No. 10-1491

In The Supreme Court of the United States

ESTHER KIOBEL, ET AL.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NAVI PILLAY, THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the Office of the High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts.

OHCHR has a mandate to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties. OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights and subsequent human rights instruments, the Vienna Declaration and Program of Action from the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

human rights. Furthermore, the Office leads efforts to integrate a human rights approach within all work carried out by United Nations agencies.

SUMMARY OF ARGUMENT

Holding corporations liable for human rights violations is fully consistent with international law. At the heart of this case is the value we attach to the idea of the rule of law, an idea expressed in the following simple statement: "Be you never so high, the law is above you." Tom Bingham, *The Rule of Law* 4 (2010) (quoting Dr. Thomas Fuller, 1654-1734).

The battle for subjecting human rights violators to the rule of international law has been fought and won against natural persons, groups, organizations and States. On a proper understanding of contemporary international law, corporations are also subject to the rule of law on the international plane, in which they ubiquitously operate. Under that law, they are accountable for human rights violations. In particular, corporations are not immune from responsibility under international law if they engage in, or are complicit in, conduct amounting to international crimes such as genocide, crimes against humanity or war crimes.

The United States has an obligation as a member of the United Nations "to take joint and separate action in cooperation with the Organization" to promote "universal respect for, and observance of,

human rights and fundamental freedoms for all...." U.N. Charter art. 55-56. From the perspective of international law, action by a State's highest court is equivalent to action by the State's legislative or executive organs: all are equally acts of the State. *See* Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 4(1), U.N. Doc. A/56/10 (2001) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions....")). Therefore, when this Court decides this case, the Court is acting as an agent of the United States to execute – or refuse to execute – the nation's international legal obligation to promote human rights.

General principles of law common to domestic legal systems throughout the world are an independent source of international law. Virtually every nation in the world imposes civil liability on artificial persons for the tortious conduct of their agents. Hence, the principle that corporations are subject to civil liability for the wrongful conduct of corporate agents is a general principle of law applicable by this Court in cases presenting claims based on international law.

The proposition that corporations may be held accountable for human rights violations pursuant to the Alien Tort Statute is wholly consistent with international law and is validated by the following considerations. First, international law obligates States to provide an effective remedy for victims of human rights violations. Second, civil liability for

corporations helps promote the international legal principle of ensuring accountability for human rights violators. Third, in accordance with the principle of complementarity, international law necessarily relies on domestic legal mechanisms to ensure the effective protection of human rights. Finally, civil liability for corporations that are complicit in gross human rights violations serves as an avenue for orderly redress of grievances. Absent effective legal mechanisms to provide remedies for victims of gross human rights violations, those victims are likely to resort to extra-legal measures to obtain redress for perceived wrongs, thereby threatening the established legal and social order.

ARGUMENT

I. International Law Obligates States to Provide Effective Remedies for Victims of Human Rights Violations

International law requires States to provide an effective remedy for breach of a right guaranteed by international law. In the *Factory at Chorzów* case, the Permanent Court of International Justice stated: "It is a principle of international law, and even a general conception of law, that the breach of an engagement involves an obligation to make reparation in an adequate form." *Factory at Chorzów* (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13). Thus, under widely accepted principles of customary international law, an act or omission contrary to international law is

a "breach of an engagement" that triggers "an obligation to make reparation in an adequate form." *Id*. Adequate reparation can take many forms, including "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." *Id.* at 47; *see also Report of the International Law Commission to the General Assembly on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. Int'l Law Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

A. Human Rights Treaties Obligate States to Provide Effective Remedies for Victims of Human Rights Violations

The principle of effective remedy, or effective reparation, is a golden thread that runs through all modern international human rights treaties. Professor Theo van Boven, an expert in the field of remedies for violations of international human rights law, explained the legal principle as follows: "As the result of an international normative process the legal basis for a right to a remedy and reparation became firmly anchored in the elaborate corpus of international human rights instruments, now widely ratified by States." Theo van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines, in Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* 21

(Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009).

