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* INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

It is well-established that this Court determines the content of international law by reference "to the customs and usages of civilized nations, and, *as evidence of these, to the works of jurists and commentators*." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis supplied). *See also* American Law Institute, Restatement (Third) U.S. Foreign Relations Law, §103(2)(c) (1987) ("In determining whether a rule has become international law, substantial weight is accorded to . . . the writings of scholars. . . .").

Amici -- whose names and biographies appear in the Appendix – are some of the world's leading experts in the field of international law and human rights.[1] Although they come from many different countries with varying legal backgrounds, they have developed – and here submit -- a consensus position on (a) the content and impact of international law in this case, (b) the international responsibilities of multinational corporations, and (c) the obligation of states to provide a meaningful remedy for violations of human rights. Each

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. The parties have consented to this filing.

separately and all collectively offer an expertise on these issues that is not available from the parties themselves. Many have previously appeared as *amici* or as expert witnesses in litigation under the Alien Tort Statute, 28 U.S.C. § 1350; indeed, previous submissions from a subset of the current *amici* have been cited with approval repeatedly, most recently by the United States Court of Appeals for the District of Columbia Circuit. *John Doe VIII et al. v. Exxon Mobil Corp.*, 654 F.3d 11, 50, 53 (D.C. Cir. 2011).

SUMMARY OF ARGUMENT

Amici submit with respect that the *Kiobel* majority committed clear errors of method and substance that require reversal by this Court. The majority below reached its conclusion only by looking for the wrong kinds of evidence of international law, inferring from the absence of cases imposing corporate liability for human rights violations that no norm imposes or allows such liability. That technique betrays a basic misunderstanding of international law and this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). It is also radically inconsistent with the Second Circuit's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),

which this Court cited with approval in *Sosa*, and which is respected around the world for its interpretation of the Alien Tort Statute and the international law of human rights.

The *Kiobel* court's methodological error has substantive consequences and leads the panel to miss the consistent principles of international law that recognize corporate liability and the obligation of States to provide a meaningful remedy for all violations of human rights, no matter who or what violates them. The failure to hold corporations liable for their torts contradicts the substance and history of international law, as every other Circuit Court to address the issue has concluded. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *John Doe VIII et al. v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).

ARGUMENT

I. REVERSAL IS APPROPRIATE BECAUSE THE PANEL MAJORITY IN *KIOBEL* FUNDAMENTALLY MISUNDERSTOOD THE PROPER METHOD FOR DETERMINING THE CONTENT OF INTERNATIONAL LAW.

A. The Panel Majority in *Kiobel* Rigorously Asked the Wrong Question by Seeking Universal Examples of Corporate Liability for Human Rights Violations.

The panel majority's essential error was its insistence that jurisdiction under the Alien Tort Statute must fail if no corporation has been held civilly or criminally liable for human rights violations. Because "corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se,* . . . it cannot . . . form the basis of a suit under the ATS." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148-49 (2d Cir. 2010). Although that formulation may have a superficial appeal, it is wrong as a matter of international law, and it fundamentally misconstrues *Sosa*.

First, it is wrong to conclude from the alleged

absence of human rights cases against corporations that they are exempt from human rights norms. International law never defines the means of its domestic implementation, leaving sovereign States a wide berth in assuring that the law is respected and enforced in accordance with its own law and traditions. The Permanent Court of International Justice – precursor to the modern International Court of Justice – established that international norms could not be inferred from the *absence* of domestic proceedings. In a case where the government of France made precisely the kind of argument the panel majority found persuasive below, the PCIJ came to the opposite conclusion:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove the circumstance alleged by the French government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so.

The Lotus Case, [1927] P.C.I.J., Ser. A, No. 10. Thus, a sovereign need not look to international law for permission to act; rather, international law prohibits egregious conduct that is of concern to all nations, and States are then empowered, indeed

required, to craft remedies appropriate to their individual justice systems.

