No. 09-2778

Nos. 09-2778-cv; 09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv

In the United States Court of Appeals for the Second Circuit

SAKWE BALINTULO, as personal representative of SABA BALINTULO, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of MANDLA MADONDO, MPHO ALFRED MASEMOLA, MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, THOBILE SIKANI, LUNGISILE NTSEBEZA, MANTOA DOROTHY MOLEFI, individually and on behalf of her deceased son, MNCEKELELI HENYN SIMANGENTLOKO, TOZAMILE BOTHA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, JAMES MICHAEL TAMBOER, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

Plaintiffs-Appellees,

vs.

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES

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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. In seven lawsuits, including three in the Southern District of New York, ERI represents or has represented plaintiffs alleging liability of corporations under the Alien Tort Statute, 28 U.S.C. § 1350, for, *inter alia*, aiding and abetting serious human rights abuses. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Wiwa v. Shell Petroleum Development Co.*, No. 08-1803-cv, 2009 U.S. App. LEXIS 11873 (2d Cir. June 3, 2009).

Amicus therefore has experience with the issue of corporate liability under the ATS, and an interest in ensuring that the courts correctly decide the question of whether corporations may be subject to ATS liability. *Amicus* has addressed the same question in several prior cases, including *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006) (concluding that corporations "may be held liable for the violation of any international law norm that is binding on private entities").

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS CURIAE

Amicus addresses the question of whether corporations may be subject to liability for violations of international law pursuant to the Alien Tort Statute, 28

U.S.C. § 1350 (ATS).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus herein address the ultimate question of whether corporations may be held liable for violations of customary international law pursuant to the Alien Tort Statute (ATS). We do not focus on the questions of whether the ATS may encompass non-criminal conduct or whether corporations may be held liable for international crimes, because we believe that the answers to these questions do not resolve the ultimate question. Regardless of whether international law embraces corporate criminal liability or the ATS embraces non-criminal conduct, the question of whether corporations may be sued under the ATS should be determined by uniform rules of federal common law, under which corporations are liable to the same extent as natural persons.

Federal common law determines whether a corporation is a proper defendant because *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. *Id.* at 724. Since the ATS is a federal statute providing common law liability for violations of international law, *see id.* at 732–33, the existence of a remedy is a question of federal common law. Conversely, under *Sosa* and this Court's jurisprudence, courts look to international

law to determine whether the *conduct* at issue violates a norm—that is, international law determines the definition of the underlying abuse and the rules that regulate conduct regarding involvement in a particular abuse.

The question of who can be a proper defendant is a question of what remedy is available for a violation of an international law norm, not a question of whether a norm has been violated. It is therefore determined by federal common law.

International law itself leads to the same conclusion. This Court has long recognized the international law principle that the manner in which international law is enforced by States is left to their own domestic laws. *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995).

Furthermore, the original intent of the First Congress, which enacted the ATS, would have been to apply rules drawn from general common law (the predecessor to federal common law), which was understood to incorporate the law of nations. In the early years of the United States, courts regularly interpreted the law of nations and applied general common law principles to attribute liability.

Regardless, even if this Court were to require international law to recognize corporate liability, corporations would still be liable under the ATS. As the Supreme Court has held, general principles of law common to the world's legal systems, and thus international law, recognize corporate personhood. The whole notion of a corporation as a juridical entity assumes that it can be sued. Corporate

personhood is a tradeoff, in which the owners' liability is limited, but the corporation—a legal fiction—becomes amenable to suit. The former does not exist without the latter. Failure to recognize both inherent aspects of corporate personhood would create an intolerable loophole that is unwarranted in any legal regime, and unsupported by any source.

ARGUMENT

I. Federal Common Law Governs the Determination of Who is a Proper Defendant in Alien Tort Statute Cases.

Regardless of whether corporations are directly subject to liability under international law, the question of corporate liability is one that should be determined by uniform federal common law rules, not international law. Both *Sosa* and the original understanding of the ATS suggest that federal common law decides this question.

