No. 06-4800

Nos. 06-4800-cv; 06-4876-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA , ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B.WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING CO.,

Defendants-Appellees-Cross-Appellants,

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant.

On Appeal From the U.S. District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS AND LABOR ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND FOR REHEARING EN BANC

Human Rights Watch; Service Employees International Union; Center for Constitutional Rights; EarthRights International, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; Global Witness; International Labor Rights Forum; International Rights Advocates; World Organization for Human Rights USA; Human Rights Law Foundation; Accountability Counsel, *Amici Curiae*

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are eleven human rights and labor organizations concerned with the enforcement of international law, including remedies against corporations. (A full list of *amici* and their interests is attached.) *Amici* believe that international law is primarily enforced through domestic mechanisms and that there is a global consensus that corporations are subject to human rights law. Limiting accountability for human rights violations to norms and actors subject to international tribunals, excluding abuses committed or abetted by corporations, among others, would severely undermine global efforts to protect human rights, contrary to the efforts of *amici*.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Domestic federal law should apply to allow suits against corporations under the ATS because the ATS embodies the fundamental international law principle that international law is primarily enforced through domestic remedies. This principle has been recognized since the drafting of the ATS and was recognized by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), which acknowledged that federal common law provides the cause of action in ATS cases.

This Court has long recognized that the manner in which international human rights law is enforced by States is left to their own domestic laws. *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995). This is especially so for private civil liability, which has never been the subject of any international tribunal, and for corporations, which are

[1] No party or counsel authored this brief; no person other than *amici* funded it.

created by municipal law. International law therefore points to U.S. domestic law to answer the question of who may be sued in U.S. courts.

Similarly, the Supreme Court, in *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), applied international law rules derived from general principles common to States' domestic law. The Court in *FNCB* did precisely what the majority claims no court has done—held a corporation liable for a violation of an international human rights norm.

Amici acknowledge that, for the question of accomplice liability in ATS cases, judges of this Court have differed on the appropriate primary source of law. *Compare*, *e.g.*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286-87 (Hall, J., concurring) (looking to federal common law) *with id.* at 268-70 (2d Cir. 2007) (Katzmann, J., concurring) (looking to international law) *and with Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d. Cir. 2009) (adopting Judge Katzmann's position). Judges subscribing to each position, however, disagree with the majority's analysis here. *See Khulumani*, 504 F.3d at 289 (Hall, J., concurring) (expressing "understanding" that "corporate actors are subject to liability under the ATCA"); *id.* at 282 (Katzmann, J., concurring) (suggesting but not deciding that "the issue of whether corporations may be held liable under the ATCA [is] indistinguishable from the question of whether private individuals may be"); Leval op.[2] at 69-73. Regardless of whether the court looks first to international law or to federal common law on the

[2] *Amici* refer to Judge Leval's separately-paginated concurrence as "Leval op."

question of corporate liability, domestic law rules ultimately apply because international law looks to domestic rules for corporate civil liability.

Finally, the Court should consider whether, in the absence of specific direction under the ATS, Federal Rule of Civil Procedure 17 directs the court to state law.

ARGUMENT

I. *Sosa* Recognizes that the ATS Provides for Domestic Enforcement of International Law Norms by Applying Federal Common Law.

By the ATS's plain language, only the "tort" must be "committed in violation of the law of nations." 28 U.S.C. § 1350. The majority did not dispute that the plaintiffs here suffered torts committed in violation of international law. Instead, the majority required that international law must also supply the rules for whether the defendant (or class of defendants) can be held liable for such a tort. That reading conflicts not only with the text, but also with the structure of international law and the original understanding of the ATS as interpreted by the Supreme Court in *Sosa*.

Judge Leval's concurrence points out 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. Leval op. at 6. The Supreme Court's decision in *Sosa* supports the notion that while the norm of prohibited conduct is governed by international law, the rules to determine who can be held to answer for that conduct are governed by federal common law.[3]

[3] Some agree with Judge Hall that questions of accomplice liability should also be determined according to federal common law. *See Khulumani*, 504 F.3d at 286-87

