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 EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENTS PURSUANT TO SUPREME COURT RULE 37

Amicus respectfully submits this Brief in support of the Petitioners pursuant to Supreme Court Rule 37.[1] All parties to this appeal have consented to filing.[2]

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings in foreign countries. *E.g., Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.).

Amicus therefore has an interest in ensuring that the courts apply the correct body of law to questions of corporate liability under the ATS.

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[1] *Amicus* affirms that no counsel for a party authored the brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution to this brief.

[2] Consent letters have been filed with the Court by the parties.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

The appropriate body of law to apply to the question of whether corporations can be sued under the ATS is federal common law. Under that body of law, corporations may be held civilly liable for violations of certain international law norms.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit held that, under the Alien Tort Statute, victims of human rights abuses that are universally recognized to violate international law cannot sue corporations—no matter how horrific the violation or extensive the corporation's participation. In effect, it found that corporations are immune simply by virtue of being corporations.

That holding contravenes the centuries-old understanding, common to our legal system and every other, that corporations can be sued just as natural persons. And it would create a new exemption from liability for acts like genocide that are so universally reviled that they render the perpetrator "an enemy of all mankind," despite the fact that corporate immunity is anathema even in the context of garden-variety torts.

"Sometimes," as Judge Posner wrote for the Seventh Circuit in rejecting the *Kiobel* majority's conclusion, "it's in the interest of a corporation's shareholders for management to violate . . . norms of customary international law." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1018 (7th Cir.

2011). Yet the Second Circuit's decision denies redress to those harmed. It rewards those few corporations willing to participate in the worst kinds of atrocity. And it penalizes companies that respect fundamental rights by forcing them to compete on an uneven playing field with those that choose to profit from acts that are everywhere prohibited.

Nothing in the law requires such an illogical result; every other Circuit to have considered the question has held that corporations may be sued. The Second Circuit's conclusions that international law controls the question of whether corporations can be sued and that international law does not provide for corporate liability are wrong in numerous respects. *Amicus* herein focuses on just one: the court erred by declining to apply federal common-law rules to determine whether corporations may be held liable.

The conclusion that federal common law governs is compelled by the text of the statute, which requires only a *violation* of international law, and this Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that an ATS cause of action is provided by federal common law. Thus, ATS *jurisdiction* requires a violation of a right guaranteed by international law: the injury to the plaintiff must be barred by the law of nations. But once jurisdiction has been established, secondary questions — including questions regarding the scope of liability — must be determined according to federal common law. The ordinary role of federal common law in giving effect to federal claims and the original purpose of the ATS also require this approach.

Even if courts must look *initially* to international law to answer the question of whether corporations can be held liable, that law itself directs the court to domestic rules. International law leaves the question of how international norms will be enforced to the domestic law of States. This principle has been recognized since the drafting of the ATS. Faithful adherence to it is especially warranted in the context of private civil liability, which international law typically does not address, and for corporations, which are created by municipal law.

In assessing whether corporations can be held liable, courts look to well-established federal or traditional common law rules. Liability rules drawn from common law principles may be informed by rules found in international law, but *Sosa*'s threshold test for identifying jurisdiction-conferring norms of international law does not apply to the internal rules for allocating liability. The applicable rule must give effect to Congress' purposes in enacting the ATS.

Corporate liability has been a feature of the common law since the Founding. International law, in the form of general principles recognized by all of the world's legal systems, also recognizes such liability. Indeed, corporate liability is inherent in the whole notion of incorporation, which allows suits against the corporation itself in exchange for the limitation of shareholder liability. Corporate liability also furthers the principle that those responsible for violations of fundamental human rights norms

ordinarily have no immunity before the law, and thus implements Congress' goals of vindicating international law and providing an adequate federal forum. The ATS provides no exception to the rule that corporations are civilly liable to the same extent as natural persons.

The text of the statute and the common law nature of the claim also require that the district courts have jurisdiction over torts in violation of the law of nations regardless of where those torts occurred. From the nation's inception to today, a tortfeasor's wrongful act creates an obligation that is enforceable wherever he is found. *Amicus*, however, addresses this issue only in case Respondents belatedly attempt to raise it. The issue does not fall within the questions presented upon which *certiorari* was granted, and should not be considered.

ARGUMENT

I. Federal common law governs the issue of whether corporations can be sued under the ATS.

The Second Circuit erroneously concluded that, in order for corporations to be held liable under the ATS, customary international law must specifically provide for corporate liability. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010). That decision conflicts with the statute's text, this Court's holding in *Sosa* that an ATS claim is a common law cause of action, the historic practice

of federal courts of applying federal common law to effectuate federal claims, the ATS's original purpose of ensuring that claims involving international law could be heard in federal court and the structure of international law, which leaves the means of enforcement of international norms to domestic law.

All of these disparate strands point to a single conclusion: while customary international law defines the content of the right whose violation gives rise to ATS jurisdiction, federal common law determines whether corporations may be held liable.

A. The text of the ATS, *Sosa,* the ordinary role of federal common law and the purpose of the ATS all direct the court to federal common law.