Article 8 of the Universal Declaration of Human Rights expresses this principle as follows: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Similarly, article 2(3) of the International Covenant on Civil and Political Rights obligates States "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," and "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities." International Covenant on Civil and Political Rights, art. 2(3), Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

The principle of effective remedy is codified in every significant international human rights treaty at both global and regional levels. For example, global human rights treaties that codify this principle include the International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Sept. 28, 1966, S. Exec. Doc. C, 95-2 (1978), 660

U.N.T.S. 195;[2] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85;[3] and article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 83, Dec. 18, 1990, 2220 U.N.T.S. 3.[4]

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[2] Article 6 states:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

[3] Article 14 states:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.... Nothing in this Article shall affect any right of the victim or other person to compensation which may exist under national law.

[4] Article 83 states:

Each State Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or

(Continued on following page)

Regional human rights treaties that codify this principle include the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 (as amended by Protocol No. 11, Nov. 1, 1998, ETS No. 155);[5] the American Convention on Human Rights, arts. 25 and 63, Nov. 22, 1969, 1144 U.N.T.S. 123;[6] and the Protocol to the

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legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

[5] Article 13 states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[6] Article 25(1) states:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 25(2) adds:

> The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

Article 63(1) provides:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the

(Continued on following page)

African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 25, July 11, 2003, OAU Doc. CAB/LEG/66.6, *available at* http://www.achpr.org/english/_info/women_en.html.[7]

B. The Practice of States and International Tribunals Supports the Principle of Effective Remedy

Under traditional principles of customary international law, the duty to make reparation for an injury is inseparable from the concept of state responsibility for an internationally wrongful act. *See* F. V. García-Amador, Louis B. Sohn & Richard R. Baxter, *Recent Codifications of the Law of State Responsibility for Injuries to Aliens* 8-9 (1974). Thus, a State can be held liable both for the underlying breach of an international human rights obligation and for the failure to provide an effective remedy for that breach.

In recent years, international law has placed great emphasis on reparation for victims of human

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> Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[7] Article 25 provides: "States Parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."

rights violations, especially for violations of international criminal norms. *See, e.g.*, Int'l Comm'n of Jurists, 2 *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes* 6-7 (2008); *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Carla Ferstman et al. eds., 2009).

The *Basic Principles on the Right to a Remedy*, adopted by the UN General Assembly in 2005 without a vote, and hence reflecting the unanimous consent of UN member states, reaffirms the right to an effective remedy. *See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement [hereinafter, *Basic Principles*]; *see also* UN Econ. & Soc. Council [ECOSOC] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* ECOSOC Res. 2005/30, ¶ 18 (July 25, 2005), *available at* http://www.un.org/en/ecosoc/docs/2005/resolution%202005-30.pdf.

This emphasis on reparation for victims is consistent with laws in national jurisdictions, which have developed mechanisms for civil reparation for crime victims to complement criminal punishment of human rights offenders. *See* Council of Europe, *Explanatory Report to the European Convention on the*

Compensation of Victims of Violent Crimes, ¶ 1 (1984), *available at* http://conventions.coe.int/treaty/en/Reports/Html/116.htm.; Jo Goodey, *Compensating Victims of Violent Crime in the European Union With a Special Focus on Victims of Terrorism* 1 (May 2003) (discussion paper for National Center for Victims of Crime), *available at* http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=32594.

Article 75(1) of the Statute of the International Criminal Court (ICC) exemplifies these recent trends; it requires the ICC to establish principles relating to reparation for victims, including restitution, compensation and rehabilitation. Rome Statute of the International Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 3. In contrast, statutes of older international criminal tribunals were silent on reparation, except that they empowered judges to order restitution of property as an incident to a guilty verdict. *See* Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 24(3), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), art. 24(3), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); *see also* Antonio Cassese, *International Criminal Law* 422-23 (2d ed. 2008).

Consistent with the other developments discussed above, the UN High Commissioner for Human Rights established a high level panel to prepare a report and recommendations on reparation for women victims of sexual violence in armed conflicts in the Democratic Republic of the Congo. *See* United

Nations, Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011), *available at* http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf.