A. Under *Sosa*, federal common law determines whether a corporation is a proper defendant in an ATS case.

Sosa held that, while there must be a violation of an international law norm for the ATS to grant jurisdiction, it is the common law that 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; certainly the norm itself—the prohibited conduct—is a question of international law. Equally certain is that

international law does not define all of the 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 . For several reasons, 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.

First, *Sosa* and international law compel the conclusion that, while the *right* violated comes from international law, the existence of a *remedy* is a question of federal common law. International law determines whether the conduct that injured the plaintiff—the infringement of the right at issue—is prohibited by international law. But whether to extend a remedy for the violation of that right, either to a particular class of defendants, or at all, *see Sosa*, 542 U.S. at 732–33, is a question of federal law.

International law itself requires the same conclusion. "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 v. Libyan*

Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring)).[1] 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*, 726 F.2d at 777–82, was adopted by *Sosa*, 542 U.S. at 724, 731; Judge Bork's contrary view was expressly rejected. *Id.* at 731. The decision whether to hold legal persons liable for the international torts the ATS was designed to enforce is a matter for the United States to decide in creating the remedy, not an issue governed by international law norms that define the rights. Indeed, as noted below in Part I(B) *infra*, when Congress passed the ATS it would not have recognized any real distinction between international law rules and general principles of law applicable in common law actions.[2]

Second, even if *Sosa* and international law did not already counsel in favor of looking to domestic legal principles for issues such as corporate liability, customary international law contains gaps that would simply make it inappropriate as the primary source for rules regarding who can be a proper defendant for tort

[1] In equating "creat[ing] private causes of action" with "defining the remedies," *Kadic* confirms that *Sosa*'s holding that the creation of a cause of action is a question of federal common law necessarily means that the existence of a remedy is a question of federal common law. *See* 70 F.3d at 246.

[2] In any event, as detailed in Part II *infra*, international law encompasses corporate liability; indeed it includes the same principles of corporate personhood as federal common law. Where international law accords with established federal law, there can be little argument against its application in ATS cases.

liability. This is the case in part because issues of corporate liability are generally a concern for domestic enforcement, not international tribunals. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), for example, the International Court of Justice considered whether a corporation was to be regarded as a separate person, distinct from its shareholders, or whether it simply reflected the personality of those shareholders. The ICJ noted that it could not answer the 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 at municipal law instead. *Id.* at 33–34, 37.[3]

Thus, for ATS claims, "the norm for which a remedy is provided" is governed by international law, and "domestic law supplies all other rules of decision." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 641, 643 (2006). These

[3] The ICJ noted that international law recognized corporations as an institution "created by States," in a domain within their domestic jurisdiction, and that the Court needed to look to municipal law to answer questions about corporate separateness. 1970 I.C.J. at 33, 37. As detailed below, the ICJ did not look to the specific laws of the states at issue, but rather looked to the "rules generally accepted by municipal legal systems," *id.* at 37, that is, it looked to international law in the form of general principles of law. What is abundantly clear, however, is that corporations can be held liable regardless of whether the Court looks to federal common law or international law, and that it would make no sense to look solely to international criminal law to answer this question.

rules include the doctrine of respondeat superior and questions of wrongful death and survival remedies, none of which bear on the nature of the defendant's conduct. *Id.* at 644; *see also id*. at 650 (treating "private individual or corporation" as equivalent).

This is fully consistent with this Court's recent ruling in *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d. Cir. 2009), which held that international law controls the standards for accomplice liability.[4] As

[4] The other circuits that have, post-*Sosa*, considered what law applies to questions other than whether the act alleged constitutes a violation (such as torture) have, like Judge Hall in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring), found that settled federal common law doctrines determine who may be held responsible in ATS cases. *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) ("Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law."); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (applying federal common law standards for aiding and abetting and conspiracy liability). Prior to *Sosa*, several other courts suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" are appropriately applied to determine liability in ATS cases); *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concurring) (differing with majority and arguing that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort"), *majority*

Professor Casto put it, aiding and abetting liability is a "conduct-regulating norm," 37 Rutgers L.J. at 650, that should therefore be determined according to international law.[5] There is a significant distinction between the questions of whether accomplice liability should be assessed under international law, and whether courts should look to international or domestic law to determine if a corporation can be sued; while accomplice liability regulates conduct, the question of whether the ATS recognizes the corporate personhood does not.[6] The question at bar clearly goes to whether there is a *remedy* for illegal acts, which is a question of federal common law, not whether the underlying act is illegal.

