

No. 10-56739

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**JOHN DOE I; JOHN DOE II; JOHN DOE III, individually and on
behalf of proposed class members; GLOBAL EXCHANGE,**

Plaintiffs-Appellants

v.

**NESTLE USA INC.; ARCHER DANIELS MIDLAND COMPANY;
CARGILL INCORPORATED COMPANY; CARGILL COCOA,**

Defendants-Appellees

**On Appeal from the
United States District Court for the Central District of California,
Case No. 2:05-cv-05133-SVW-JTL
The Honorable Stephen V. Wilson, United States District Judge**

**BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS
IN SUPPORT OF
APPELLANTS' PETITION FOR INITIAL HEARING *EN BANC***

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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INTEREST OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29 and 35, *Amici* respectfully seek leave to file the accompanying brief in support of Appellants' Petition for Initial Hearing *En Banc*. Counsel for Plaintiffs-Appellants have consented to the filing of this brief. Counsel for Defendants-Appellees were contacted but did not respond.

Amici – whose biographies appear in the accompanying Brief – are nine of the world's leading legal experts in the field of international law and human rights: Philip Alston, Jose Alvarez, Cherif Bassiouni, Gaspar Biro, Andrew Clapham, Lori Damrosch, John Dugard, Richard Goldstone, and Chip Pitts. Their work has been cited by courts at all levels of the federal judiciary for guidance in determining the content of international law and its impact in domestic proceedings. *Amici* believe they can offer particular expertise on the issues presented in this matter.

SUMMARY OF ARGUMENT

In *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), the District Court erred by suggesting that international law does not allow for the imposition of civil liability on corporations. *Amici* respectfully submit that this Court should grant the Petition for Initial Hearing *En Banc* to

address this issue, which requires authoritative disposition in this Circuit. Contrary to the District Court's decision, international law extends liability to corporations and other non-state actors. Indeed, the Alien Tort Statute (ATS) has long been assumed to cover claims against corporations for torts in violation of the law of nations. Because numerous other cases are pending within this Circuit and in courts around the country, an authoritative resolution of this case *en banc* will serve judicial economy and bring clarity to a disputed area of law.

ARGUMENT

INITIAL *EN BANC* REVIEW IS NECESSARY TO RESOLVE THE STATUS OF CORPORATE LIABILITY UNDER INTERNATIONAL LAW

A diverse array of treaties reveals the accepted understanding within the international community that corporations can be held liable for violations of international law.¹ To suggest that international law does not

¹ See, e.g., European 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

recognize corporate liability is contrary to established law, practice, and reason. *En banc* review is necessary in the first instance to bring an authoritative and coherent response to the District Court's essential error.

The uniform recognition of corporate liability in legal systems around the world further demonstrates that legal responsibility accompanies legal personality – a proposition that qualifies as a general principle of law. *See, e.g.*, Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055; Restatement (Third) of U.S. Foreign Relations Law Section § 102(1)(c) (1987). Accordingly, 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 Alien Tort Statute. *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003).

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. 25 (emphasis added in all cases).

International law is routinely established through this exercise in comparative law, and this approach would have been familiar to the drafters of the ATS.

There is no legal system in the world that immunizes corporations from their civil liability for tortious conduct, and all legal systems recognize corporate personhood.² The law of civil remedies does not necessarily use the terminology of human rights law, of course, but in every jurisdiction it protects interests such as life, liberty, dignity, physical and mental integrity, and it includes remedial mechanisms that mirror the reparations required by international law for the suffering inflicted by abuse. *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), available at http://www.icj.org/IMG/Volume_1.pdf.

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

² The U.S. Supreme 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 v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-629 (1983) (citing the decision of the International Court of Justice in *Barcelona Traction (Belgium v. Spain)*, [1970 I.C.J. at 38-39.]

and remediation, leaving States a wide berth in assuring that the law is respected and enforced as each State thinks best. It hardly follows that States remain free to allow violations so long as a corporation commits the wrong. Equally important, Congress has already exercised its discretion by directing the federal courts to allow civil actions for those violations of international law that take tortious form, without specifying the types of defendants who might be sued. As recognized by the Supreme 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).

The ATS has long been assumed to cover claims against corporations for torts in violation of the law of nations, and the issue has previously been before this Circuit *en banc* in the *Unocal* litigation, which settled prior to argument. *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005).³ The Seventh Circuit in *Flomo v. Firestone Nat’l Rubber Co.*, 2011 U.S. App. LEXIS 14179 (7th Cir. 2011), and the District of Columbia Circuit in *Doe VIII v. Exxon Mobil Corp.*, 2011 U.S. App. LEXIS 13934 (D.C. Cir. 2011), have both rejected the reasoning of the District Court in recent weeks and, in the process, explicitly rejected

³ Currently *sub judice* for *en banc* disposition in this Circuit is *Sarei v. Rio Tinto, PLC*, No 02-56256 (argued *en banc* Sept. 2010).

the Second Circuit's analysis in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. pending*, No. 10-1491 (U.S. June 6, 2011).

The District Court's conclusion on corporate liability would allow governments to privatize their way around their international law obligations and is, therefore, radically inconsistent with the requirement of States to provide a remedy for human rights violations.⁴ International law would not protect a corporation that operated as a front for piracy on the high seas, or engaged in the slave trade, or produced the contemporary equivalent of Zyklon B for the destruction of Jews in concentration camps.

⁴ According to the U.N. Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations, “[a]s 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). *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, 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.”)

CONCLUSION

Amici are concerned that, by creating a law-free zone for corporations, the District Court has charted an unprecedented and unjustified course that effectively immunizes juridical entities that commit serious human rights violations. For the reasons submitted, *Amici* respectfully urge the Court to grant the Appellants' Petition for Initial Hearing *En Banc*.

July 29, 2011

Respectfully Submitted,

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APPENDIX

LIST OF AMICI

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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

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Andrew Clapham is Professor of Public International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland. His current research and publication relates to the role of non-state actors in international law and related questions in human rights and humanitarian law. His publications include *Human Rights: A Very Short Introduction* (2007), *Human Rights Obligations of Non-State Actors* (2006), and *International Human Rights Lexicon* (2005), with Susan Marks. Before he joined the Graduate Institute in 1997, he was the Representative of Amnesty International to the United Nations in New York.

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 UN 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 UN Commission on Human Rights on violation of Human Rights and International Humanitarian Law in the Occupied Palestinian Territory. He has held the Chair in Public International Law at the University of Leiden since 1998. He is also a Professor of Law in the Centre for Human Rights of the University of Pretoria, South Africa. He has held visiting positions in the United States (Princeton, Duke, Berkeley and Pennsylvania), Australia (New South Wales) and England (Cambridge). From 1995-1997 he was Director of the Lauterpacht Research Center for International Law, Cambridge.

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 Michigan and Harvard. 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.

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.

CERTIFICATE OF COMPLIANCE

This brief is proportionally spaced, with a typeface of 14 points, and contains 1,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

July 29, 2011

/s/ William Aceves

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2011, I electronically filed the foregoing **Motion of *Amici Curiae* International Law Scholars for Leave to File Brief of *Amici Curiae* in Support of Appellants' Petition for Initial Hearing *En Banc* and Brief of *Amici Curiae* International Law Scholars in Support of Appellants' Petition for Initial Hearing *En Banc*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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July 29, 2011

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