C. Corporations are Not Exempt from the Duty to Provide Effective Remedies for Human Rights Violations

Although the general rule of effective remedy, as a principle of international law, has its origins in traditional doctrines of State responsibility, corporations are not exempt from the duty to provide effective remedies. Any exemption from the general rule must be founded upon a rational theory that validates the exception. It cannot depend upon a casuistic attempt to preserve or exploit an apparent loophole in the law. Indeed, an exception for corporations cannot be justified, either as a matter of common sense or in terms of traditional or evolving principles of international law.

The term "reparation" has different meanings under international law, as illustrated by the International Law Association's *Declaration of International Law Principles on Reparation for Victims of Armed Conflict* (Substantive Issues), 74 Int'l L. Ass'n Rep. Conf. 291 (2010), *available at* http://www.ila-hq.org/. In the first paragraph of article 1, the ILA

Declaration defines 'reparation' to include "measures that seek to eliminate all the harmful consequences of a violation of rules of international law applicable in armed conflict and to re-establish the situation that would have existed if the violation had not occurred." *Id.* art. 1(1). The second paragraph of article 1 explains that the goal of reparation can be accomplished by means of "restitution, compensation, satisfaction and guarantees and assurances of non-repetition, either singly or in combination." *Id.* art. 1(2).

The ILA provisions are a synthesis of definitions appearing in earlier international documents. The earliest of these instruments, the ILC's *Articles on the Responsibility of States for Internationally Wrongful Acts* provides as follows: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...." Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 34, U.N. Doc. A/56/10 (2001).[8] Similarly, the *Basic Principles*

[8] The International Law Commission is a body of experts created by the UN General Assembly and charged with the "progressive development" and "codification" of international law. Although the Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* are labeled "draft articles," the cited draft is the final version. The "Draft Articles" are generally viewed as an authoritative expression of customary international law. *See* James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – as adopted by the UN General Assembly, the UN Economic and Social Council, and the Commission on Human Rights – explains that the notion of "full and effective reparation" includes "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." *See Basic Principles, supra*, ¶ 18. In particular, the *Basic Principles* also stipulate that "[i]n cases where a person, *a legal person*, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim." *Id*., ¶ 15 (emphasis added).

Thus, the proposition that corporations are not accountable for violations of international human rights law ignores a fundamental principle of international law: the principle that victims of human rights violations are entitled to an effective remedy. Without detracting from the value of other types of reparation, it bears emphasis that the guarantee of non-repetition is a method of reparation that underscores the elementary flaw in the proposition that corporations are not accountable for international human rights violations. If corporations could not be held accountable, then corporations could continue to violate human rights without any compelling need to cease and desist; this is contrary to the principle that reparation includes a guarantee of non-repetition. It

would be more than an act of "passive injustice"[9] to accept such a grotesque interpretation of international law.

International law protects victims from human rights violations committed by States, natural persons, and other types of organizations.[10] *See* Phillipe Sands & Pierre Klein, *Bowett's Law of International Institutions*, ch. 15 (6th ed. 2009); *see also* Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 63-69 (2006). In these circumstances, a rule of law exempting corporations from the same liability for human rights violations that encumbers all other actors in the international legal system would be a brazen perpetuation of the axiom that "corporate status has long implied economic and political power without accountability." David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 Stan. Agora 1 (2001); *see also* Stephen Tully, *Corporations and International Lawmaking* (2007) (especially chapters 1 and 2). Such a state of affairs would be intolerable in an international legal order that has repeatedly emphasized the need for accountability for

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[9] As Judith Shklar helpfully reminds us, "passive injustice" includes the silent acceptance of "laws that we regard as unjust, unwise or cruel." Judith N. Shklar, *Faces of Injustice* 6 (1990).