1. The text of the ATS requires that federal common law governs.

The ATS grants jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350.[3] The statute "by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438

[3] The ATS originally provided "cognizance" of "all causes where an alien sues for a tort only in violation of the law of nations." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. There is no evidence that the alterations changed the statute's scope.

(1989). This alone compels the conclusion that the ATS includes no limit on corporate liability. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (finding corporations can be sued based on the statute's text).

But even if the statute's plain language does not answer the question at bar, it refutes the Second Circuit's contention that international law governs that question. The court below read the text to mean that *liability* must arise under customary international law. *Kiobel*, 621 F.3d at 121–22. But the ATS confers *jurisdiction* over tort actions involving the alleged transgression of certain international law norms. The text does not require that the cause of action "arise under" the law of nations; "by its express terms, nothing more than a *violation* of the law of nations is required." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis in original); *accord In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). Thus, the text does not require that international law must define who can be a proper defendant. Indeed, as detailed in the next section, ATS jurisdiction authorizes liability under domestic common law, not international law.

Moreover, the word "tort" precludes the claim that international law governs this question. "Tort" is a domestic law concept. Once a tort suit is authorized for a particular international norm, the

attributes of tort law, including corporate liability, apply. And since the notion of tort comes from domestic law, so too must the tort principles.

The Second Circuit's reading of the ATS cannot be reconciled with the text.

2. *Sosa* directs courts to apply federal common law.

Sosa made clear that "although the ATS is a jurisdictional statute," the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide [the] cause of action." 542 U.S. at 724. While there must be a "violation[] of [an] international law norm" to invoke the ATS, the claims are "claims under federal common law." *Id.* at 732; *accord id.* at 721.

Sosa's conclusion that federal law provides the cause of action flows expressly from the eighteenth-century understanding of international law, relying heavily on Blackstone. *See id.* at 714–24. *Sosa* recognized that private parties were capable of violating certain norms and thereby "threatening serious consequences in international affairs," and that these violations were "admitting of a judicial remedy" — *i.e.*, subject to domestic enforcement. *Id.* at 715.

Blackstone confirms that violations of international law by private parties have always been addressed through domestic processes: "[W]hen committed by private subjects," violations of the law

of nations "are then the objects of the municipal law." William Blackstone, *An Analysis of the Laws of England* 125 (6th ed. 1771). Kent's *Commentaries*, also cited by *Sosa*, note that although States wage war to enforce rules among themselves, "[t]he law of nations is likewise enforced by the sanctions of municipal law." 1 James Kent, *Commentaries on American Law* *181–82. This is why *Sosa* speaks of recognizing claims "under federal common law for violations of [an] international law norm." 542 U.S. at 732.

Indeed, even *Sosa*'s threshold test for determining whether the violation of an international norm affords jurisdiction involves a federal common law inquiry. Under that test, the international norm must have "[no] less definite content and acceptance" among nations than the "historical paradigms familiar when § 1350 was enacted." *Id.* at 732. This standard is "generally consistent with" prior cases requiring that a norm be specific (or definable), universal, and obligatory. *Id.* (citing *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring); *Marcos*, 25 F.3d at 1475). The specificity the *Sosa* test requires is not a prerequisite under international law for recognition of a norm as customary. *See Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987) (customary international law requires consistent

state practice followed from sense of legal obligation). Rather, it is a matter of ATS jurisprudence.[4]

For all of these reasons, any suggestion that international law defines every aspect of an ATS action would render meaningless *Sosa*'s holding that the ATS allows federal courts to recognize causes of action *at federal common law*. The ambit of federal common law necessarily includes substantive liability standards. That is what *Sosa* meant by a federal common law claim and why it noted that the "post-*Erie* understanding [of federal common law] has identified limited enclaves in which federal courts may derive some *substantive* law in a *common law way*." 542 U.S. at 729 (emphasis added). Indeed, international law today, as when the law was passed, still does not address civil liability for violations of international law, but instead leaves such matters to domestic law. *See infra* Section I.B.

Accordingly, once the threshold test for determining whether there has been a violation that gives rise to federal jurisdiction has been met, federal common law governs the scope of liability. Put another way, under *Sosa*, the *right* — the legal principle that prohibits the harm the plaintiff suffered — must come from international law.

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[4] Moreover, since "the domestic law of the United States recognizes the law of nations," *Sosa*, 542 U.S. at 729, even the international law that courts look to in considering the threshold question of whether there has been a jurisdiction-conferring violation is in some sense federal common law.

Kiobel, 621 F.3d at 153 (Leval, J., concurring). But the manner in which a jurisdiction-conferring international norm can be enforced under the ATS — *i.e.* the rules governing liability or what some courts have described as the remedy, *see* Section I.B *infra* — is a question of federal common law.