In adopting the Alien Tort Statute, the First Congress of the United States exercised the sovereign discretion protected by international law by empowering the federal courts to hear aliens' civil actions for those violations of international law that take tortious form, and it did so utterly without specifying the types of defendants who might be sued. As recognized by this Court, "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants…." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 438 (1989).[2]

Second, even if the *mode* of enforcing international law is left to the sovereign discretion of States, it hardly follows that States remain free to allow violations so long as some corporation commits the wrong. The relevant distinction at

[2] The ATS clearly does specify the kind of conduct that falls within its scope, *i.e.*, violations of the law of nations or a treaty of the United States, but it equally clearly does not specify the kind of defendants that may be sued. By contrast, other sections of the Judiciary Act did limit the availability of a remedy by strictly defining the proper defendant. *See, e.g.,* Judiciary Act, ch. 20, § 9, 1 Stat. at 76-77 (limiting defendants to "consuls or vice-consuls").

international law is not between State actors and corporations *simpliciter*. It is between conduct that requires State action to be a violation (like torture under the Torture Convention *infra*), and conduct that violates international law even when committed without State action (like piracy and genocide, *infra*). In other words, certain egregious conduct violates international human rights standards, whether committed by State or non-State actors. Thus, both juristic and natural individuals violate international law if they engage in activity that does not require State action to be wrongful *or* if they are – by analogy to the anti-discrimination laws of the United States -- a "willful participant in joint action with the State or its agents" or are otherwise acting "under color of law." *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980). In either case, States would be obliged to provide some meaningful remedy for the violation.

Although it is true as noted by the *Kiobel* majority that the instruments establishing the jurisdiction of international criminal tribunals distinguish between natural and juristic persons *for purposes of criminal prosecution,* these instruments – and the tribunals generally -- do not establish the limits of conduct that violates international law; instead, they simply provide an extraordinary means of enforcement against specific human beings. Nothing in international

law or the charters of the international criminal tribunals precludes the imposition of civil or tort liability for corporate misconduct, a form of accountability that is of course common in legal systems around the world. The right question is not whether human rights treaties explicitly impose liability on corporations, or whether the international criminal tribunals have jurisdiction over corporations, or even whether other States have universally imposed criminal or civil liability for violations of international law, as the *Kiobel* majority thought. 621 F.3d at 119. It is whether those treaties, the charters of the criminal tribunals, and the practice of states affirmatively distinguish between juristic and natural individuals in a way that exempts the former from all responsibility for violations of international law. They clearly and profoundly do not, as demonstrated in Part II, *infra*.

The correct analysis under international law is exemplified by *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996), cited with approval by this Court in *Sosa*, 542 U.S. at 748. In *Karadzic*, the Second Circuit Court of Appeals rightly concluded that conventional and customary international law imposes human rights obligations on a variety of persons who are not "State actors." Specifically, the court ruled that

> the law of nations as understood in the modern era [does not] confine its reach to state action. Instead, certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.

Id., at 236. The *Karadzic* court articulated two separate circumstances under which a nominally private actor might bear international responsibility. In both cases, it is the nature of the conduct, not the nature of the actor, that matters.

The first category comprises conduct that is wrongful even in the absence of State action. For at least two hundred years, it has been recognized that there are acts or omissions for which international law imposes responsibility on persons and for which punishment may be imposed, either by international tribunals or by national courts.[3]

[3] Indeed, the *least* controversial aspect of the Alien Tort Statute is that private individuals who commit torts in the course of violating international law fall squarely within its jurisdictional reach. Pirates -- the exemplar of intended defendants under § 1350, were not always or necessarily considered "state actors," and there was never any question that their depredations were in violation of the law of nations. One of the earliest exercises of jurisdiction under the Act

The Genocide Convention for example requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or *private individuals*."[4] Certain aspects of the war crimes regime of the Geneva Conventions of 1949, especially common Article 3, similarly bind non-State actors when they are parties to an armed conflict.[5] The anti-slavery regime is similar in not prohibiting exclusively State-run slavery rings.[6]

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involved an unlawful seizure of property by a non-state actor. *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795). Nor was there any doubt that private citizens who infringed the rights of ambassadors or diplomats could be sued under § 1350, and that statute clearly provided jurisdiction over a child custody dispute that involved a breach of the law of nations. *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

[4] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis supplied).

[5] *See, e.g.,* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Feb. 2, 1956, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.T.S. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[6] *See, e.g.*, Slavery, Servitude, Forced Labour, and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926,

Crucially, these regimes do not distinguish between natural and juridical individuals, and it is implausible that international law would not reach -- and thereby protect -- a corporation that engaged in the slave trade or produced the contemporary equivalent of Zyklon B for the destruction of Jews in concentration camps.