[10] Juridical persons other than corporations also have obligations under international law. For example, in non-international armed conflicts, non-State armed groups are also bound by international humanitarian law. *See* Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules* 495-98 (2005).

human rights violations. Corporations are not above the law that binds every other participant in the international legal system. In particular, a corporation cannot be permitted to commit genocide, crimes against humanity or war crimes, given that every other participant on the plane of international law is prohibited from doing so.

In addition to the foregoing considerations, one must at all times keep in view the clear pronouncement of the International Court of Justice: "Responsibility is the necessary corollary of a right." *Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5). This is a straightforward application of Hohfeldian jural correlativity, in which a right in someone entails an obligation for someone else implicated in the violation. As a principle of international law, this simply means that the person or entity implicated in the violation of the right bears an obligation to make reparation for the violation.

II. Corporate Civil Liability Helps Promote the International Legal Policy of Ensuring Accountability for Human Rights Violations

As a matter separate from international law's requirement that perpetrators of human rights violations must offer guarantees of non-repetition, there is a clear international legal principle of promoting

accountability for human rights violations already committed.

The clear course of international human rights law is to require accountability on the part of every person or entity that enjoys recognition in international law. Elements of the principle of promoting accountability include: state responsibility for human rights violations; individual criminal responsibility for gross human rights violations, *see* Rome Statute, *supra*; complementarity of jurisdiction between national judiciaries and international tribunals with respect to gross violations of human rights, *see id*.; and, responsibility of States and the international community to protect persons from gross human rights violations. *See* UN Secretary General, *A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

The principle of promoting accountability has moved international law to a point where it is taken for granted nowadays that a State may be held accountable by way of civil remedies for any violation of human rights attributable to it. It is, however, important to recall that this was not always the case. In the first half of the twentieth century, States could not be held accountable for the violation of their own citizens' rights, because notions of sovereignty prevented States from concerning themselves with what was considered the internal affairs of one another. How state officials treated their own citizens was

then considered an internal affair of that State. *See* Louis Henkin et al., *Human Rights* 136 (2d ed. 2009).

With the development of modern international human rights law after World War II, that objection was overridden. *See id*. at 136-41. International law now recognizes that the obligation to respect human rights entails an incidental obligation of accountability owed to the whole world: an obligation *erga omnes*, as the International Court of Justice stated. *See Barcelona Traction, supra* at 32. The doctrinal products of this obligation *erga omnes* include: the idea of universal jurisdiction for the criminal prosecution of natural persons who committed gross human rights violations, *see, e.g*., Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003); the establishment of international criminal courts and tribunals; and, most recently, acceptance of the doctrine that national authorities and the international community have a responsibility to protect citizens from the most serious human rights violations – namely, genocide, crimes against humanity, and war crimes. *See 2005 World Summit Outcome*, G.A. Res. 60/1, ¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *see also A More Secure World*, *supra*.

Just as international law has evolved to hold States accountable for human rights violations, international law has also evolved to hold specific human beings accountable for gross human rights violations. The Nuremberg defendants notably argued that "international law [was] concerned with the actions of sovereign States and provide[d] no

punishment for individuals; and further, that where the act in question [was] an act of state, those who [carried] it out [were] not personally responsible, but [were] protected by the doctrine of the sovereignty of the State." *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (October 1, 1946), 446 [hereinafter *Nuremberg Judgment*]. However, the judges of the International Military Tribunal (IMT) rejected that argument, relying significantly on the jurisprudence of this Court. *See id.,* at 446, citing *Ex Parte Quirin,* 317 U.S. 1 (1942). As part of its reasoning, the IMT delivered the following classic international legal dictum: "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Nuremberg Judgment*, at 447. This judgment helped crystallize the international legal principle of individual criminal responsibility for international crimes.

Unfortunately, the Second Circuit in *Kiobel* misinterpreted that classic Nuremberg dictum. The point of the dictum was not to limit responsibility to natural persons alone, as the Second Circuit suggested. *See Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, 119 (2d Cir. 2010). Rather, the point was to reject an argument of impunity by extending accountability to the human defendants who claimed, like the corporate defendants in *Kiobel*, that they could not be held accountable under international law.

