the UN High Commissioner for Human Rights*, (2014), available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

[21] *See also Ubaser S.A. v Argentina*,ICSID Case No. ARB/07/26,¶1193 et seq. and in particular 1210 (Dec. 8 2016) (International investment tribunal concluded that a prohibition to commit acts violating human rights can be of immediate application upon private parties).

[22] Art. 2 provides: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Pursuant to Article 60(1) of the Brussels Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of

Regulation 44/2001, arts. 2, 60, 2001 O.J. (L 12) 3, 13, and amendment Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, arts. 4, 63. Moreover, the European Court of Justice clarified in 2005 that the *forum non conveniens* doctrine is incompatible with Brussel Convention of 1968, therefore EU Member States could no longer invoke *forum non conveniens* to dismiss a case from their jurisdiction when the company involved is domiciled in the E.U, without facing the risk of being sanctioned by the ECJ.[23] The 2014 Protocol to the African Court of Justice and Human and Peoples' Rights has a section called 'Corporate Criminal Liability' which establishes jurisdiction for the court over the actions of legal persons, including corporations. African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014.[24]

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business.

[23] CJEC, *Andrew Owusu v. N.B. Jackson*, agissant sous le nom commercial "Villa Holidays Bal-Inn Villas" e.a., 1 March 2005, C-281/02, 2005, C-106/2 ("The Convention of 27 September 1968 (...) precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting state is in issue or the proceedings have no connecting factors to any other Contracting State).

[24] The new article 46C(1) states: "For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States." *available at*: http://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

Accordingly, as a matter of international law derived from the general principles of law of civilized nations, corporations can be held liable under the ATS.

## III. BECAUSE IT APPLIES BROADLY TO ALL CORPORATE ACTORS, THE ATS MUST NOT BE INTERPRETED IN A WAY THAT PREFERENCES NATIONAL SECURITY INTERESTS OR THE REMEDIATION OF ALLEGED TERRORIST ACTS.

The ATS applies to all juridical entities, including corporations. As discussed above, this follows from the baseline human rights function of the ATS, situated as it is in an international consensus to provide remediation to victims of serious violations of international law regardless of the legal form the violator takes. It also follows from the recognition that human rights law does not preference certain victims of otherwise cognizable human rights claims over others.

Against this baseline, *amici* write to stress that the ATS must not be warped to preference remediation of the harms from terrorism or claimed threats to national security, above or even to the exclusion of the panoply of other human rights violations corporations may commit. That is, allegations that the defendant in this case provided support to "international terrorism" should not offer a fast track to remedies, enable procedural short cuts, or alter accepted definitions of human rights violations and liability for those abuses.

*Amici's* concern is driven by our own experience with the way in which claims of terrorism distort

national security policies, U.S. interpretations of international law, and even U.S. interpretations of constitutional law. *Amicus* CCR has repeatedly challenged executive branch efforts to redefine basic principles to serve a "war on terrorism."[25] *Amici* recognize the need for security, but insist that all branches of our government respect constitutional and international law safeguards –including the principle of non-discrimination – in doing so. Based on this experience, we view with alarm the possibility that the ATS will be severed from its human rights foundation and transformed into yet one more means to undercut or violate human rights principles in the name of the "war against terrorism."

Since the attacks of 9/11, asserted national security imperatives have been used to distort international law – and in some cases, domestic constitutional law norms. As former Legal Advisor to the Department of State has observed, for the last fifteen years, international law conceptions regarding detention and targeting of terrorist suspects has been largely displaced by the "law of 9/11." Harold Hongju Koh, Legal Advisor to the U.S. Dep't of State, Speech at the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at*: https://www.state.gov/documents/organization/179305.pdf.

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[25] *See* FIDH, *France: Counter-Terrorism measures and human rights: When the exception becomes the norm*, (June 2016) *available at*: https://www.fidh.org/IMG/pdf/report_counter_terrorism_measures_human_rights.pdf.

Indeed, the last fifteen years are replete with examples where protective principles for civilians enshrined in international humanitarian and human rights law have been turned on their head to allow broad deprivations of fundamental rights to liberty, or even life, in service of the Executive Branch's national security and anti-terrorism agenda.[26] As a noted legal scholar observed, "[t]he U.S. has simply chosen the bits of the law model and the bits of the war model that are most convenient for American interests, and ignored the rest." David Luban, *The War on Terrorism and the End of Human Rights*, Philosophy and Public Policy Quarterly, Vol. 22, No. 3 (Summer 2002).