The second category of non-State liability according to the *Karadzic* court, namely conduct that is internationally wrongful by virtue of the private actor's relationship with a State, is equally consistent with precedent and principle. International law recognizes the possibility that a private entity might become a State actor *de facto,* as for example when the private entity acts on behalf of the government or exercises governmental authority in the absence of official authorities. *See, e.g., Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports 92, 103-04 (1987). In *Karadzic*, the plaintiffs were entitled to prove their allegations that Karadzic acted in concert with Yugoslav officials or with significant Yugoslavian aid. A substantial degree of cooperative action between private actor defendants and government officials can trigger the application of international

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60 L.N.T.S. 253; Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.

standards.

These categories of liability hardly erase the distinction between State and non-State actors altogether, but they are sufficiently well-established to support the *Karadzic* court's more modest conclusion that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a State or only as private individuals." Under international law, there can be no absolute rule against private obligations under international law, especially of the type alleged in this case. As noted by the court of appeals in *John Doe VIII et al. v. Exxon Mobil Corp.*, 654 F.3d 11, 42 (D.C. Cir. 2011), "the fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS."

B. The Court of Appeals in *Kiobel* Committed Reversible Error in its Misinterpretation of *Sosa*: Nothing in That Case Alters the Traditional Test for Finding a Violation of International Law.

The panel majority in *Kiobel* apparently felt compelled by *dicta* in a footnote in this Court's decision in *Sosa*, 542 U.S. 692 n. 20, but nothing in *Sosa* requires so distorted a focus. To the contrary, in *Sosa*, this Court rejected the aggressively pro-corporate positions advanced by business groups appearing *amicus curiae*, reasoning only that the "determination whether a norm is sufficiently definite to support a cause of action" is

> related . . . [to] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karădzíc,* 70 F.3d 232, 239–241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

Id., at 732 n.20. *Sosa* thus rightly distinguished between those wrongs, like torture, that require some State participation to be wrongful and those – like genocide -- that do not. The text shows that this Court was referring to the nature of the

conduct, and specifically the requirement *vel non* of State action, not the nature of the *actor*. For these purposes, it rightly referenced a single class of non-State actors (natural and juristic individuals), not two separate classes as assumed by the *Kiobel* majority below.

Nor is it relevant that this Court after *Sosa* would only recognize a cause of action, derived from the common law, for certain violations of international law:

> The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

542 U.S. at 724. The ATS requires only that the tort be "*committed*" in violation of a specific, universal, and obligatory norm or international law, *id.*, not that international law itself recognize a right to sue or distinguish for purposes of civil liability between natural and juristic individuals. The cause of action follows from the international wrongfulness of the underlying conduct, such as that alleged in Petitioners' complaint.

C. *Filartiga* Itself Was Wrongly Decided If the Panel Majority's Approach in *Kiobel* Is Correct.

The mark of the panel majority's essential error is that, if its approach were the law, *Filartiga* itself – the fountainhead of ATS jurisprudence for a generation, cited with approval by this Court in *Sosa*, 542 U.S. at 731, approved and extended by Congress in the Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1991), and now a globally-respected advance in the development of human rights standards – would have been wrongly decided. The *Kiobel* panel would apparently have required the *Filartiga* plaintiffs to demonstrate that torturers were universally held civilly liable in the courts of third countries. Of course, no such demonstration could have been made at the time, because internationally-defined State-sponsored torture – though common – had *never* grounded an award of civil damages from the torturer to the victim in the domestic courts of that State, let alone some other country.

Equally telling, every element of proof relied upon in *Filartiga* for its conclusion that torture violates the law of nations would be rejected by the *Kiobel* panel: the various treaties rightly cited in *Filartiga* as evidence of custom would be irrelevant, because the United States was not a party to any of

them and not a single torturer had ever been found civilly liable under any of them. The Universal Declaration of Human Rights, rightly considered by the *Filartiga* court as an authoritative interpretation of States' human rights obligations under the U.N. Charter, would be rejected as a merely aspirational document – a view that has been inconsistent with international law for decades – and because the Universal Declaration only refers to the role of "every individual and *every organ* of society" in promoting respect for human rights and does not explicitly refer to "corporations" or their civil liability.[7] Universal Declaration of Human Rights, G.A. Res. 217A, Preamble, U.N. GAOR, 3d Sess., 1st plen. Mtg. U.N. Doc A/810 (Dec. 12, 1948) (emphasis supplied). The international tribunal decisions cited in *Filartiga* would also be irrelevant, because not one of them involved a private right of action for civil damages against the torturer himself, awarding damages directly to the victims or their representatives.