Sosa held that, while there must be a violation of an international law norm for the ATS to grant jurisdiction, the common law provides the cause of action. 542 U.S. at 725. The federal common law that defines ATS actions incorporates international law to a certain extent; as Judge Leval recognized, the norm itself—the prohibited conduct that violates the victim's rights—is a question of international law. Leval op. at 7. Equally certain is that international law does not define all aspects of an ATS action; otherwise, *Sosa*'s holding that the ATS allows federal courts to recognize causes of action *at federal common law* would be meaningless. *Id.* at 724. For example, federal procedural rules apply, and this Court has also applied the federal common law of political questions to ATS cases. *E.g.*, *Kadic*, 70 F.3d at 249–50 . The question of whether a corporation may be sued is not governed by international law but, like the political question doctrine, determined by uniform federal common law. Indeed, numerous courts, both before and after *Sosa*, have held that federal common law rules apply generally in ATS cases.[4]

(Hall, J., concurring). Nonetheless, corporate liability is determined according to domestic law even if accomplice liability is not. Leval op. at 69-73. The argument for an international-law aiding-and-abetting rule is that this is a "conduct regulating norm." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 650 (2006); *accord* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72-74 (2008). But "the type of entity against which a claim can be asserted" is not conduct-regulating, and so is determined according to domestic law. Keitner, *supra*, at 72.

[4] *See Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of en banc review and remanded on other grounds by* 550 F.3d 822 (9th Cir. 2008); *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); *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J.,

Sosa's conclusion that federal law provides the cause of action flows directly and expressly from the 18th-Century understanding of international law, relying heavily on Blackstone. *See* 542 U.S. at 714-24. *Sosa* recognized that although norms of international law generally applied to States, individuals 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).[5] 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. Thus, *Sosa* speaks of recognizing claims "under federal

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concurring) (differing with majority and arguing that federal common law applies in ATS cases "in order to fashion a remedy"), *majority opinion vacated by grant of en banc review*, 395 F.3d 978 (2003) (according to subsequent April 9, 2003 order, en banc review was to focus on "whether Unocal's liability should be resolved according to general federal common law tort principles" or under "an international-law aiding and abetting standard"); *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).

[5] The observation that these offenses are committed by "private subjects" further refutes the majority's conclusion that corporations cannot violate international law unless they are "*subjects* of international law." Slip op. at 17. Blackstone recognized that even those who were not generally "subjects" of international law could nonetheless violate its norms and be subject to domestic punishment.

common law for violations of [an] international law norm." 542 U.S. at 732.

The majority's conclusion here, that ATS cases cannot be brought against corporations unless international law itself expressly provides punishment for corporations, is directly contrary to *Sosa*'s conclusion that the cause of action is provided by federal common law. The principle that international law itself need not provide a right to sue, which was discussed in detail by Judge Edwards in his concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777–82 (D.C. Cir. 1984), was adopted by *Sosa*, 542 U.S. at 724, 731; Judge Bork's contrary view was expressly rejected. *Id.* at 731.[6]

Finally, as a matter of federal common law, corporations are unquestionably subject to the same civil liability as natural persons; this is inherent in the whole notion of corporate personality. Judge Katzmann's observation that this Court has "repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be," *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring), accords with the general federal common law rule. This rule is also reflected in footnote 20 of *Sosa* itself, in which the Supreme Court treated a "corporation or individual" as equivalent for the purposes of assessing whether a norm of international law prohibits conduct by a

[6] The majority appears to acknowledge that it is embracing this view. *See* slip op. at 12 n.24. Contrary to the majority's suggestion, *id.*, this view is not deemed wrong simply because Judge Bork held it, but because *Sosa* rejected Judge Bork's view.

"private actor" (as opposed to a state actor). 542 U.S. at 732 n.20.[7] This equivalence between natural and legal persons has been part of the common law for centuries.[8]

II. Even for Criminal Offenses and Especially for Civil Liability, International Law Is Primarily Enforced by Domestic Means.

As Judge Leval correctly observed, criminal and civil remedies have very different purposes, and international law leaves the question of private civil liability to domestic enforcement. Leval op. at 39-46. Indeed, international law leaves most

[7] Footnote 20 is likewise fully consistent with the distinction between the right (defined by international law) and the remedy (provided by domestic law). The question of whether the perpetrator must be a state actor is one of international law because the involvement of the State is an element of the offense and thus is part of what defines whether the right has been violated at all. Certain acts, such as torture, only implicate international law when there is state involvement. Others, such as war crimes and genocide, are prohibited regardless of state involvement. *See* 542 U.S. at 732 n.20. The reason that the question of state action falls within the province 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*, 70 F.3d at 240; *cf. Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006) ("The dividing line for international law has traditionally fallen between States and private actors."). Corporate liability is completely different; it is a question of what entities an individual State chooses to hold liable for acts that are of sufficient international concern to violate international law. One can hardly argue, for example, that crimes against humanity are not of international concern if committed by a corporation. *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)).

