No. 13-3605(L)

13-3620(CON), 13-3635(CON), 13-4650(CON), 13-4652(CON)

United States Court Of Appeals for the Second Circuit

JOSEPH JESNER, *et. al.*, VIKTORIA AGURENKO, *et al.*, YAFFA LEV, *et al.*, JOSEPH ZUR, *et al.*, ODED AVRLINGI, *et al.*,

Plaintiffs-Appellants,

– v. –

ARAB BANK, PLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS

Accountability Counsel, EarthRights International, Human Rights Law Foundation, International Labor Rights Forum, International Rights Advocates, Service Employees International Union, *Amici Curiae*

Richard L. Herz
Marco B. Simons

Jonathan G. Kaufman
Marissa Vahlsing
Benjamin Hoffman
EarthRights International
1612 K Street, N.W. Suite 401
Washington, DC 20006
202-466-5188 (ph); 202-466-5189 (fax)
Attorneys for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), *amici curiae* submit their Corporate Disclosure Statement as follows: None of the incorporated *amici curiae* has a parent corporation nor a publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amici curiae are 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 in the attached Appendix.) *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, and excluding abuses committed or abetted by corporations, among others, would severely undermine global efforts to protect human rights, contrary to the efforts of *amici*.

The parties have consented to the filing of this brief.[1]

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 Alien Tort Statute (ATS), 28 U.S.C. § 1350, 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

[1] No counsel for a party authored this brief in whole or in part, and no persons other than *amici* funded it.

In *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), 621 F.3d 111 (2d Cir. 2010), a sharply divided panel of this Court held that the Alien Tort Statute provides no jurisdiction over suits against corporations. Thus, under *Kiobel I*, 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. This Court must revisit that decision, because, as Appellants explain, it has since been undermined by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Appellants' Brief at 18-28.

Amici demonstrate that *Kiobel I* was wrong when decided. The panel's holding contravenes the centuries-old understanding, common to our legal system and every other, that corporations can be sued. Despite the fact that corporate immunity is anathema even for garden-variety torts, *Kiobel I* would create an exemption from liability for acts like genocide that are so universally reviled that they render the perpetrator "an enemy of all mankind."

As Judge Posner wrote for the Seventh Circuit in rejecting *Kiobel I*, "Sometimes, 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 *Kiobel I* rewards those few corporations willing to participate in the worst kinds of

atrocity. Indeed, 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. And it denies redress to those harmed.

Nothing in the law requires this. Every other Circuit to have considered the question, even *since Kiobel I,* has held that corporations may be sued. *E.g., Doe v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013); *Flomo*, 643 F.3d at 1021; *Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). The United States Government has reached the same conclusion, *see* Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Dec. 2011) [hereinafter "Brief for United States as Amicus Curiae"], noting that corporate liability is a matter of federal common law, and that federal common law allows for corporate liability.

Kiobel I held that international law controls the question of whether corporations can be sued and that international law does not provide for corporate liability. The panel erred by declining to apply federal common-law rules.

The conclusion that federal common law governs the question is compelled by the text of the statute, which requires only a violation of

international law, and the Supreme 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. Under *Sosa*, 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 looked to international law to determine whether corporations can be liable, international law itself points to domestic rules. This is because international law leaves the question of how international norms will be enforced to domestic law. 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.

Therefore, 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 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.

ARGUMENT

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

The *Kiobel I* panel erroneously concluded that, in order for corporations to be held liable under the ATS, customary international law must specifically provide for corporate liability. 621 F.3d at 118. That conclusion conflicts with

the statute's text, the Supreme Court's holding in *Sosa* that an ATS claim is a common law cause of action, the historic practice of federal courts 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. The statute "by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). This alone compels the conclusion that the ATS does not bar 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, it refutes the contention that international law governs that question. *Kiobel I* read the text to mean that *liability* must arise under customary international law. 621 F.3d at 121–22. But the ATS confers *jurisdiction* over tort actions involving the alleged violation 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 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.

The word "tort" precludes the claim that international law governs this question. "Tort" is a domestic law concept. Once there is jurisdiction over a tort suit 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 *Kiobel I* panel's reading of the ATS cannot be reconciled with the text.