Filartiga was methodologically sound as a matter of international law. The panel majority's approach in *Kiobel* was not and should be reversed.

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[7] Two former UN High Commissioners for Human Rights have concluded that corporations are among the "organs of society" referenced in the Declaration. *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006), at 228.

II. THE *KIOBEL* MAJORITY'S METHODOLOGICAL ERRORS CAUSED IT TO MISCONSTRUE AND UNDERMINE THE CONTENT OF INTERNATIONAL HUMAN RIGHTS LAW.

A. International Law In All Its Forms Allows The Imposition Of Civil Liability On Corporations.

The law-free zone of immunity created for corporations by the court below is inconsistent with international law and potentially places the United States in violation of its obligation to provide a meaningful remedy for violations of international law. The rule adopted by the *Kiobel* majority, which radically distinguishes between natural and juristic individuals, has no basis in international law in any form.

Treaties. A diverse array of treaties reveals the accepted understanding that corporations have international obligations and can be held liable for violations of international law as translated into domestic law. *See, e.g.*, Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005) ("Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal entities* for

participation in the offences set forth in Articles 5 to 7 and 9 of this Convention."); Convention against Transnational Organized Crime, Nov. 15, 2000, art. 10(1), 2225 U.N.T.S. 209 ("Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the *liability of legal persons* for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention."); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 2, S. Treaty Doc. No. 105-43 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal persons* for the bribery of a foreign public official."); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973 art. I(2), 1015 U.N.T.S. 243 ("The States Parties to the present Convention declare criminal those *organizations, institutions, and individuals* committing the crime of apartheid."); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251 (emphasis

supplied in all cases). These examples demonstrate that the *Kiobel* majority's categorical rule – distinguishing between the liability of particular CEOs and that of the corporations they run-- has no basis in international treaty law and is flatly contradicted by it.

Regional treaties as applied also create obligations and liability for legal persons and therefore contradict the *Kiobel* majority's idiosyncratic rule. For example, the Treaty Establishing the European Community embraces the norm of non-discrimination, and national courts, driven by the European Court of Justice, have applied the treaty provisions against corporations.[8] Article 9 of the Council of Europe Convention on the Protection of the Environment through Criminal Law (1998) provides for corporate liability specifically, though leaving the means of assuring accountability to the discretion of individual States.[9]

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[8] Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 *Int'l Leg. Mats.* 79; See e.g. *Walrave and Koch v Association Union Cycliste Internationale*, Case 36/74 [1974] ECR 1405; *Angonese v Cassa di Risparmio di Bolzano SpA*, Case C–281/98 [2000] ECR I–4139.

[9] Council of Europe, Convention on the Protection of the Environment Through Criminal Law, ETS No. 172 (November 4, 1998). The Convention recognizes the discretion

There is certainly no rule in international treaty law that corporations, regardless of their relationship with a government, enjoy immunity for their State-like or State-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons. As noted by the Special Representative of the U.N. Secretary-General, the corporate responsibility to respect human rights includes avoiding complicity, which has been most clearly elucidated

> in the area of aiding and abetting international crimes, *i.e.* knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.... The number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses.

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of States to apply criminal sanctions, administrative sanctions, and/or other measures in fulfillment of its obligations. *See* Explanatory Report, Convention on the Protection of the Environment through Criminal Law, ETS No. 172, Art. 4.

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶73-74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (footnote deleted).

Other authoritative actors within the U.N. human rights system have similarly ruled that human rights treaties to which the United States is a party apply to corporations. For example, the Human Rights Committee, which oversees States' compliance with the International Covenant on Civil and Political Rights, has ruled that States must "redress the harm caused by such acts by private persons *or entities*." U.N. Human Rights Comm., *Gen. Cmt. No. 31, [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant [ICCPR]* ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (emphasis supplied). Similarly, the Convention on the Elimination of All Forms of Racial Discrimination obliges States to remedy "any acts of racial discrimination," and the Race Committee established under the Convention has consistently ruled that this provision includes the acts of corporations. International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Dec. 21, 1965, 660 U. N. T. S. 195; U.N. Committee on the Elimination of Racial Discrimination (CERD), *Considerations of Reports*

Submitted by State Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶30 CERD/C/USA/CO/6 (Feb. 2008). None of the reservations, understandings, and declarations adopted by the United States Senate in giving its advice and consent to the ratification of these treaties immunizes corporations.