The *Kiobel* court relied upon footnote 20 of *Sosa* to conclude that customary international law governs the scope of ATS liability. 621 F.3d at 127–28 (citing 542 U.S. at 732 n.20). But that footnote actually treated corporations and natural persons in the same way. *Kiobel*, 621 F.3d at 165 (Leval, J., concurring). Moreover, footnote 20 did not address issues of liability, but instead suggested that whether for a given norm the perpetrator must be a state actor is a question of international law. 542 U.S. at 732 n.20. This fully accords with the distinction between the right violated (defined by international law) and the scope of the remedial cause of action (provided by domestic law). Where international law requires state action, it is an element of the offense and thus part of what defines whether any international right has been violated at all.

For example, torture typically only implicates international law where state agents are involved; torture by a purely private party is not generally a violation of the law of nations. By contrast, customary international law prohibits other abuses, such as genocide, regardless of state involvement.

See id. The distinction — and the reason that the question of whether state action is required is one of international law — is that not all acts that international law forbids if committed by a state actor are of sufficiently "universal concern" if committed by a private actor. *See Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

There is no comparable dichotomy between liability for natural persons and corporations.[5] An abuse that is of universal concern, either because it involves state action or because by its nature it does not require state action to disrupt the international order, is not any less so because a corporation is responsible.[6] Whether a corporation can be held liable is not an element of the international law right that a plaintiff must prove has been violated. Rather, it is an issue that arises only after the plaintiff establishes the elements of that right — a question of whether a state makes a particular cause of action available to the injured party. Nothing in footnote 20

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[5] *See Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006) (noting that "[t]he dividing line for international law has traditionally fallen between States and private actors," and that therefore there is little reason to differentiate between corporations and natural persons).

[6] *E.g.*, *Prosecutor v. Tadic*, Case No. IT-91-1-T, Opinion & Judgment ¶ 655 (May 7, 1997) (crimes against humanity can be committed by "*any* organization or group, which may or may not be affiliated with a Government" (internal punctuation omitted)).

suggests that, where a violation of international law has been committed, international rules must determine who can be held liable for that violation.

Accordingly, the *Kiobel* majority asked the wrong question when it considered whether corporate liability meets the *Sosa* threshold standard for determining whether violation of a particular right gives rise to jurisdiction. As a result, it erred when it held that ATS cases cannot be brought against corporations unless international law itself expressly provides for corporate liability. *Sosa* contemplated an ordinary common law tort claim to remedy violations of universally recognized human rights norms that meet the *Sosa* threshold test.

3. Courts generally look to federal liability rules to effectuate federal causes of action.

The judiciary's ordinary approach to federal claims also requires courts to apply federal common law to the issues at bar. Federal courts nearly always apply preexisting, general liability rules to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *see also Burlington Indus., Inc. v. Ellerth*, 542 U.S. 742, 754–55 (1998) (fashioning a "uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law").

Such an approach is consistent with long-recognized canons of statutory construction. When Congress creates a tort action, it "legislates against a legal background" of ordinary tort liability rules and intends to incorporate those rules. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). And should Congress wish to abrogate a common-law rule, the statute must "speak directly" to the question addressed by the common law. *Id.* Moreover, "[t]he canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). If a statute that displaces the common law should be interpreted consistently with common law rules, then surely the common law must provide the default rule for a law that does *not* displace the common law, but instead creates jurisdiction to hear a common law cause of action.

Moreover, courts apply federal common law "to fill the interstices of federal legislation." *Kimbell Foods*, 440 U.S. at 727; *accord Sosa*, 542 U.S. at 726 (discussing this rule); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring) (applying this rule to the ATS).[7] The text

[7] *See also County of Oneida, N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226, 237 (1985) (noting that federal common law is a "necessary expedient" where a statute has not spoken to a particular issue and applying federal common law to question of whether plaintiff had a right of

of the statute neither precludes corporate liability nor requires that the question be resolved under international law. *See supra* Section I.A.1.[8] Thus, even if the text and *Sosa* were agnostic on the proper body of law to apply, which they are not, such silence would be a further reason to look to federal common law.[9]

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action); *Illinois v. City of Milwaukee, Wisc.*, 406 U.S. 91, 100–04 (1972) (holding that federal courts may fashion federal common law remedies regarding interstate water pollution, a matter of federal concern, where federal legislation did not address the specific issue).

[8] Nor does international law preclude corporate liability. Section I.B, *infra*. On the contrary, it contemplates such liability. Section II.B, *infra*. ; Petitioners Br. at 43–47; *Sarei v. Rio Tinto, PLC,* 2011 U.S. App. LEXIS 21515 (9th Cir. Oct. 25, 2011)(*en banc*) (finding international law recognizes corporate liability for war crimes and genocide); *Flomo*, 643 F.3d at 1017 (noting that sanctions were inflicted on corporations under international law in the wake of World War II).

[9] The majority's assumption that international law governs the question at bar also cannot be reconciled with the background principle established by Federal Rule of Civil Procedure 17(b)(2). Under that Rule, a corporation's capacity to be sued is determined "under [the law by] which it was organized." *See Community Elec. Service of Los Angeles, Inc. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989) ("Rule 17(b) prevails over [federal] antitrust law and requires us to apply California law"); *Tex. Clinical Labs Inc v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008) (applying Rule 17(b) to Social Security Act claim); *see also Marsh v. Rosenbloom*, 499 F.3d 165, 176–77, 184 (2d Cir. 2007) (citing Rule 17(b) and holding that CERCLA does not preempt state law regarding corporate capacity). While application of Rule 17 would point to

4. Congress' original purpose of providing a federal forum suggests that who can be sued must be determined by common law rules.