Over time, and with the ratification or acquiescence of the judiciary, Executive Branch practices regarding the detention, trial and targeting of terrorist suspects has bent and contorted international law in service of the asserted need to combat terrorism. For example, since this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the judiciary has largely turned away claims of habeas petitioners based in international law, preferencing the Executive Branch's asserted need for indefinite detention, fifteen years hence. *See*, *e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (rejecting international laws of war as

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[26] In one of the earliest and more controversial chapters, Executive branch attorneys engaged in legal contortions and efforts at redefining internationally prohibited conduct to avoid clear and non-derogable international law prohibitions on torture and cruel, degrading and inhumane treatment. *See* Memorandum from Jay S. Bybee, the Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *available at* https://www.justice.gov/olc/file/886061/download.

a limit on the President's war powers) (citation omitted), *reh'g denied*, 619 F.3d 1, 1 (D.C. Cir. 2010). *See also*, *e.g.*, *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (characterizing detainee litigation as "a charade prompted by the Supreme Court's defiant if only theoretical assertion of judicial supremacy . . . sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.") (citation omitted).

In addition, the Executive Branch has distorted international humanitarian and human rights norms to justify a broad policy of "targeted killing" of terrorist suspects, by, *inter alia*, interpreting the geographical scope of armed conflict broadly so as to permit the use of lethal military force off recognized battlefields. *See, e.g.*, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at the Woodrow Wilson Int'l Ctr. for Scholars: "The Ethics and Efficacy of the President's Counterterrorism Strategy," April 30, 2012 (asserting that "[t]here is nothing in international law … that prohibits us from using lethal force against our enemies outside of an active battlefield"); *but see* 31st International Conference of the Red Cross and Red Crescent, Nov. 28 – Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 22, I.C.R.C. Doc. 31IC/11/5.1.2 (Oct. 2011) (critiquing the concept of a "global battlefield"). Similarly, the Executive Branch has imported traditional international armed conflict concepts into a non-international conflict involving irregular terrorist groups so as to justify the targeting of an ever-changing list of "associated forces" of Al Qaeda and the

Taliban. *See, e.g.*, John C. Denn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 200 (2011), (noting "the complete absence of state practice or *opinio juris* supporting the existence of such a customary rule.").

Likewise in the realm of military commissions of terrorist suspects, the courts have not sought to correct the way the Executive Branch has engaged in a strategic distortion of international humanitarian law in the name of fighting terrorism.[27] What has emerged is what one commentator has labeled "folk international law" – i.e. "a law-like discourse that relies on a confusing and soft admixture of IHL [international humanitarian law] *jus ad bellum*, and IHRL [international human rights law] to frame operations that do not, ultimately, seem bound by international law – at least not by any conception of international law recognizable to international lawyers – especially non-Americans." Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War*

[27] For example, in the context of the military commissions, the government picks and chooses which rules or principles of international or non-international armed conflict it wishes to apply to Guantánamo detainees in order to suit its needs, but it does so selectively and always to the detriment of those detainees. This selective application of armed conflict rules for prosecution and detention purposes deprives Guantánamo detainees of any status recognized by the laws of war. These issues have been presented to the Court for its review. *See* Petition for a Writ of Certiorari, *Bahlul v. Trump*, No. 16-1307 (U.S. docketed May 1, 2017); Brief of *Amicus Curiae* Center for Constitutional Rights, *Bahlul v. Trump*, No. 16-1307 (U.S. docketed May 31, 2017).

*Governance*, 5 Harv. Nat'l Sec. L. J. 225, 229 (2014).

At the same time, a number of arguably extra legal practices designed to respond to the threat of terrorism inside the United States has compromised constitutional principles in service to national security goals. *See* Amna Akbar, *Policing "Radicalization"*, 3 U.C. Irvine L. Rev. 809 (2013) (police practices that have emerged in the aftermath of 9/11 include coerced interviews, mapping and surveillance, and broad use of material support laws that target Muslims). These practices emerge from a domestic law enforcement paradigm that unfairly associates Muslim communities with the threat of terrorism, *id.* at 826, and trades on assumptions that Muslims are inherently suspicious, unassimilable and latently violent. Khaled Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 Colum. L. Rev. Online 108, 120 (2016). These law enforcement practices also come in a sphere where terror attacks spur the "redeployment of old Orientalist tropes," Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1586 (2002), that are embedded in politics and popular culture and that have, regrettably, too often come to define the legal and political conflict between Israel and Palestine. *See* Edward Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (Rev. Ed. 1997).