As noted above, international law itself directs the Court to domestic law as the proper source for remedies and thus for norms regarding who can be a defendant. Looking to international *criminal* law to provide the rules that govern this civil liability question would be particularly contrary to the nature of

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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) (finding liability under the ATS where "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").

[5] *Accord* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72-74 (2008).

[6] *See id.* Keitner, *supra*, at 72 (concluding that while "conduct-regulating rules," including those of accomplice liability, come from international law, U.S. law governs "the type of entity against which a claim can be asserted").

international law. International criminal law, like customary international law, generally does not prescribe who may be held liable for an offense; it is primarily enforced "subject to the municipal criminal laws of the states who enter the conventions in question." M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international criminal law*, 45 Revue Internationale de Droit Penal 405, 429 (1974). The exception is the few international criminal tribunals that have been formed, which cover only a handful of international crimes—notably excluding recognized ATS norms such as piracy and state-sponsored torture. These limited international criminal regimes are created by treaties as one means to enforce norms that are already prohibited by customary international law or other treaties.[7] These regimes do not limit the conduct proscribed by, or the remedies available pursuant to, customary international law.[8]

[7] 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 prosecute particular instances of genocide.

[8] 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

Moreover, they are created with the expectation that domestic measures will provide parallel means of enforcing the underlying proscriptions of customary international law. *See Kadic*, 70 F.3d at 240 (for conduct 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 international law. *See* Casto, *supra*, 37 Rutgers L.J. at 651. ATS remedies are not created pursuant to international criminal law; rather, under international law, both international criminal regimes and domestic measures such as the ATS are complementary, parallel enforcement mechanisms. For nearly 50 years prior to 1993, international criminal law was enforced exclusively through domestic jurisdictions, and even today domestic systems still have the primary enforcement role.[9]

Moreover, limiting remedies to those available in international criminal law cannot be squared with *Sosa*. That case did not even require that the underlying act

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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 are unaffected.

[9] Under the Rome Statute, for example, the principle of complementarity demonstrates that the international system prefers domestic prosecutions to actions before international tribunals. Rome Statute art. 17(1)(a) (providing that a case is inadmissible before the International Criminal Court if it is "being investigated or prosecuted by a State which has jurisdiction over it").

be prohibited by international criminal law; instead, it held that the act must violate a "specific, universal, and obligatory" norm with the "potential for personal liability." 542 U.S. at 732, 724. This is not synonymous with international criminal law, which is a subset of such norms and which may also address conduct not prohibited by customary international law. Since the norm itself need not be criminal, there can be no argument that a defendant must be a proper defendant under international criminal law to be sued under the ATS.

Third, there is no question that, as a matter of federal common law, corporations and natural persons are treated equivalently in terms of their capacity for civil liability; indeed 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," 504 F.3d at 282 (Katzmann, J., concurring), is not without import, because it reflects the general rule in federal common law. 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 conducts by a "private actor" (as opposed to a state actor). 542 U.S. at

732 n.20.[10] These assumptions reflect a rule that has been part of the common law for centuries.[11] "The dividing line for international law has traditionally fallen between states and private actors. Once this line has been crossed and an international norm has become sufficiently well established to reach private actors, there is very little reason to differentiate between corporations and individuals." *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS

[10] 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 a state action requirement is part of what defines the right. Certain acts, such as torture, only implicate international law when there is state involvement in their commission. 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. The question of corporate liability is completely different. That question is a matter of the remedy an individual state chooses to provide where the act that injured the plaintiff is of sufficient international concern to violate international law.

[11] *E.g.*, 1 Blackstone, *Commentaries on the Laws of England* at 463 (1765) (among the capacities of a corporation is "[t]o sue and be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may"); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) ("An aggregate corporation at common law . . . . possesses the capacity . . . of suing and being sued in all things touching its corporate rights and duties.") (op. of Story, J.); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (noting that by the 19th century "the common understanding" was "that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued").