In passing the ATS, Congress sought to provide a federal forum for that limited subset of torts that implicate the law of nations. As *Sosa* recognized, the First Congress was concerned about "the inadequate vindication of the law of nations" and that the United States was failing to provide a uniform forum for redress of a series of crimes against ambassadors and violations of the law of neutrality, as well as eagerness to prove its credibility as a new nation. 542 U.S. at 715–19. State courts already had jurisdiction over such suits. *Sosa*, 542 U.S. at 722; *Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring). But Congress was afraid that state courts could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations, and therefore wanted to provide an alternative federal forum. *Tel-Oren*, 726 F.2d at 783–84, 790–91 (Edwards, J., concurring); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 235–36 (1996). Thus, the First Congress desired to make federal courts *more accessible* to foreigners

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the law of the place of incorporation rather than federal common law, it confirms that international law does not control.

bringing these sorts of tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 21 (1985).

Given these aims, the First Congress would have expected federal courts to resolve the question of who could be sued by reference to the familiar body of general common law—just as state courts would do. Any other approach could potentially exclude from federal court certain suits involving violations of the laws of nations even though those same suits would be heard in state court. That is precisely what the statute meant to avoid. *Tel-Oren*, 726 F.2d at 790–91 (Edwards, J., concurring).

B. International law itself requires the conclusion that federal common law applies.

Even if the *Kiobel* majority were correct that courts must *first* look to international law, the applicable rule would still ultimately come from federal common law, because international law itself directs courts to domestic law. The Framers' understanding that international law is enforced through domestic law remains true today.

As courts in ATS cases have long recognized, international human rights law generally leaves the manner in which it is enforced by States to their own

discretion.[10] In *Sosa*, this Court adopted the principle discussed in detail by Judge Edwards in his concurrence in *Tel-Oren*, 726 F.2d at 777–82, that under the ATS, international law itself need not provide a private cause of action; the Court rejected Judge Bork's contrary view, which would have nullified the ATS. *Sosa*, 542 U.S. at 714, 724, 729–31. In short, the "'position of international law on whether civil liability should be imposed for violation of its norms is that international law takes no position and leaves that question to each nation to resolve.'" *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 51

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[10] *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 42 (D.C. Cir. 2011); *Flomo*, 643 F.3d at 1020 (concluding that "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them"); *Marcos*, 25 F.3d at 1475; *Kadic*, 70 F.3d at 246 (holding that international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations"); *Kiobel*, 621 F.3d at 172–76, 187–89 (Leval, J., concurring) (noting that international law establishes "norms of prohibited conduct," but "says little or nothing about how those norms should be enforced," leaving these questions to domestic law); *Khulumani*, 504 F.3d at 286 (Hall, J., concurring) (finding that "[i]t is a 'hornbook principle that international law does not specify the means of its domestic enforcement'"); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring) (holding that "the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations," and that although international law governs the question of whether there has been a violation, the decision of "how the United States wishe[s] to react to such violations [is a] domestic question").

(D.C. Cir. 2011) (quoting *Kiobel*, 621 F.3d at 152 (Leval, J., concurring)). Thus, international law, like *Sosa*, distinguishes the question of whether a person has suffered a violation of an international right from the scope of the remedial cause of action a state chooses to provide.[11]

The *Kiobel* majority conceded that international law "leave[s] remedial questions to States." 621 F.3d at 147. But it then proceeded to define "remedial" in its narrowest sense, limiting it to forms of *relief* available — damages, declaratory relief, an injunction — without regard to how the term is used in international law. *Id.* at 147 & n.50. As *Sosa* recognized, "remedy" in this context signifies the means to enforce a right, equivalent to a cause of action. In discussing whether to allow a cause of action for the brief arbitrary detention at issue in that case, this Court referred to "the creation of a federal remedy." 542 U.S. at 738. Plainly the Court was speaking of whether a cause of action was available, not what form of relief the plaintiff could recover.[12]

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[11] *See Flomo*, 643 F.3d at 1019 (underscoring the distinction between a customary international law principle "and the means of enforcing it, which is a matter of procedure or remedy"); *Exxon Mobil*, 654 F.3d at 41–42 (holding that because international law "creates no civil remedies and no private right of action [] federal courts must determine the nature of any [ATS] remedy . . .by reference to federal common law")

[12] The same is clear from the quotes in the previous two footnotes. Thus, Judge Leval's concurrence recognizes that the

The Second Circuit's position would render meaningless the principle that international law allows States to define domestic remedies, and would render the statute a nullity. The specific type of relief available only matters if there *is* a civil cause of action. But as we have just seen, international law does not provide one. So under the Second Circuit's approach, there would be no claims for which the courts could apply relief — against a corporation or a natural person, *see Flomo*, 643 F.3d at 1019; *Kiobel*, 621 F.3d at 153, 176, 178 (Leval, J., concurring) — and thus no issue left to domestic law.