While the legality of many of these domestic practices has not reached this Court, one salient example highlights *amici's* concern that national security or anti-terrorism rationales may compromise pre-existing legal constraints. This Court has deferred to the government's expansive interpretation of laws

criminalizing the provision of material support to terrorism, *see* 18 U.S.C. § 2339B, which is a form of liability analogous to the aiding and abetting terrorism claims advanced by Petitioners in this case. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (giving "significant weight" to the views of the political branches when "sensitive interests in national security and foreign affairs" are implicated even when "conclusions must often be based on informed judgment rather than concrete evidence"). As one commentator has observed, the decision portends doctrinal developments that may "dramatically expand[] government authority to suppress political expression and association in the name of national security." David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 Harv. L. & Pol'y Rev. 147, 149 (2012). Indeed, in practice, the government has very aggressively deployed broad material support statutes to punish conduct that is often attenuated from actual terrorist acts, and the judiciary has acceded to the government's asserted interest in national security over speech and associational rights. See, e.g. *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (rejecting the defendant's argument that the government's evidence of culpable intent constituted protected First Amendment activity and affirming conviction for material support).

Thus, Petitioners' case arises in a context where both international and domestic law norms have been loosened and distorted—indeed, in the context of the "war on terror," turned on their head—in order to accommodate the asserted aim of combating terrorism. It also arises in a legal environment where even

peaceful, lawful actions in support of Palestinian human rights is regularly silenced, attacked or even criminalized. *See Palestine Exception to Free Speech: A Movement Under Attack in the US* (Sept. 2015), *available at* https://ccrjustice.org/the-palestine-exception.

*Amici* thus caution against viewing the question presented in this case through the lens of national security or to preference the United States interest in combating terrorism. In addressing the question of corporate liability under the ATS, the Court should resolve the question in line with general principles of international law, which command that human rights violations be remediated regardless of the legal form of the violator. Human rights laws likewise cannot be constrained in a way that preferences the sovereign interests of the United States or its political allies, lest it do lasting violence to the animating principle that human rights are to be "for all, and against all."

## CONCLUSION

*Amici curiae* respectfully submit that this Court should reverse the judgment below that corporations cannot be held liable under the ATS, and remand for further proceedings to accord with fundamental principles of international human rights law.

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Respectfully submitted,

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## APPENDIX A – LIST OF *AMICI CURIAE*

The **Center for Constitutional Rights** ("CCR") is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources. CCR brought the landmark case that, for the first time in the modern era, recognized claims under the Alien Tort Statute to remedy human rights violations, *Filártiga v. Peña-Irala*, 630 F. 2d 876 (2d Cir. 1980), a decision ultimately endorsed by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and brought cases that recognized that the ATS applies to non-state actors, *Kadić v. Karadžić*, 70 F. 3d 232 (2d Cir. 1995), cert denied, 518 U.S. 1005 (1996), and to corporations, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), dismissed by stipulation pending reh'g en banc, 403 F.3d 708 (9th Cir 2005). In *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, CCR filed a brief amicus curiae on behalf of prominent human rights organizations and experts explaining that general principles of law – i.e., the way in which domestic and municipal laws across the globe recognize that corporations are liable for egregious conduct –supports the principle of corporate liability for violations of the laws of nations under the ATS. CCR also filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive without counsel, charge or trial, at the U.S. Naval Station at Guantánamo Bay, Cuba – petitions that have twice reached this Court.

*See Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723, 769 (2008).

The **FIDH (International Federation for Human Rights)** is an international human rights non-governmental organization with its headquarters in Paris, France. Founded in 1922, it brings together 184 national human rights organizations from all regions in the world. FIDH's mandate is to defend all human rights enshrined in the Universal Declaration of Human Rights, including the right to be free from discrimination. FIDH aims at obtaining effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. For more than a decade, FIDH has been focusing on the effects of globalization on the full recognition of human rights, and particularly the impact of business activities on economic, social and cultural rights. FIDH is involved in strategic litigation before domestic jurisdictions (*i.e.,* France, Guinea Conakry, Ivory Coast), regional courts and bodies (African Commission and Court on Human and Peoples' Rights, Inter-American Court of Human Rights, European Committee of Social Rights, European Court of Human Rights) and international/ised jurisdictions (International Criminal Court, Extraordinary Chambers in the Courts of Cambodia). Along with ESCR-Net, FIDH established the Treaty Imitative, aimed at contributing to the work of the United Nations Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.