Indeed, the argument for impunity advanced by the Second Circuit in *Kiobel* is remarkably similar to the argument that the IMT considered and rejected in the Nuremberg judgment. Notably, at the time the Nuremberg Tribunal rendered its judgment, there was not a universal practice of imposing criminal responsibility on natural persons for violations of international law. It is hard, therefore, to resist the speculation that had the Second Circuit majority dominated the bench of the IMT in 1946, they might well have held that the individual defendants were not accountable because, at that time, individual criminal responsibility had not attained the status of "a discernable, much less universally recognized, norm of customary law," just as they held in 2010 that corporations were not accountable because corporate liability had not attained the requisite level of universal practice. *See Kiobel*, *supra*, at 149. As Judge Leval correctly observed in his concurring opinion in *Kiobel*: "If past judges had followed the majority's reasoning, we would have had no Nuremberg trials, which for the first time imposed criminal liability on natural persons complicit in war crimes; no subsequent international tribunals to impose criminal liability for violation of international law norms; and no judgments in U.S. courts under the ATS, compensating victims for the violation of fundamental human rights." *Id*. at 153 (Leval, J., concurring).

As with States and natural persons, artificial entities have not escaped legal censure for violation of

international legal norms, including human rights norms. There is no convincing reason to accept that States and natural persons should be held accountable for gross violations of human rights, while denying similar accountability for business entities organized as corporations. Indeed, business corporations never truly escaped accountability. As Judge Posner correctly observed, writing for the Seventh Circuit: "At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort ... and did so on the authority of customary international law." *Flomo v. Firestone Natural Rubber Co.,* 643 F.3d 1013, 1017 (7th Cir. 2011).

Moreover, other tribunals at Nuremberg explicitly recognized the liability of corporations for violations of international law in the judgments against executives of IG Farbenindustrie and Krupp, two corporations implicated in Nazi crimes. In the *Krupp* case the Military Tribunal held as follows:

> We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants ..., voluntarily and without duress

> participated in these violations ... and that there was no justification for such action.

United States v. Krupp, IX Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1351-52 (1952).

In the *I.G. Farben* case, the Nuremberg Military Tribunal held that the Farben conglomerate had violated the prohibition of pillage under Article 47 of the Hague Regulations on the Laws and Customs of War:

> Similarly, where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.... The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War. And in the instance involving private property, the permanent acquisition was in violation of the Hague Regulations which limits the occupying power to a mere usufruct of real estate. The forms of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage,

> plunder and spoliation stands out, and there can be no uncertainty as to the actual result.... With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described.

United States v. Krauch (*The I.G. Farben Case*), VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1131-32, 1140-41 (1952).

Therefore, although the International Military Tribunal did not have jurisdiction to subject corporations to criminal liability, the Nuremberg judgments made clear that corporations can be held accountable under international law for gross human rights violations committed by corporate agents on behalf of a corporation. The fact that a particular tribunal lacks authority to impose criminal punishment on corporations does not contradict the proposition that corporations can and should be held accountable for violations of fundamental human rights norms.

III. General Principles of Law Recognized by Civilized Nations Support Civil Liability for Corporations that Commit Serious Human Rights Violations

The Statute of the International Court of Justice directs the Court to decide cases in accordance with "the general principles of law recognized by civilized nations." Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993. Similarly, the Restatement of Foreign Relations Law directs U.S. courts to apply "[g]eneral principles common to systems of national law ... as an independent source of [international] law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement." *Restatement (Third) of United States Foreign Relations Law*, §102 cmt. l (1987). This Court has often consulted general principles of law to establish a rule of decision in cases presenting claims based on international law. *See, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 287-88 (1933); *United States v. Smith*, 18 U.S. 153, 163-80 (1820). Indeed, this Court has previously relied on general principles of law to support a finding of corporate liability for a violation of international law. *See First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621-33 (1983).