The *Kiobel* majority's claim that the ATS requires that international law provide a right to sue corporations is simply a version of the position *Sosa* rejected that international law must provide the right to sue. *Kiobel*, 621 F.3d at 176 (Leval, J., concurring).[13] Since international law does not address whether there is a right to sue *anyone*, it

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"remedy" at issue in this context is the means of enforcement and redress generally, and is thus much broader than merely what kind of relief a plaintiff may recover. *Kiobel*, 621 F.3d at 175 n.33 (Leval, J., concurring). Indeed, in conflating "remedy" with "relief," the *Kiobel* majority departed from established Second Circuit law. In *Kadic*, the court equated "creat[ing] private causes of action" under the ATS with "defining the remedies." 70 F.3d at 246.

[13] The majority appears to acknowledge that it embraced this view. 621 F.3d at 122, n.24. Contrary to the majority's suggestion, *id.*, this position is not deemed wrong because Judge Bork held it, but because *Sosa* rejected it.

cannot be expected to explicitly provide a right to sue a corporation. *Id.*

Whether a corporation may be held liable in tort for violations of international law is necessarily a question international law leaves to states to determine for themselves, and thus for the federal judiciary "to answer in light of its experience with particular remedies and its immersion in the nation's legal culture," rather than by reference to customary international law. *Flomo*, 643 F.3d at 1020. For this reason, courts and judges have explicitly rejected the Second Circuit's approach and instead applied federal common law to this issue. *Id.* at 1019–20; *Exxon Mobil*, 654 F.3d at 41–43, 50; *Kiobel*, 621 F.3d at 174–76 (Leval, J., concurring); *see also Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (Lynch, J., dissenting from denial of rehearing en banc) (four judges opining that,"for the reasons stated by Judge Leval," the *Kiobel* decision is "very likely incorrect"). The majority's opinion cannot be reconciled with the manner in which international law contemplates its own enforcement.[14]

[14] That corporate liability is a question to be decided under federal common law is clear even if there is some disagreement about where the line is drawn in other areas, such as accomplice liability standards. According to one view, federal common law governs complicity standards, in part because the means of domestic enforcement that international law leaves to States includes at least some theories of accessorial liability. *E.g.*, *Khulumani*, 504 F.3d at 286–87 (Hall, J., concurring); *see generally Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) (op. of Stevens, J.) (noting that aiding and

C. Courts commonly apply federal common law in ATS cases.

Contrary to *Kiobel*, the general trend in cases both before and after *Sosa* has been to apply principles drawn from federal common law to issues beyond the right violated.[15]

Indeed, the Second Circuit's approach, under which all substantive issues must be decided under international law, arguably would preclude the application of any number of established federal

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abetting is a theory of liability for a violation, not an aspect of the right violated). Under another school of thought, international law governs, based on the belief that conduct-regulating norms must come from international law. *Id.* at 268–70 (Katzmann, J., concurring); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d. Cir. 2009) (adopting Judge Katzmann's position); *Exxon Mobil*, 654 F.3d at 30, 33 (same). The question, of course, need not and should not be resolved here. Notably, however, judges who subscribe to the position that accomplice liability is determined according to customary international law have rejected *Kiobel* and concluded that corporate liability is determined according to domestic law, at least in part because corporate liability is not conduct-regulating. *Exxon Mobil*, 654 F.3d at 41–43, 50–51; *Kiobel*, 621 F.3d at 187–89 (Leval, J., concurring); *Kiobel*, 642 F. 3d at 380–81 (Katzmann, J., dissenting from denial of *en banc* review).

[15] *See, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995).

common law doctrines that are routinely applied in ATS cases. Courts, however, have not questioned that these doctrines apply regardless of whether they reflect international law.

For example, in a recent ATS case, this Court held that federal common law governed the question of whether a foreign official was immune from suit. *Samantar*, 130 S. Ct. at 2284. Similarly, in *Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009), *cert. denied*, 2011 U.S. LEXIS 4854 (U.S. June 27, 2011), the court determined that the federal common law doctrine of government contractor immunity applied in an ATS case. Such a doctrine is alien to international law, and *Saleh* never suggested that it must be found in international law. Indeed, international law does not recognize personal immunities for offenses such as war crimes. *See* Rome Statute of the International Criminal Court, art. 27, July 17, 1998, 2187 U.N.T.S. 3. Doctrines such as head-of-state immunity, and even the sovereign immunity of the United States, are also federal common-law doctrines. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) (head-of-state immunity); *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) (sovereign immunity).

No court has suggested that international law should displace these federal common law doctrines. Were courts to apply international law to these issues, all of which bear on a defendant's liability, these doctrines would fall away. The same reasoning

holds true for other liability principles. Federal common law applies to all ancillary issues in ATS cases, including the scope of liability.