63209, *37 (N.D. Cal. Aug. 22, 2006).[12]

B. Congress' original understanding of the Alien Tort Statute mandates application of general common law rules regarding who can be a defendant.

As *Sosa* recognized, the First Congress enacted the ATS to give federal courts jurisdiction over tort suits under the law of nations brought by aliens out of concern that the United States was failing to provide a uniform forum for redress of a series of violations of international laws protecting ambassadors and the international law of neutrality, and eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 229–30 (1996). In doing so, they were partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations. *See id.* at 235–36. Thus, the First Congress desired to make federal courts more accessible for foreigners' tort claims that, when unaddressed, gave rise to international diplomatic friction. *See* Kenneth C.

[12] Indeed, if a state were to take the position that it would enforce violations of international law against natural persons but not against corporations, it would likely be in breach of its own international obligations to protect human rights. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (noting that state are obligated to protect "against acts committed by private persons or entities").

Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. Int'l L. & Pol. J. 1, 21 (1985).

Given these aims, the First Congress would not have limited corporate liability to principles drawn from an external body of international law that is generally silent as to tort liability, when state courts were not so limited. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that already incorporated relevant aspects of the law of nations.

The incongruity of applying international law standards of liability is underlined by the fact that many modern ATS cases also plead domestic common law tort claims for the same conduct implicated in the ATS claims. *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–94 (2d Cir. 2000). Domestic law claims are typically decided under the general civil liability standard. The First Congress would not have wanted a foreign diplomat, for example, who could sue a corporation for ordinary common law torts in a New York court, to face a higher burden (or a complete bar) in federal court for a breach of diplomatic inviolability. Such rule would disadvantage aliens' claims arising under the law of nations vis-à-vis their state law claims—thus "treat[ing] torts in violation of the law of nations less favorably than other torts," Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev.

99, 110 (2004)—and frustrating the aims of the First Congress.

II. International Law Recognizes Corporate Personhood.

Even if the Court were to conclude that international law, not federal common law, determines whether a corporation can be sued under the ATS, international law as applied by the Supreme Court indicates that corporations are not immune.[13] International law has long recognized corporate personhood. Indeed, it has done so in the context of civil claims, which are far more relevant to the civil tort claims at issue here than is international criminal law.[14]

International law looks, as a source of law, to general principles of law common to the major legal systems of the world. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157 (2d Cir. 2003). There can be no question that all of the world's major legal systems recognize corporate personhood. Thus, the United States

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[13] *Amicus* understands that the Plaintiffs-Appellees and the Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellees demonstrate that corporate liability, including criminal responsibility, is recognized by customary international law, treaties, and general principles of law. Accordingly, *amicus* herein addresses only international law recognition of corporate personhood in the civil context.

[14] To be sure, courts, including this one, have held that international criminal law is one proper source to consider under the ATS. *E.g. Kadic*, 70 F.3d at 241–42. But they have never held that courts cannot look to international civil law. Indeed, as Judge Katzmann noted, "international law does not maintain [a] hermetic seal between criminal and civil law." *Khulumani*, 504 F.3d at 270 n.5 (Katzmann, J. concurring), *citing Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring).

Supreme Court, quoting the International Court of Justice, specifically recognized corporate veil-piercing liability as a principle of international law, based on general principles. *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba (Bancec)*, 462 U.S. 611, 628 n.20 (1983) (citing *Barcelona Traction*, 1970 I.C.J. at 38–39). The Court held that, under international law, "the legal status of private corporations" an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances" and that veil-piercing is a principle of international law, as well as federal common law. *FNCB*, 462 U.S. at 613, 623, 628–29, n.20.[15]

This holding that corporations are legally separate from their owners in some circumstances necessarily presumes that corporations can be sued in their own right under international law. Indeed, the whole notion of a corporation as a juridical entity assumes that it can be sued; its personality is substituted for that of the shareholders, whose liability is thereby limited and who ordinarily are not subject to suit directly.

[15] "The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. . . . . In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. . . ." 462 U.S. at 628 n.20, *quoting Barcelona Traction* at 1970 I.C.J. 3, 38–39.