General Principles. Even if treaties did not explicitly speak to the question, the uniform recognition of corporate liability in legal systems around the world demonstrates that legal responsibility accompanies legal personality – a proposition that qualifies as a general principle of law. *See* Statute of the International Court of Justice, art. 38(1)(c). In essence, general principles encompass maxims that are "accepted by all nations in *foro domestico*"[10] and are discerned by reference to the common domestic legal doctrines in representative jurisdictions worldwide.[11] Statute of

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[10] Permanent Ct. of Int'l Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee*, July 16th – July 24th, 1920, with Annexes (The Hague 1920) at 335 (quoting Lord Phillimore, the proponent of the general principles clause).

[11] *See* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS 390 (1953) (noting that general principles encompass "the fundamental principles of every

the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Section 102(1)(c) of the Restatement (Third) of U.S. Foreign Relations Law (1987) similarly provides that "[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world." In consequence, courts may and should consult the general principles of law common to legal systems around the world in order to give content to the law of nations for purposes of the ATS.[12]

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legal system" and that they "belong to no particular system of law but are common to them all").

[12] The majority below categorically misunderstood the proof, status, and use of general principles as a source of international legal principles. The existence of general principles does not depend on the proof of *opinio juris*, as the panel majority thought. 621 F.3d at 141 n. 43. *Opinio juris* – the conviction that a sovereign's conformity to some general practice of States is a matter of legal obligation – is a constituent element of customary international law, not general principles. *See* Statute of the International Court of Justice, *supra,* at Article 38(1)(b). Nor are general principles a "secondary" source of international law, as the majority of the panel below believed. 621 F.3d at 141 n. 43. Under Article 38(1)(c) of the ICJ Statute, treaties in subparagraph (a), custom in subparagraph (b), and general principles in subparagraph (c) are equally valid sources of international law. Only the sources outlined in subparagraph (d) – including "judicial decisions and the writings of the most highly qualified publicists of the various nations" -- are

International law is routinely established through this exercise in comparative law, as this Court has demonstrated repeatedly. *United States v. Smith*, 18 U.S. 153, 163-80 (1820); *Factor v. Laubenheimer*, 290 U.S. 276, 287-88 (1933); *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623, 633 (1983). The use of general principles to give content to the law of nations would have been especially familiar to the founding generation and the drafters of the ATS.[13]

Because corporate liability for serious harms is a universal feature of the world's legal systems,

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designated "secondary." Most important, indeed fatal to the *Kiobel* majority's approach to general principles is the fact that the majority inexplicably limited its consideration to principles of criminal liability when the pertinent inquiry in this case is civil liability. The civil liability of corporations for their torts (and, in civil law jurisdictions, their *delicts*) plainly qualifies as a general principle of law recognized by civilized nations.

[13] *Jus gentium* was the precursor to what the 18th-century lawyers called "the law of nations," and it consisted essentially of general principles among civilized nations that the Roman praetors would consider in resolving "transnational" cases. It was by no means limited to state responsibility norms, because it would apply whenever the case involved two aliens (*i.e.,* non-Roman citizens) in what we would today characterize as a torts or contracts case.

it qualifies as a general principle of law. In most legal systems, this can take the form of actual criminal or quasi-criminal liability in addition to civil liability or administrative sanction. We are aware of no domestic jurisdiction that exempts legal persons from all liability. To the contrary, every legal system around the world encompasses some form of tort law (or delicts), and none exempts a corporation altogether from the obligation to compensate those it injures.

All legal systems also recognize corporate personhood.[14] The International Court of Justice has explicitly recognized corporate personhood as a general principle of law, based on the "wealth of practice already accumulated on the subject in municipal law," *Barcelona Traction, Light & Power Co.,* 1970 I.C.J. 3, 38–39 (Feb. 20). As correctly noted by the Court of Appeals for the District of Columbia Circuit, "[l]egal systems throughout the world recognize that corporate legal responsibility

[14] This Court has recognized the international principles governing corporate personhood, holding under international law that "the legal status of *private* corporations . . . is not to be regarded as legally separate from its owners in all circumstances." *First Nat'l City Bank (FNCB) v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (citing the decision of the International Court of Justice in *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39.