[8] *E.g.*, 1 William Blackstone *Commentaries* at *463 (among the capacities of a corporation is "[t]o sue and be sued . . . and do all other acts as natural persons may"); *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.); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (citing sources dating back to 1793 confirming "the common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued").

questions of enforcement—including criminal enforcement—to States.

A. International Crimes Are Primarily Enforced Domestically, Subject to Domestic Rules.

The majority relies heavily on the fact "that no international tribunal . . . has *ever* held a corporation liable for a violation of the law of nations." Slip op. at 27. But the jurisdiction of international tribunals does not even set the limits of international criminal law, which is primarily enforced through domestic systems.[9] When *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980), recognized that torture was actionable, there had been no international criminal tribunals since Nuremburg, and to date no such tribunal has ever held anyone liable for, nor had jurisdiction to prosecute, torture (outside the context of crimes against humanity or war crimes). International tribunals do not generally establish the limits of the conduct that violates international law;[10] instead, they simply provide an extraordinary means of enforcement.

[9] For example, article 10 of the Rome Statute states that the definitions of crimes should not be read "as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, art. 10. Likewise, article 22(3) notes that limitations on the jurisdiction of the Court, (including the limit on jurisdiction to natural persons), "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." Last, article 25(4) states that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law," meaning that States' responsibility to enforce international law through their own domestic legal systems is unaffected.

[10] Genocide, for example was prohibited by both customary international law and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, which entered into force in 1951, long before tribunals such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court were created to

Writing before the modern tribunals were established, Prof. Cherif Bassiouni (whom the majority cites) noted that international crimes are enforced "subject to the municipal criminal laws of the states." *An appraisal of the growth and developing trends of international criminal law*, 45 Revue Internationale de Droit Pénal 405, 429 (1974). Subsequent ad hoc tribunals were created where domestic systems were seen as unable or unwilling to prosecute the offenders, as in war-torn Yugoslavia and genocide-wracked Rwanda. Even in the International Criminal Court, whose jurisdiction is less geographically and temporally constrained (but not unlimited), this deference to municipal remedies remains. *See* Rome Statute art. 17(1)(a).[11]

In fact, international criminal tribunals are created with the expectation that domestic measures will provide parallel means of enforcing the underlying norms of international law. *See Kadic*, 70 F.3d at 240 (for abuses considered international crimes, "international law also permits states to establish appropriate civil remedies"). The remedy in a civil ATS action comes from federal common law, while the remedy in an international tribunal comes from the international law specifically created to govern that particular tribunal. *See* Casto, *supra*, at 651.

Because international crimes are enforced primarily through domestic systems, corporate criminal liability for international offenses is typically governed by the

prosecute particular instances of genocide.

[11] Other criminal treaties are enforced exclusively through domestic means. *E.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 279, art. 4 (requiring States to criminalize terrorism financing), art. 5 (requiring States to provide liability against legal entities for terrorism financing).

general domestic rule concerning corporate criminal liability. For example, in monist countries—in which international law is typically directly incorporated into domestic law—corporations are subject to prosecution for international crimes in the countries that allow corporate criminal liability generally. Thus monist States party to the Rome Statute that generally recognize corporate criminal liability, such as Belgium and the Netherlands,[12] allow it for Rome Statute crimes as well.[13] This refutes any suggestion that corporate liability is prohibited by the Rome Statute or inapplicable to international offenses. Corporate liability cannot be precluded under the ATS based on the notion that corporate criminal liability is absent in international law; as the monist example shows, corporate criminal liability is, as a matter of international law, a question of enforcement that is decided according to each State's general practice.

B. Civil Liability is Exclusively Provided by Domestic Law.

The principle that the remedies for international violations are governed by domestic law, and not limited by international tribunals, is all the more true for *civil* liability, which has never been the subject of any international tribunal. The panel concludes that "who is liable for what" must be "determined by customary

[12] *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L. 310, 320 (1992) (noting that Belgium and the Netherlands are monist).