Virtually every nation in the world imposes civil liability on artificial persons for the tortious conduct

of their agents. Hence, the principle that corporations are subject to civil liability for the wrongful conduct of corporate agents is a "general principle of law recognized by civilized nations." *See* Brief of *Amici Curiae* International Human Rights Organizations and International Law Experts in Support of Petitioners.

The Second Circuit majority in *Kiobel* completely disregarded "general principles of law" as an independent source of international legal rules. Instead, the majority focused exclusively on customary international law. However, treaties and customary international law are not the only sources of international legal rules. The ICJ Statute identifies "general principles of law recognized by civilized nations" as an important third source of international law, especially when treaties and customary international law do not provide clear answers to questions that arise in litigation. *See* I.C.J. Statute, *supra*, art. 38(1)(c). Therefore, the *Kiobel* majority erred by failing to consult this important source of international law.

According to Professor Manley Hudson – a former Judge of the Permanent Court of International Justice, former Harvard professor, and one of the preeminent American international lawyers of his generation – "general principles of law recognized by civilized nations" are a source of international law that:

> empowers the Court to go outside the field in which States have expressed their will to

> accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in the national law of the various States. It makes possible the expansion of international law along lines forged by legal thought and legal philosophy in different parts of the world.

Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942* 611 (1943). More succinctly, Lord Phillimore, who proposed the formulation now embodied in article 38(1)(c) of the ICJ Statute, had explained general principles as those "accepted by all nations in *foro domestico*." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 25 (1994).

As a source of international law, general principles of law are derived directly from shared features of municipal legal orders. They do not require an intermediate process of uniform practice of States in their relations with each other. Hence, general principles of law must not be confused with customary international law, which depends on universality of the practice of States oriented towards *the international plane*. According to Professor Bin Cheng, a renowned authority on general principles of law as a source of international law:

> In Article 38[(1)(a)] ... custom is used in a strict sense, being confined to what is a general practice among States accepted by them as law. General practice among nations, as well as the recognition of its legal character, is therefore required.... In the definition of the third source of international law [general principles of law recognized by civilized nations], there is also the element of recognition on the part of civilized peoples, but the requirement of general practice is absent.... The recognition of these principles in the municipal law of civilized peoples, where the conception of law is already highly developed, gives the necessary confirmation and evidence of the juridical character of the principle concerned.

Bin Cheng, *supra* at 24.

In a recent case before the International Court of Justice. Judge Simma applied this approach in his separate opinion and "engaged in some research in comparative law to see whether anything resembling a 'general principle of law' within the meaning of Article 38, paragraph 1(c) of the Statute of the Court can be developed from *solutions arrived at in domestic law* to come to terms with the problem of multiple tortfeasors." *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 354 (Nov. 6) (separate opinion of Judge Simma) (emphasis added). On the basis of the recognition of the principle of joint and several liability in the municipal law of both common law and civil law jurisdictions, Judge Simma concluded "that we find

ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy." *Id*.

A. Application of General Principles in this Case Promotes Justice

The preceding argument demonstrates that, in the absence of treaty or custom, general principles of law derived from municipal law offer a rich source of principles of law and justice in the international sphere. The usual concern in relying on general principles of law as a source of international law has always been that their application may lead to distortion or injustice in particular cases. *See, e.g.*, 1 *Oppenheim's International Law* 37 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). Naturally, any concern about distortion or injustice would then require specific and rational considerations that engage reasonable apprehensions. Corporate civil liability for human rights violations engages no such concern. To the contrary, a ruling that corporations cannot be held liable for human rights violations would be unjust: since corporations have extensive rights under international law, it makes no sense to exempt them from liability when they violate the rights of others.

International law has long recognized that corporations have legal personality, which entails certain rights and responsibilities. In the recent case of *Ahmadou Sadio Diallo*, the ICJ dealt with the

question of corporate personality and its consequences as follows:

> The Court notes that the Parties have referred frequently to the case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*. This involved a public limited company whose capital was represented by shares.... As the Court recalled in the *Barcelona Traction* case, "[t]here is ... no need to investigate the many different forms of legal entity provided for by the municipal laws of States." ... What matters, *from the point of view of international law*, is to determine whether or not these [corporate entities] have a legal personality independent of their members.... *In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law*.

Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 190, 194 (May 24) (emphasis added).

Indeed, in the *Barcelona Traction* case itself, the first case in which the ICJ addressed the concept of corporate personality, the Court clearly recognized that "[t]hese [corporate] entities have rights and obligations peculiar to themselves." *Barcelona Traction, supra,* at 34. Similarly, in his commentary on corporations in international law, Professor Peter Muchlinski observed:

> The act of incorporation creates a legal person separate from the owners and managers of the underlying enterprise. This allows for the creation of a separate capital fund to be applied for the purposes of the corporation, in that *the corporation acquires the right* to own its own assets, to enter into contracts in its own name, to pledge its assets to creditors, and to *be held liable for its actions*.

Peter Muchlinski, *Corporations in International Law, in The Max Planck Encyclopedia of Public International Law*, online edition (Rudiger Wolfrum ed., 2008) (emphasis added), *available at* http://www.mpepil.com. There is therefore no question that corporations have obligations for their own errors in international law.

In the *Barcelona Traction* case, the Court recognized the tremendous influence of corporations in international affairs. The Court noted "the profound transformations which have taken place in the economic life of nations." It then added: "These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity." *Barcelona Traction, supra*, at 33.

Speaking about the need to accord corporations recognition in international law, the ICJ continued as follows:

> In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law depend upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction.

Id. Thus, according to the ICJ, international law recognizes that corporations have the powers, duties and liabilities assigned to them by domestic law.

Naturally, to protect the rights of these municipal institutions that have transcended frontiers and exerted such considerable influence in international relations, "calls for a transparent, stable, and predictable investment environment have given rise to specialized rules of international law that offer protection to the assets of corporate investors among others." Muchlinski, *supra*, ¶ 5. Hence, a robust subset of international law has developed – including international commercial arbitration, investment disputes and mixed claim courts – to protect the rights of corporations.

It would then be highly inappropriate to maintain that corporate rights – as opposed to corporate liabilities – are the only jural correlative that flows

from international law's recognition of corporate personality as an incident of the "general principles of law recognized by civilized nations." There is no rational basis for such a conclusion. The jurisprudence of the International Court of Justice flatly negates such a position. So, too, do many international instruments that have imposed legal obligations on corporations. *See* Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. Int'l Econ. L. 263 (2004) (providing a useful summary of these instruments). The claim that international law grants corporations rights without liabilities amounts to a distortion of the idea of corporate personality.

B. The Absence of an International Forum to Enforce Corporate Criminal Liability is Irrelevant

In *Kiobel*, the Second Circuit claimed that the absence of criminal responsibility for "juridical persons" in the ICC Statute resulted from a rejection of the idea during treaty negotiations, thus suggesting that international law is inclined to grant immunity to corporations for human rights violations. *See Kiobel*, *supra*, at 119. This claim lacks evidentiary support. There is contrary information indicating that criminal responsibility for juridical persons, which had been in earlier drafts of the Statute, disappeared from the final document because "time was running out," not because of a deliberate choice to exclude it. *See* Per Saland, *International Criminal*

Law Principles, *in The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* 189, 199 (Roy Lee ed., 1999).

Regardless, it is clear that several States Parties to the ICC Statute have included corporate criminal responsibility in municipal legislation they adopted to implement the ICC Statute. These parallel trends in national legal systems provide further evidence of a "general principle of law recognized by civilized nations," which supports corporate criminal liability for egregious human rights violations.

For example, corporations and other private legal persons can be prosecuted for genocide and crimes against humanity under Article 213-3 of the French Penal Code. If a corporation is found guilty, it can be dissolved, barred from exercising its functions for a certain period, fined, or ordered to make reparation. Additionally, the French government has the power to confiscate part or all of the corporation's assets in accordance with Articles 131-39 and Article 213-3 of the French Penal Code. Moreover, Article 689-11 of the French Code of Penal Procedure, as amended in 2010 to implement the ICC Statute, authorizes French courts to exercise jurisdiction over crimes against humanity and genocide committed abroad by French nationals, including both French corporations and natural persons.