is part and parcel of the privilege of corporate personhood." *Doe v. Exxon Mobil Corp*. 654 F.3d 11, 53-54 (D.C. Cir. 2011) The law of civil remedies in the various nations does not necessarily use the terminology of human rights law, but it is substance not label that counts: every jurisdiction protects interests such as life, liberty, dignity, physical and mental integrity, and each includes remedial mechanisms that mirror the reparations required by international law for the suffering inflicted by abuse. *See* Int'l Comm'n of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International* Crimes (Sept. 16, 2008). Indeed, from that perspective, as shown below, the panel majority's conclusion is inconsistent with the obligation of States to assure a remedy for human rights violations.

Customary international law. If, as shown above, *treaties* impose specific obligations on corporations and *general principles recognized by civilized nations* universally recognize corporate personality and legal responsibility, *customary international law* – the third of the traditionally recognized sources of international law – flatly contradicts the *Kiobel* majority's immunization of corporations from responsibility under international standards. To the contrary: customary international law has long recognized the legitimacy of holding non-human entities

responsible for egregious violations of international norms.

The law maritime, an ancient and specialized subspecies of customary international law, has long recognized the authority of domestic courts to enforce claims against juridical entities for violations of the law of nations. Ships, like modern corporations, were entities through which owners and managers conducted business across borders. The exposure of such non-human entities to liability under international standards was routinely recognized in this country through the instrument of civil *in rem* jurisdiction. In *The Marianna Flora*, for example, this Court, *per* Justice Story, concluded that "piratical aggression by an armed vessel . . . may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. (11 Wheat.) 1, 40-41 (1825). *See also The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), at 14 ("The thing is here primarily considered the offender, or rather the offence is attached primarily to the thing."). In *The Little Charles*, 26 F. Cas. 979 (No. 15,612) (C.C. Va. 1818), Chief Justice Marshall, sitting on circuit, explained:

> *[I]t is a proceeding against the vessel, for an offence committed by the vessel. . . .* It is true, that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master.

Id., at 982 (emphasis supplied). *See also The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844). Similarly, one routine sanction for engaging in the internationally-unlawful slave trade was the condemnation of the vessel involved. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law,* 117 YALE L. J. 550 (2008), at 590-591. Thus in addition to whatever sanctions may have been imposed on the people involved, international law was enforced against entities as well.

Similarly, in the aftermath of World War II, the victorious allies dissolved German corporations that had violated international law. *See* Control Council Law No. 2, Providing for the Termination and Liquidation of the Nazi Organizations (Oct. 10, 1945); Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G.

Farbenindustrie and the Council Thereof, Nov. 30, 1945. The human beings that managed I.G. Farben were placed on trial at Nuremberg, but the corporations through which they committed their crimes were at no point immunized from responsibility; indeed, the corporations were sanctioned out of existence, as effectively "seized" as ships engaged in piracy or the slave trade.

In modern times, it is not uncommon for the human rights responsibilities of multinational corporations to be addressed and applied by intergovernmental organizations. For example, on June 16, 2011, the Human Rights Council of the United Nations approved three Guiding Principles proposed by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. These principles include (1) the duty of the State to protect against human rights abuses by, or involving, transnational corporations and other business enterprises; (2) the corporate responsibility to respect all human rights: and (3) the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms. United Nations Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/RES/17/4 (6 July 2011). Then in November 2011, the United Nations published THE

CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (November 2011), in which it described the Guiding Principles as "the global standard of practice that is now expected of all governments and businesses with regard to business and human rights." *Id.*, at 3. The Interpretive Guide makes it clear that the Guiding Principles, though not legally obligatory themselves, offer an authoritative elaboration on "*existing* standards and practices for States and businesses." *Id*. This Court has made it clear that such non-binding but authoritative guidance from expert agencies within the United Nations should not be ignored. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 439 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Geneva, 1979).")

The United Nations is not the only intergovernmental organization to address and implement the human rights responsibilities of corporations. The International Committee of the Red Cross has articulated the legal obligations of companies under international humanitarian law. *See* International Committee of the Red Cross, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS

OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW, *Publication Ref. 0882* (2006). In addition, the Organization for Economic Cooperation and Development ("OECD"), through its National Contact Points process, now routinely receives and processes complaints that specific corporations have acted inconsistently with the OECD's Guidelines for Multinational Enterprises. OECD, SPECIFIC INSTANCES CONSIDERED BY NATIONAL CONTACT POINTS (22 November 2011). With respect to the human rights for workers, the Declaration on Fundamental Principles and Rights at Work, adopted in 1998 by the International Labour Organization ("ILO"), requires all ILO Member States to implement and enforce the principles contained in the eight so-called "core conventions," each of which governs employment relationships in the private sphere. 37 *Int'l Leg. Mats*. 1233 (1998).