[13] For Belgium, see Jan Wouters & Leen De Smet, *De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van internationaal humanitair recht in het licht van de Belgische genocidewet* 5-6, Katholike Universiteit Leuven, Faculteit Rechtsgleerheid, Instituut voor Internationaal Recht Working Paper Nr. 39 (Jan. 2003); for the Netherlands, see *Wet internationale misdrijven*, Kammerstuk 2001-2002, 28337, Nr. 3 (Dutch government's explanatory memorandum).

international law," slip op. at 1, but this ignores the fact that customary international law does not purport to provide rules of civil liability and leaves these questions to domestic law. *See* Leval op. at 39-46. It is also inconsistent with the law of this Court. "The law of nations 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." *Kadic*, 70 F.3d at 246 (citing *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring)).

While the *right*—the prohibited conduct that harms the victim—comes from international law, the existence of a *remedy* is a question of federal common law. Thus "the norm for which a remedy is provided" is governed by international law, and "domestic law supplies all other rules of decision." Casto, *supra*, at 641, 643. These rules include the doctrine of *respondeat superior* and questions of wrongful death and survival remedies, none of which bear on the nature of the wrongful conduct. *Id.* at 644; *see also id.* at 650 (treating "private individual or corporation" as equivalent).

The majority here rejected the notion that the question of whether corporations may be liable for international torts is a matter for the United States to decide in creating the remedy, finding that "[w]hether a particular remedy—money damages, an injunction, etc.—can be *enforced* against a certain individual or entity is not a question of remedy; it is a question of the scope of *liability*." Slip op. at 47 n.50. But this conclusion is contrary to *Kadic*, which equated "creat[ing] private causes of

action" with "defining the remedies." *See* 70 F.3d at 246. If creating a private cause of action is a question of remedies, then the decision whether to allow causes of action against corporations is one of remedies as well, and therefore it is a task left to each individual nation. *See id.*

III. International Law Expressly Recognizes Corporate Civil Liability.

In addition to contemplating that States will provide corporate civil liability, international law also recognizes such liability in at least two other ways: First, international law *requires* States to provide domestic civil remedies. Second, tribunals applying international law, including our Supreme Court, look to general principles of law common to the world's legal systems, which allow corporate civil liability.

A. International Law Requires States to Provide Civil Remedies.

International law does not merely *allow* States to provide civil remedies against corporations for serious human rights abuses, it *obligates* them to do so. Thus the U.N. General Assembly, in a 2005 "restatement of existing State obligations," noted that States must provide "access to justice" for victims of serious abuses, specifically contemplating liability for "reparation" from "a legal person, or other entity."[14] This reflects the general rules of human rights law, including remedies required under the International Covenant on Civil and Political Rights (ICCPR)[15] and the International

[14] Basic Principles & Guidelines on the Right to a Remedy & Reparations for Victims of Gross Violations of Int'l Human Rights Law & Serious Violations of Int'l Humanitarian Law, A/RES/60/147 Annex, Principles 3(c) & 15.

[15] U.N. Human Rights Comm., Gen. Cmt. No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (stating that States must "provide

Convention on the Elimination of All Forms of Racial Discrimination (CERD),[16] to which the United States is a party, as well as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[17]

B. International Law Tribunals Apply General Principles of Law, Which Allow Civil Liability, to Questions of Corporate Liability.

The majority also erred in failing to apply international law rules drawn from general principles of law common to the world's legal systems, contrary to the Supreme Court's decision in *First National City Bank*. There, the Court upheld a counterclaim "aris[ing] under international law" against a Cuban government corporation for the illegal expropriation of property. 462 U.S. at 623. *FNCB* belies the majority's assertion, slip op. at 48, that corporations have never been subject to liability for human rights claims. More importantly, it upheld the claim under principles "common to both international law and federal common law." *Id.* Those international law principles were general principles common to the world's legal systems.[18] Thus, *FNCB* establishes that U.S. courts apply general principles as rules

effective remedies" and "redress the harm caused . . . by private persons or entities").

[16] The requirement that States must provide remedies "against any acts of racial discrimination," CERD art. 6, Dec. 21, 1965, 660 U.N.T.S. 195, has been repeatedly applied to corporate acts. *See, e.g.*, Concluding observations for the United States, 2008, CERD/C/USA/CO/6 ¶30.

[17] *See* CEDAW art. 2(e), Dec. 18, 1979, 1249 U.N.T.S. 14 (requiring States to take measures to eliminate discrimination by any "organization or enterprise").