II. Federal common law provides for corporate liability.

Concluding that federal common law rules govern the issue of corporate liability does not end the inquiry. The Court must consider what sources to consult as part of a federal common law analysis and then discern the applicable rule. The primary source is preexisting, well-established federal or traditional common law rules, as well as relevant international law. The rule established must best implement Congress' purposes in enacting the statute. Here, the relevant question is, when a norm that meets *Sosa*'s threshold test is violated, does corporate liability or corporate immunity better effectuate Congress' aims?

In this case, discerning the applicable rule is easy. Under both ordinary common law principles and international law, corporations are liable on an equal footing with natural persons. This rule also vindicates the policies animating the ATS. Accordingly, the Court should simply adopt the usual rule of corporate liability rather than creating a special rule that corporations should be immune from suit for participating in violations of universally recognized human rights.

A. The applicable liability rules incorporate established federal or traditional common law rules and international law.

The first question courts typically ask in discerning a federal common law rule is whether to adopt state law or apply a uniform federal rule. *E.g. Kimbell Foods*, 440 U.S. at 727. In cases involving international law, courts should apply a uniform federal rule. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–26 (1964). This is especially true here, since one purpose of the ATS was to ensure that a uniform body of law would apply to these kinds of claims. *See supra* Section I.A.4.

The appropriate focus of the analysis is on ordinary common law tort principles. As noted above, the ATS creates a federal cause of action under which federal common law tort principles are used to redress violations of customary international law. Such reference to widely applied common law principles also accords with the manner in which federal courts typically establish uniform federal standards, *e.g.*, *Burlington Indus.*, 524 U.S. at 754, as well as the rule that Congress must "speak directly" to a question in order abrogate a common law principle. *Meyer*, 537 U.S. at 285. Indeed, this Court has held that "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of" this rule. *United States v. Bestfoods*,

524 U.S. 51, 63 (1998). Additionally, courts may consult state law in discerning the federal rule that will best effectuate the policy of the statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

Moreover, due to the unique nature of ATS claims as federal common law claims vindicating international law rights, it may also be appropriate to consider international legal principles. For example, in determining the relative rights of contending states, which are analogous to individual nations, this Court has looked to international law as well as federal and state law. *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). International law may contain gaps that make it inappropriate as the primary source of liability rules; yet, where international law accords with established federal law, there can be little argument against its application in ATS cases, in part because international law is part of federal law. *Sosa*, 542 U.S. at 729. The touchstone, however, remains federal common law. This means both that a liability rule need not meet *Sosa*'s threshold standard for determining whether there has been a violation that supports jurisdiction, and that an international principle that accords with federal common law provides further support for that common law standard, even if the international principle does not meet the *Sosa* test.

The federal common law rule must implement the policies underlying the statute at issue. *Textile Workers*, 353 U.S. at 457 (holding that courts "look[] at the policy of the legislation and fashion[] a remedy that will effectuate that policy"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (applying *Textile Workers* to the ATS).[16] Thus, the applicable rule in this case must give effect to Congress's decision to recognize tort liability for violations of international law.

Here, the precise methodology for determining the applicable federal common law rule is not critical, because, as the next sections demonstrate, ordinary common law principles, international law and the policies animating the ATS all require corporate liability.

B. Under federal common law, corporations are subject to the same liability rules as natural persons.

The common law subjects corporations to the same civil liability as natural persons; this is inherent in the whole notion of corporate personality,

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[16] *See also Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 154 (1987) (holding that court should avoid creating statute of limitations rule that would "thwart the legislative purpose of creating an effective remedy").

and has been the rule for centuries.[17] Indeed, this Court noted well over a hundred years ago that the common law principle that a corporation is equally responsible as a natural person for torts done by its servants is "so well settled as not to require the citation of any authorities." *Baltimore & P.R. Co. v. Fifth Baptist Church,* 108 U.S. 317, 330 (1883). *Amicus* is aware of no state that departs from this rule.

International law supports federal common law in recognizing that corporations can be sued. Petitioners' Br. at 43–47. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), the International Court of Justice noted that international law recognized corporations as institutions "created by States" within their domestic jurisdiction, and that the court therefore needed to look to general principles of law — a species of international law derived from principles common to States' domestic law — to answer questions about corporate separateness. *Id.* at 33–34,

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[17] *See* Petitioners' Br. at 26 n.18; *Exxon Mobil*, 654 F.3d at 47–48 (collecting cases); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (noting that a "corporation at common law . . . possesses the capacity . . . of suing and being sued") (op. of Story, J.); *Daniels v. Tearney,* 102 U.S. 415, 420 (1880) (noting that a corporation is liable for malicious torts, including assault and battery); *Bestfoods*, 524 U.S. at 62–65 (applying ordinary common law principles to CERCLA and finding that corporations can be held liable either on a veil-piercing theory or for their own acts).

37. This Court, citing *Barcelona Traction*, upheld a counterclaim "aris[ing] under international law" against a Cuban government corporation for the illegal expropriation of property, under principles "common to both international law and federal common law." *First Nat'l City Bank* [*FNCB*] *v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983). Furthermore, as the Second Circuit has recognized, general principles provide rules applicable in ATS cases. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). All legal systems recognize that corporations can be sued; this rule is a general principle of law. The "understanding of corporate personhood [reflected in *FNCB* and *Barcelona Traction*] is directly contrary to the conclusion of the majority in *Kiobel*." *Exxon Mobil*, 654 F.3d at 54.