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

"[A]lthough 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." *Sosa*, 542 U.S. at 724. While there must be a "violation[] of [an] international law norm," ATS claims are "claims under federal common law." *Id.* at 732; *accord id*. at 721. Thus, contrary to *Kiobel I*, 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.[2]

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

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[2] *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).

"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.

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. *Kiobel*, 621 F.3d at 153 (Leval, J., concurring in the judgment). But the manner in which a jurisdiction-conferring international norm is 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 I* panel relied on 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. *See Kiobel I*, 621 F.3d at 165 (Leval, J., concurring in the judgment); Brief of United States as Amicus Curiae at 18. 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. *Sosa*, 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 implicates international law only if 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. Indeed, the United States has represented that it is "not aware of any international law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors."

Brief of United States as Amicus Curiae at 20.[3] 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.[4] 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 a question 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 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 I* panel 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

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[3] *Accord Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006) (noting that international law provides little reason to differentiate between corporations and natural persons).

[4] *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)).

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. Federal courts nearly always apply 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").

That approach is consistent with long-recognized canons of statutory construction. When Congress creates a tort action, it "legislates against a legal background" of, and intends to incorporate, ordinary tort liability 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 like the ATS, which does *not* displace the common law, but instead creates jurisdiction to hear a common law cause of action.

Courts also 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).[5] The text of the ATS neither precludes corporate liability nor requires that the question be resolved under international law. *See supra* Section I.A.1. 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.[6]

[5] *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 an issue and applying federal common law to question of whether plaintiff had a right of 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).

[6] *Kiobel I* also conflicts with Federal Rule of Civil Procedure 17(b)(2); a corporation's capacity to be sued is determined "under [the law by] which it was organized." *E.g. Community Elec. Service of Los Angeles, Inc. v. National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989); *Tex. Clinical Labs Inc v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *see also Marsh v. Rosenbloom*, 499 F.3d 165, 176–77, 184 (2d Cir. 2007) (citing Rule 17(b) and

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. 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. *Sosa*, 542 U.S. at 715–19. State courts already had jurisdiction over such suits. *Id*. 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; it 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 bringing these sorts of tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over*

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holding that CERCLA does not preempt state law regarding corporate capacity). While Rule 17 points to the law of the place of incorporation rather than federal common law, it confirms that international law does not control.

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 I* 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.[7] In *Sosa*, the Supreme 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.'" *Exxon Mobil*, 654 F.3d at 51 (quoting *Kiobel I*, 621 F.3d at 152 (Leval, J., concurring in the judgment)). Thus, international law, like *Sosa*, distinguishes the question of whether a person has suffered a

[7] *See, e.g., 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"); *Exxon Mobil*, 654 F.3d at 42; *Flomo*, 643 F.3d at 1020; *Marcos*, 25 F.3d at 1475; *Kiobel I*, 621 F.3d at 172–76, 187–89 (Leval, J., concurring in the judgment) (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 does not "define the civil actions to be made available by each . . . nation[]," and that although international law governs whether there has been a violation, the decision of "how the United States wishe[s] to react to such violations [is a] domestic question").

violation of an international right from the scope of the remedial cause of action a state chooses to provide.[8]

The *Kiobel I* majority conceded that international law "leave[s] remedial questions to States." 621 F.3d at 147. But it defined "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 detention at issue in that case, the Supreme 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 might recover.

Thus, international law provides the right and domestic law provides the right of action — the remedy to enforce that right. Judge Leval's concurrence recognized that the "remedy" at issue in this context is the means of enforcement and redress generally, and is thus much broader than merely

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[8] *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")

what kind of relief a plaintiff may recover. *Kiobel I*, 621 F.3d at 175 n.33 (Leval, J., concurring in the judgment). Indeed, in conflating "remedy" with "relief," *Kiobel I* departed from established Second Circuit law. In *Kadic*, this Court equated "creat[ing] private causes of action" under the ATS with "defining the remedies." 70 F.3d at 246.

The *Kiobel I* panel's position would render meaningless the principle that international law allows States to define domestic remedies, and would render the ATS 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 panel'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 I*, 621 F.3d at 153, 176, 178 (Leval, J., concurring in the judgment) — and thus no issue left to domestic law.