At a minimum, customary international law does not recognize, preserve, or allow the international law-free zone for corporations created out of whole cloth by the two-judge majority below.

B. The Failure To Redress Corporate Violations Of International Human Rights Law Violates The Obligation To Provide A Meaningful Remedy For Such Abuses.

The panel majority's conclusions allow governments to privatize their way around their obligations under international human rights law. The simple expedient of creating a corporation to run prisons or maintain civil order or fight wars would effectively block the imposition of liability on the entity that is responsible for the violation. The panel majority's approach thus conflicts with the obligation of States to provide a meaningful remedy for such abuses. *See, e.g.*, 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.")[15] This

[15] The right to a remedy for conduct that violates human rights is recognized in Article 2(3) of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999

conclusion has been articulated by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, who noted in 2009:

> As part of their duty to protect, States are required to take appropriate steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction – in short, to provide access to remedy.

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).[16] Similarly, the Human Rights

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U.N.T.S. 171, to which the United States is a party; Article 25 of the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S 123, which the United States has signed; and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

[16] The Special Representative recently confirmed these principles – with governments' approval – in his Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (March 21, 2011), which included two articles

Committee has stated that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by *private persons or entities*." *General Comment 31 supra,* ¶ 8. In these circumstances, when the Second Circuit decided by an evenly divided vote not to correct the panel majority, it falls to this Court to assure respect for the obligations of the United States, the rights of human beings, and the responsibilities of juridical persons.

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that recognized a State's positive obligations to provide a remedy. Id, at Art. 25 ("As part of their duty to protect against business-related human rights abuse, States *must* take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.")

CONCLUSION

The panel majority below found restrictions on American jurisdiction that do not exist under international law and ignored limits on corporate action that do. It thereby effectively denied a remedy where there are rights at issue. Its decision must be reversed.

Respectfully Submitted,

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Dated: December 21, 2011

APPENDIX

LIST OF AMICI

N.B. Institutional affiliations are for identification purposes only.

Philip Alston is John Norton Pomeroy Professor of Law and Director of the Center for Human Rights and Global Justice, at New York University Law School. From 2004 until 2010, he served as Special Rapporteur of the United Nations Human Rights, Council on Extrajudicial, Summary, or Arbitrary Executions. He chaired the UN Committee on Economic, Social and Cultural Rights from 1991 to 1998 and was Editor-in-Chief of the *European Journal of International Law* from 1996-2007.

Jose Alvarez is Herbert and Rose Rubin Professor of International Law at the New York University School of Law. From 1999-2008, he taught at Columbia Law School, where in 2005 he became Hamilton Fish Professor of International Law & Diplomacy and Director of the Center on Global Legal Problems. He is a former president of the American Society of International Law, and has served on the Editorial Boards of the *American*

Journal of International Law and the *Journal of International Criminal Justice*. He is also member of the Council on Foreign Relations and the American Law Institute. Since May 2010, he has been the special adviser on public international law for the prosecutor of the International Criminal Court, Luis Moreno Ocampo.

Cherif Bassiouni is a Distinguished Research Professor of Law Emeritus at DePaul University College of Law and president emeritus of the law school's International Human Rights Law Institute. He has served the United Nations in several capacities, including most recently as the Chair of the Commission of Inquiry on Libya. He also served as a member, then chairman, of the Security Council's Commission to Investigate War Crimes in the Former Yugoslavia (1992-1994); vice-chairman of the General Assembly's Ad Hoc and Preparatory Committees on the Establishment of an International Criminal Court (1995 and 1998); chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court; independent expert for the Commission on Human Rights on The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000); and independent expert for the Commission

on Human Rights on the Situation of Human Rights in Afghanistan (2004-2006).

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Douglass Cassel is Professor of Law and Notre Dame Presidential Fellow at Notre Dame Law School, where he teaches international human rights law and related courses. His scholarship on the civil liability of corporations for violations of international human rights law has been cited by several appellate and district court opinions. A former member of the Executive Council of the American Society of International Law, he has served as advisor on international human rights law to the United Nations, the Organization of American States, and the United States Department of State.