Since the rule that corporations can be held liable in tort is clear in both domestic and international law, it should be applied under the ATS. Indeed, doing so avoids resort to the "judicial inventiveness" that federal common law sometimes requires. *Textile Workers*, 353 U.S. at 457. The opposite would be true if this Court were to depart from domestic and international principles to craft a new immunity.

C. Corporate liability best effectuates the Framers' purposes in passing the ATS.

As *Sosa* recognized, the ATS was enacted to vindicate the laws of nations. 542 U.S. at 717. Thus, the ATS expresses a basic Congressional policy of using tort law to redress international wrongs. The same corporate liability rule that ordinarily applies in tort cases furthers Congress' goals in passing the statute, for at least four reasons.

First, liability rules under the ATS must reflect the universal condemnation of the underlying violations. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984). A holding that the same corporate liability that applies to run-of-the-mill torts does not apply to genocide, state-sponsored torture or crimes against humanity would turn this principle on its head. International law is subverted if, for example, a modern day Tesch & Stabenow — whose top two officials were convicted at Nuremberg for supplying poison gas for the death chambers of Auschwitz, *In re Tesch*, 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946) — can participate in and profit from atrocity and not be held to account by its victims.

Second, tort law's twin aims — compensation and deterrence — cannot be achieved without holding corporations liable. Where a corporation is involved in abuse, the corporation, not its agents, reaps the profits. Thus, there is no reason to believe the agents have the wherewithal to provide redress.

Flomo, 643 F.3d at 1019; *Kiobel*, 621 F.3d at 179 (Leval, J., concurring). And since it is sometimes in a corporation's interests to violate international law, *Flomo*, 643 F.3d at 1018, a rule that only a corporation's agents are potentially liable would under-deter abuse.

Third, Congress passed the ATS in part because it preferred claims involving international law to be heard in federal rather than state court. *See supra* Section I.A.4. The First Congress would not have wanted a foreign claimant, who could sue a corporation if he filed his claim in state court, to be barred from federal court. Indeed, in many modern ATS cases, the plaintiffs also plead municipal common law tort claims. Precluding corporate liability would disadvantage aliens' claims arising under the law of nations vis-a-vis their state law claims — thus "treat[ing] torts in violation of the law of nations less favorably than other torts," contrary to the Framers' understanding. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain* ["Legal Historians' Brief"], 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 110 (2004).[18] The *Kiobel* majority's position would undermine the purposes of the ATS

[18] This brief's argument that ATS claims were part of the common law and required no implementing legislation was adopted by *Sosa*. 542 U.S. at 714.

by leaving at least some such plaintiffs recourse only to state court.

Fourth, refusing to recognize corporate liability would lead to absurd results. The ability to sue the corporation is inherent in the notion of limited shareholder liability; plaintiffs may sue the corporation *because* limited liability ordinarily immunizes the shareholders. If corporations were not legal persons that could be sued, they could not be considered legal persons separate from their shareholders. And if a corporation is not a separate person, it is simply an aggregation of agents (the corporation's directors, officers and employees) acting on shareholders' behalf. Thus, if corporations cannot be sued, the *owners* would be liable on an agency theory for everything that employees of the company do, without need to pierce any veil.

To find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* — that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, and yet not subject the corporation to liability. Neither federal common law nor international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are two sides of the same

coin, and both derive from principles of domestic law common to all legal systems.

* * *

Under the ATS, the violation of international law gives rise to a federal common-law tort cause of action. Where it is necessary to answer a question that the text does not address, courts — giving due regard to the ATS's history and purposes — must resort to federal common law. The same corporate liability that applies to ordinary torts is not too strict when applied to genocide, torture or slavery. If anything, those committing or assisting crimes that transgress humanity's most fundamental values should be held to a more exacting standard.

III. The text of the ATS and the common law nature of the claim demonstrate that the law applies to conduct occurring abroad.

The question of whether the ATS encompasses claims arising abroad is not among the questions presented here and was not addressed by the court below; there is therefore no call for this Court to reach this question. Nonetheless, because ATS defendants have on occasion argued that the ATS does not extend to claims arising abroad, *amicus* briefly demonstrates that this position is unsound.

The text of the ATS contains "no limitations as to . . . the locus of the injury," *Trajano v. Marcos*, 978 F.2d 493, 499–501 (9th Cir. 1992), in sharp contrast to the first clause of Section 9 of the Judiciary Act of

1789, which conferred jurisdiction with a geographical limitation. 1 Stat. at 76–77. More importantly, the plain meaning of every phrase Congress chose demonstrates that the law applies to acts that occurred abroad.

"Any civil action." The term "any," and the original use of "all," indicate the absence of additional limitation beyond those expressly delineated in the text. If Congress sought to exclude claims that arise abroad, it would have chosen a more narrow formulation.