[18] To determine the content of international law, *FNCB* relied upon *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5). *See* 462 U.S. at 628 n.20. There, the International Court of Justice applied general principles of law as international law in considering whether a corporation was to be regarded as a separate person, distinct from its shareholders. The ICJ could not answer the

of international law, and that those rules provide for corporate liability.

The universal application of corporate civil liability, despite the plethora of approaches worldwide on corporate criminal liability, makes perfect sense. As Judge Leval noted, the debate over corporate criminal liability centers on a corporation's capacity for criminal intent and the fact that corporations cannot be imprisoned. Leval op. at 5. Civil liability, however, generally concerns monetary compensation, and corporations are universally allowed to hold assets separately from any natural person. By insulating those assets from tort recovery, the majority is interpreting international law to allow States to create entities that can retain the profits of gross human rights abuses, while also allowing or even *requiring* that those entities be immune from suit. There is no support for such a conclusion.

IV. The Majority Did Not Consider the Possibility that Rule 17 Controls Whether Corporations Can Be Sued Under the ATS.

Federal Rule of Civil Procedure 17(b)(2) establishes the background principle that the capacity of a corporation to be sued is determined "by the law under which it was organized." Because the text of the ATS does not discuss corporate liability—the ATS "by its terms does not distinguish among classes of defendants," *Argentine Republic v. Amerada Hess Shipping Corp.*, 188 U.S. 428, 438 (1989)—the Court should

question solely by reference to customary international law, because "there are no corresponding institutions of international law to which the Court could resort," and needed to look to municipal law instead. *Id.* at 33–34, 37. The ICJ noted that international law recognized corporations institutions "created by States," within their domestic jurisdiction, and that the Court needed to look to municipal law to answer questions about corporate separateness. *Id.* at 33, 37.

consider whether Rule 17 controls. *See Community Elec. Service of Los Angeles, Inc. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235 (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 (5th Cir. 2008) (applying Rule 17(b) to Social Security Act claim); *see also Marsh v. Rosenbloom*, 499 F.3d 165 (2d Cir. 2007) (citing Rule 17(b) and holding that CERLCA does not preempt state law regarding corporate capacity). Even if the ATS pointed to international law on this question, and even if international law did not expressly recognize corporate liability, Rule 17 may still apply. Because the majority only claims to find an *absence* of an international law rule, not a rule of *immunity*, slip op. at 48, then the lack of a specific rule under the statutory scheme may again lead to Rule 17. The majority did not consider this possibility.

CONCLUSION

For the foregoing reasons, *amici* submit that the Court should grant review, and if it finds that the question of corporate liability under the ATS can be considered in this case, it should conclude that corporations may be held liable for violations of international law norms on the same basis as natural persons.

DATED: October 15, 2010

Respectfully submitted,

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ADDENDUM
LIST OF HUMAN RIGHTS AND LABOR ORGANIZATIONS

LIST OF *AMICI CURIAE* HUMAN RIGHTS AND LABOR ORGANIZATIONS

Human Rights Watch is a non-profit 501(3) organization that investigates and reports violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. It has conducted extensive investigations into the responsibility of corporations for human rights violations around the world and worked collaboratively with business to create and uphold standards of conduct that protect human rights. Human Rights Watch maintains a program dedicated specifically to research and advocacy of business and human rights.

Service Employees International Union (SEIU) is one of the largest labor unions in the world, an organization of 2.2 million members united by the belief in the dignity and worth of workers and the services they provide and dedicated to improving the lives of workers and their families and creating a more just and humane society. As part of its mission, SEIU acts in partnership with labor unions and other human rights and environmental groups worldwide, and SEIU has a long history of working to ensure that U.S. corporations are held accountable for transgressions of worker and human rights, regardless of where such violations occur.

The **Center for Constitutional Rights** (CCR) is a nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed

by the United States Constitution and the Universal Declaration of Human Rights. Since its founding in 1966 out of the civil rights movement, CCR has litigated several international human rights cases under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, before the Second Circuit, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995), and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), as well as numerous other ATS cases before other courts.

EarthRights International (ERI) is a nonprofit organization that litigates and advocates on behalf of victims of human rights abuses worldwide. In seven lawsuits, ERI represents or has represented plaintiffs alleging liability of corporations under the ATS, for, *inter alia*, aiding and abetting serious human rights abuses. ERI has previously submitted several briefs on the issue of corporate liability under the ATS, and has an interest in ensuring that the courts correctly decide the question of whether corporations may be subject to ATS liability.