Andrew Clapham is Professor of Public International Law, Graduate Institute of

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Lori Fisler Damrosch is Hamilton Fish Professor of International Law and Diplomacy and Henry L. Moses Professor of Law and International Organization at Columbia University. She is a former vice president of the American Society of International Law, an associate member of the Institut de Droit International, and co-Editor in Chief of the *American Journal of International Law*.

John Dugard is a member of the Institut de Droit International and the United Nations International Law Commission. From 2002 to 2008, he served as Judge *ad hoc* in the International Court of Justice. He has also served as Special Rapporteur to the United Nations Commission on Human Rights on the Violation of Human Rights and International

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Richard Goldstone served as the first chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and for Rwanda. He was then appointed to the Constitutional Court of South Africa, to which he had been nominated by President Nelson Mandela. He has taught at a variety of U.S. and foreign law schools, including Fordham, Harvard, Georgetown New York University, and Stanford. He chaired the Independent International Commission on Kosovo and was a member of the Volcker Committee, appointed by UN Secretary General Kofi Annan, to investigate the Iraq Oil for Food program. In 2009, Goldstone led an independent fact-finding mission created by the UN Human Rights Council to investigate international human rights and humanitarian law violations related to the Gaza War. He has received the International Human

Rights Award of the American Bar Association, the Thomas J. Dodd Prize in International Justice and Human Rights, and the MacArthur Award for International Justice.

Ryan Goodman is the Anne and Joel Ehrenkranz Professor of Law and Director of the Center for Human Rights and Global Justice at NYU Law School. He was the Rita E. Hauser Professor of Human Rights and Humanitarian Law and the Director of the Human Rights Program at Harvard Law School. Among other works, he is the author of International Human Rights in Context (Oxford University Press, 2008) (with Henry Steiner & Philip Alston). He is a member of the Council on Foreign Relations and a member of the Department of State's Advisory Committee on International Law.

Vaughan Lowe, QC, is Chichele Professor of Public International Law and a Fellow of All Souls College, in the University of Oxford. He practices as a barrister and has appeared in cases in the English courts, the European Court of Human Rights, the International Court of Justice, and other international tribunals. He works as an arbitrator and has sat on tribunals organized under NAFTA and the World Bank's International Centre for the Settlement of Investment Disputes, among

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Chip Pitts is Lecturer in Law at Stanford Law School, Professorial Lecturer with the George Washington Law School/Oxford University Joint Summer Program on Human Rights, and Professorial Fellow at the SMU Law Institute of the Americas. He co-authored *Corporate Social Responsibility: A Legal Analysis* (2009). A frequent delegate of the US government and leading NGOs to the United Nations, he is former Chair of Amnesty International USA and former president of the Bill of Rights Defense Committee, on whose board he continues to serve. His other board and advisory board roles including the Business and Human Rights Resource Center, Lawyers for Better Business, and the Electronic Privacy Information Center (EPIC), *inter alia*.

Dinah Shelton holds the Manatt/Ahn Professorship in International Law at the George Washington University Law School. Professor Shelton is the author of three prize-winning books and numerous other articles and books on international law, human rights law, and international environmental law. She is a member of the board of editors of the *American Journal of International Law*. She has served as a legal

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Constance de la Vega is Professor of Law at the University of San Francisco, where she teaches international human rights law and directs the Frank C. Newman International Human Rights Law Clinic. In the latter capacity, she has contributed to the procedure adopted at the U.N. Human Rights Council for the mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises. She is co-author of INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION, as well as numerous articles on the application of international human rights law in the United States. She recently co-authored *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps*, which was published by Friedrich Ebert Stiftung in Germany.

David S. Weissbrodt is the Regents Professor and Fredrikson & Byron Professor of Law at the University of Minnesota. He served as a member of

the United Nations Sub-Commission on the Promotion and Protection of Human Rights (1996 to 2003), as chairperson of the Sub-Commission (2001), as one of the principal authors of the Sub-Commission's "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (2003), and as the United Nations Special Rapporteur on the rights of non-citizens from 2001 to 2003. He is co-author of *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 Minn. L. Rev. 1339 (2011) and INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (LexisNexis 4th ed. 2009).