"[B]y an alien." This Court has expressly held that the term "alien" within the meaning of the ATS includes non-citizens living abroad. *Rasul v. Bush*, 542 U.S. 466, 484 (2004). This was also the understanding when the ATS was passed. The leading dictionaries and commentaries of the period defined "alien" by place of birth, without reference to current residence, and described rules that would apply when an "alien" entered the country.[19] Indeed,

[19] *E.g.*, 1 A Modern Law Dictionary Containing the Present State of the Law in Theory and Practice: With a Definition of its Terms; and the History of its Rise and Progress (T.E. Tomlin ed., 1797) (unpaginated); Richard Burn & John Burn, 1 A New Law Dictionary: Intended for General Use, as Well as for Gentlemen of the Profession 30–31 (1792); Charles Viner, 2 Abridgment of Law and Equity of the Law of England 261–62, 265 (2d ed. 1790); Timothy Cunningham, 1 A New And Complete Law-Dictionary, or, General Abridgment of The Law, *tit. "Alien"* (3d ed. 1783) (unpaginated); John Cowell, The Interpreter of Words and Terms, *tit. "Alien"* (1701) (unpaginated); Giles Jacob, A New Law-Dictionary: Containing

if any ambiguity existed, it related to whether "alien" *excluded* residents. *Breedlove v. Nicolet*, 32 U.S. 413, 431–32 (1833) (holding for purposes of alienage jurisdiction that "[i]f originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in [the U.S.]").

The plain meaning of "any" claim brought by a non-citizen living abroad includes claims that arise outside the United States.

"**[F]or a tort only."** The term "tort" necessarily includes torts committed abroad, because "tort[s]" at the time the ATS was passed, as now, were understood to be transitory. The tortfeasor owed an obligation to the victim that could be enforced wherever the tortfeasor was found, regardless of where the tort occurred. *See Dennick v. Central Ry. Co.,* 103 U.S. 11, 18 (1880). A nation "has a legitimate interest in the orderly resolution of disputes among those within its borders." *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

A court's power to adjudicate transitory torts involving claims that arise abroad has been recognized since at least 1774. This Court has traced the doctrine to *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), among other cases, noting that:

> The courts in England have been open in cases of trespass . . . to foreigners

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the Interpretation and Definition of Words and Terms Used in the Law (10th ed. 1782) (unpaginated).

> against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions.

McKenna v. Fisk, 42 U.S. 241, 248–49 (1843). The state courts regularly applied this doctrine.[20] Indeed, Oliver Ellsworth, the author of the Judiciary Act of 1789, had himself done so in 1786, as a state judge. *Stoddard v. Bird*, 1 Kirby 65, 68, 1786 Conn. LEXIS 36 at *4 (Conn. 1786) (Ellsworth, J.).

The transitory tort doctrine is a basic assumption of our common law. It was the original basis for state court jurisdiction over out-of-state torts. *Filártiga*, 630 F.2d at 885. As noted above, *Sosa* confirmed that the ATS was enacted on the understanding that the common law would provide

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[20] *Taxier v. Sweet,* 2 U.S. 81, 84, 85 (S. Ct. Pa. 1766) (affirming jurisdiction over case regarding seizure of ship on the high seas, where plaintiff argued transitory actions are triable anywhere); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811); *Pease v. Burt*, 3 Day 485, 1806 WL 202, at *2 (Conn 1806)*; see also Burnham v. Superior Court*, 495 U.S. 604, 610–11 (1990) (plurality) (English common-law practice "sometimes allowed 'transitory' actions, arising out of events outside the country" (citing *Mostyn* and *Cartwright v. Pettus*, 22 Eng. Rep. 916 (Ch. 1675)); The Federalist No. 82 (Alexander Hamilton) ("The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.").

the cause of action, and that torts in violation of the law of nations could already be heard in state court. *See supra* Sections I.A.2 & I.A.4. Thus, "any. . . tort" encompasses transitory torts. And based on the transitory tort doctrine, the Courts of Appeals have held that the ATS applies to claims arising abroad. *Filártiga*, 630 F.2d at 885; *Exxon Mobil*, 654 F.3d at 24–25.[21]

"[C]ommitted in violation of the law of nations." At the time the ATS was passed, it was understood that "all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained." *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (Iredell, J.) (rejecting the claim that "the United States have no right to decide a dispute between the Dutch and the French, in regard to a capture on the high seas").

In sum, the ATS applies to "any" suit by a non-citizen — including those living abroad — for claims that were well-understood to be actionable wherever the tortfeasor could be found. The text leaves no question that the ATS applies to conduct outside the United States.

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[21] Unlike the regulatory statute at issue in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), which involved an exercise of Congress' jurisdiction to prescribe, here Congress merely authorized courts to adjudicate claims involving conduct that is universally forbidden.

CONCLUSION

Whether corporations can be sued under the ATS for committing or abetting genocide or other atrocity is determined by federal common law. Under centuries-old common-law principles, corporations are subject to the same tort liability as natural persons. Nothing in law or logic warrants the creation of a new, special immunity for the very worst kinds of torts.

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