The **United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union** (USW) is a labor organization representing 1.2 million active and retired workers in North America. The USW has been active in helping to prosecute ATS and TVPA cases arising from abuses against workers in Colombia, Argentina, Turkey and Nicaragua and believes that these laws are critical in protecting labor rights throughout the world. The USW

therefore joins in this amicus brief in the hopes that the Second Circuit continues to interpret these laws as expansively as possible to permit workers around the world who are abused by tort-feasors in the United States to find a remedy for human and labor rights violations.

Global Witness is a non-governmental organization that exposes the corrupt exploitation of natural resources and international trade systems. Global Witness obtains evidence to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds, and works predominantly in conflict-affected countries, emerging markets and in countries with totalitarian regimes and low levels of transparency. Global Witness seeks to end the impunity enjoyed by individuals and companies that profit from the illicit (and often illegal) exploitation of natural resources, and is constantly seeking ways to hold perpetrators of natural resource-related harm to account.

International Labor Rights Forum (ILRF) is an independent, not-for-profit non-governmental organization that seeks to promote the enforcement of worker rights in the global economy. It was formed in 1986 by a coalition of labor leaders, human rights activists, academics and religious leaders to monitor practices such as child labor, forced labor, attacks on and imprisonment of union leaders, and other violations of international labor standards, and more importantly to develop the

means to counter these abuses. ILRFs core mission is, thus, to achieve just and humane treatment for workers worldwide through collaboration with labor and other non-governmental organizations both domestically and internationally.

International Rights Advocates is a non-governmental organization that seeks to enforce international human rights norms through litigation and public campaigns. International Rights Advocates has a particular interest in human rights litigation using the ATS and the Torture Victim Protection Act, and has been lead counsel in 15 cases using these laws. International Rights Advocates also works with human rights lawyers in developing countries to coordinate efforts requiring multinational companies to observe international law in their offshore operations.

The **World Organization for Human Rights USA** (Human Rights USA) is a non-profit human rights organization based in Washington, D.C. that employs legal strategies to obtain justice for those whose human rights are violated and hold the violators accountable. Human Rights USA is and has been counsel in several lawsuits addressing claims under the ATS and TVPA, including claims against corporations involved in human rights abuses, such as Yahoo!, Inc., for its complicity in handing over the identifying information of internet users in China to Chinese authorities, resulting in the individuals' arbitrary arrest, long-term detention, abuse, and torture. Human Rights USA's core mission is to ensure that U.S. law upholds internationally-recognized human rights standards.

Human Rights Law Foundation (HRLF) is a human rights non-governmental organization that was officially founded in 2005 to formalize a pre-existing cooperative relationship with human rights attorneys in the United States, Europe and Asia dating back to 2001. HRLFs core mission is to assist survivors of human rights abuses through direct litigation, global legal assistance, and an Underground Railroad project, which provides safety, refuge and self-help services for those at risk of persecution where they currently reside.

Accountability Counsel is a non-profit legal organization dedicated to assisting communities around the world who seek accountability for violations of their environmental and human rights. Among its clients are people harmed by large projects such as mines, oil pipelines and agribusiness projects, where multinational corporations are beyond the reach of weak rule of law in their host countries. Accountability Counsel was founded in 2009 by lawyer Natalie Bridgeman Fields who has been involved for nearly a decade in ATS and TVPA litigation against corporations and individuals involved in human rights violations in South America and South Africa.

CERTIFICATE OF SERVICE

I, Marco Simons, the undersigned, hereby certify that I am employed by EarthRights International, 1612 K St., NW, Suite 401, Washington, DC 20006; I am over the age of eighteen and am not a party to this action. I further declare under penalty of perjury that on October 14, 2010, I served the foregoing **Brief of *Amici Curiae* Human Rights and Labor Organizations in Support of the Plaintiffs-Appellants' Petition for Rehearing and for Rehearing En Banc** by sending electronic copies to the following recipients by electronic mail, and, except for those indicated as having waived paper service, by placing two true copies in envelopes addressed as follows:

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XX **BY FIRST CLASS U.S. MAIL**
XX I caused such envelopes to be deposited in the mail at Washington, D.C. The envelopes were mailed with postage thereon fully prepaid. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 14, 2010.

_____
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