The *Kiobel I* majority's position 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 I*, 621 F.3d at 176 (Leval, J., concurring in the judgment).[9] Since international law does

[9] The majority appears to acknowledge that it embraced this view. 621 F.3d at 122, n.24.

not address whether there is a right to sue *anyone*, 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 *Kiobel I* approach and instead applied federal common law to this issue. *Id.* at 1019–20; *Exxon Mobil*, 654 F.3d at 41–43, 50; *Kiobel I*, 621 F.3d at 174–76 (Leval, J., concurring in the judgment); *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 *Kiobel I* majority's opinion cannot be reconciled with the manner in which international law contemplates its own enforcement.[10]

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[10] That corporate liability is a federal common law question is clear regardless of where the line is drawn in other areas, such as accomplice liability. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d. Cir. 2009), this Court held that international law governs complicity standards, based on the belief that conduct-regulating norms must come from international law. *Accord Khulumani*, 504 F.3d at 268–70 (Katzmann, J.,

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 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. Thus, the question is, when a norm that meets *Sosa*'s threshold test is violated, does corporate liability or corporate immunity better effectuate Congress' aims?

Discerning the rule here 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

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concurring); *Exxon Mobil*, 654 F.3d at 30, 33. Under another view, federal common law governs, 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 abetting is a theory of liability for a violation, not an aspect of the right violated). Notably, judges who believe that accomplice liability should be determined according to customary international law have also rejected *Kiobel I* 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 I*, 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).

rather than creating a special rule that corporations should be immune from suit when they participate 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 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, the Supreme 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, the Supreme 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). 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, and has been the rule for centuries.[11] Indeed, the Supreme Court noted well

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[11] *See 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

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); *see also* Brief of the United States as Amicus Curiae at 25 ("the proposition that corporations are 'deemed persons' for 'civil purposes,' and can be held civilly liable, has long been recognized as 'unquestionable'") (internal citations omitted). *Amicus* is aware of no state that departs from this rule.

International law supports federal common law in recognizing that corporations can be sued. 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, 37.

The Supreme Court, citing *Barcelona Traction*, upheld a counterclaim "aris[ing] under international law" against a Cuban government corporation

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sued") (op. of Story, J.); *Bestfoods*, 524 U.S. at 62–65 (applying ordinary common law principles to CERCLA and finding that corporations can be held liable).

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). And, as this 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 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 [I]*." *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.

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 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 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 I*, 621 F.3d at 179 (Leval, J., concurring in the judgment); Brief of United States as Amicus Curiae at 24. 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. In many 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*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 110 (2004).[12] The *Kiobel* majority's position would undermine the purposes of the ATS 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,

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[12] 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.

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 perfectly appropriate for genocide, torture or slavery. Holding those that commit or assist crimes that transgress humanity's most fundamental values to a less exacting standard makes little sense.

CONCLUSION

Whether corporations can be sued under the ATS for committing or abetting genocide or other atrocities is determined by federal common law. Centuries-old common-law principles subject corporations 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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Respectfully submitted,

/s/ Richard L. Herz
Richard L. Herz
Counsel of Record
Marco B. Simons
Jonathan G. Kaufman
Marissa Vahlsing
Benjamin Hoffman
EarthRights International
1612 K Street, N.W. Suite 401
Washington, DC 20006
202-466-5188 (ph)
202-466-5189 (fax)

Counsel for *amicus curiae*

ADDENDUM LIST OF *AMICI CURIAE*

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.

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.); *Doe v. Chiquita Brands International,* No. 08-01916-MD (S.D.Fla).

Human Rights Law Foundation (HRLF) is a human rights non-governmental organization 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. HRLF's 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.

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.

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.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. R. 32(a)(7)(C)

In re: Arab Bank, PLC Alien Tort Statute Litigation, No. 13-3605(L)

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d), the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 6,903 words, according to Microsoft Word, the word processing program used to prepare the brief.

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/s/ Richard Herz
Richard Herz
EARTHRIGHTS INTERNATIONAL
Counsel for *Amici Curiae*