Indeed, *FNCB* itself is a case where a corporation was held to account for a claim arising under international law. There, the Cuban government seized FNCB's assets. FNCB thus had a claim that arose under international law against Cuba. *Id.* at 623. The Supreme Court held that this claim could be asserted as a set-off against Bancec (in a case brought by Bancec against FNCB), because Bancec, although a corporation, was the alter-ego of the Cuban government.

Similarly, both *FNCB* and *Barcelona Traction* are clear that veil piecing protects the interests of those who have dealings with the corporation. 462 U.S. at 628 n.20; *Barcelona Traction*, 1970 I.C.J. at 38–39.[16] This recognition that shareholders can be sued where the veil is pierced assumes that the corporation can be sued, and in fact is usually the only proper defendant. In so holding, the ICJ noted that it was applying general principles drawn from municipal law to fill

[16] *Barcelona Traction* involved a Canadian company that allegedly had international law rights violated by Spain. Belgium brought the claim at the ICJ, on the basis that most of the shareholders were Belgian. The ICJ held that Belgium lacked standing, specifically because international law recognizes corporate personhood as a general principle of law and thus a principle of international law. 1970 I.C.J. at 33–38, 50; *see also id*. at 32 (noting that principle that states must extend the benefits of the law to foreign nationals applies equally to foreign juristic persons as to national persons). The Court's recognition of the separate corporate personhood of a plaintiff equally establishes the personhood of a corporate defendant, since there is no basis in international law or in the law of the world's major legal systems for a finding that corporations are recognized for purposes of suing, but not for purposes of being sued. As noted, inherent in the very idea of a corporation is the fact that it is amenable to suit. But even if *Barcelona Traction* itself could somehow be distinguished on its facts, there is no question that the ability to sue a corporation is a general principle of law.

gaps in international law, and that failure to do so "would lose touch with reality." *Id*. at 37.[17]

Refusing to recognize corporate liability would lead to absurd results, not only for ATS plaintiffs but equally so for corporations that could otherwise be sued. The ability to sue the corporation is inherent in the notion of limited liability; plaintiffs may sue the corporation precisely because limited liability ordinarily prevents suits against the shareholders. If international law did not recognize that corporations were legal persons that could be sued, this would also mean that they would not be considered legal persons separate from their shareholders. If a corporation is not a separate person, it is simply an aggregation of agents (the corporation's directors, officers and employees) acting on behalf of principals (the shareholders). Thus, if corporations cannot be sued, the *individual owners* of the companies would be liable on an agency theory for everything that employees of the company do, without any need to pierce any veil, because, absent the concept of corporate personhood, employees of the corporation would all be employees of the shareholders collectively.

In order to find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* in

[17] *See also id.* at 33 (noting that "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction").

international law—that is, 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, yet not subject the corporation itself and the corporation's assets to liability. But there is no possible argument that 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 not separate concepts, and both derive from general principles of domestic law common to all legal systems. In the absence of corporate personality, liability for violations of international law would be greatly expanded—to all of the shareholder-principals for any act of their agents—rather than limited.

CONCLUSION

For the foregoing reasons, *amicus* submits that, if the Court addresses the question of corporate liability under the Alien Tort Statute, it should conclude that corporations may be held liable for violations of international law norms on the same basis as natural persons.

DATED: December 22, 2009

Respectfully submitted,

_____

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CERTIFICATE OF ANTI-VIRUS SCANNING PURSUANT TO INTERIM LOCAL R. 25.1(6)

Balintulo *et al.* v. Daimler AG, *et. al.* Case Nos. 09-2778-cv; 09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv.

I certify that, pursuant to Second Circuit Local Rule 32(a)(1)(E), I have scanned for viruses the PDF version of the **BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES** that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

DATED: December 22, 2009

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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 December 22, 2009, I served the foregoing **Brief of *Amicus Curiae* U.S. Diplomats in Support of the Plaintiffs-Appellees** by sending electronic copies to the following recipients by electronic mail, and by placing two true copies in envelopes addressed as follows:

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Executed on December 22, 2009.

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