In Canada, section 2 of the Criminal Code and section 1 of the Criminal Code Amendment Act (2003) define the term "persons" to include both human

beings and corporate entities. The Crimes Against Humanity and War Crimes Act, which enables the operation in Canada of the norms contained in the ICC Statute, provides: "Every *person* is guilty of an indictable offence who commits: (*a*) genocide; (*b*) a crime against humanity; or (*c*) a war crime." Crimes Against Humanity and War Crimes Act, c. 24, ch. 4(1) (2000) (Can.). Moreover, section 2(2) of that statute states: "Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Criminal Code." *Id.* at 2(2). Thus, Canadian national law authorizes criminal prosecution of corporations that commit crimes covered by the ICC Statute.

In Australia, the Criminal Code "applies to bodies corporate in the same way as it applies to individuals" with "modifications ... made necessary by the fact that criminal liability is being imposed on bodies corporate." Criminal Code Act, 1995, § 12.1(1) (Austl.). Moreover, a corporation may be found guilty of any offence, including an offence punishable by imprisonment. *See id.,* § 12.1(2). Division 268 of the Australian Criminal Code proscribes "genocide, crimes against humanity, war crimes and crimes against administration of the justice of the International Criminal Court."

Ultimately, though, an objection founded on a perceived absence of a strong norm of corporate *criminal* responsibility in international law amounts to a mere smoke screen. The caution seen in the domestic realm in the area of corporate criminal

responsibility has never restricted the *civil* liability of corporations for the tortious conduct of their agents. There is no doubt that domestic legal systems were once hesitant to impose criminal liability on corporations. *See* Celia Wells, *Corporations and Criminal Responsibility* (2d ed. 2001); Wayne R. LaFave, *Criminal Law* § 13.5 (5th ed. 2010); Sara Sun Beale, *A Response to Critics of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1481, 1493-95 (2009); Andrew Weissmann et al., *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior* (U.S. Chamber Institute for Legal Reform, Oct. 2008). That initial hesitancy was inspired by notions of moral autonomy and personal responsibility for criminal conduct. *See* Andrew Ashworth, *Principles of Criminal Law*, 146-54 (6th ed. 2009). However, the cautious approach to corporate criminal liability has never previously been thought to provide a rationale for restricting the civil liability of corporations for the wrongful acts of their agents. *See* Beale, *supra*, at 1481; *see also* Int'l Comm'n of Jurists, 3 *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes* (2008).

IV. Corporate Civil Liability is Consistent with the Principle of Complementarity Between International and Domestic Legal Regimes

Applying the Alien Tort Statute to impose civil liability on corporations for international human rights violations is wholly consistent with the

principle of complementarity between domestic and international legal regimes. All major international human rights treaties require States to take the necessary steps – consistent with their domestic legal systems and with the provisions of that specific treaty – to adopt the measures necessary to give effect to the rights recognized in the particular treaty.

Article 2(2) of the International Covenant on Civil and Political Rights illustrates this point. That article states: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such other measures as may be necessary to give effect to the rights recognized in the present Covenant." ICCPR, *supra*, art. 2(2). Similar provisions are included in: the International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, *supra*, art. 6; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *supra*, art. 14(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra*, art. 83; the Convention on the Elimination of All Forms of Discrimination against Women, art. 2-8, Dec. 18, 1979, 1249 U.N.T.S. 13; the Convention on the Rights of the Child, art. 2 & 4, Nov. 20, 1989, 1577 U.N.T.S. 3; the Optional Protocol

to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 1, 3 & 4, May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4(2), 6(1) & 6(3), May 25, 2000, T.I.A.S. No. 13,094, 2173 U.N.T.S. 222; the Convention on the Rights of Persons with Disabilities, art. 4, 7 & 8, Dec. 13, 2006, 2515 U.N.T.S. 3; and the International Convention for the Protection of all Persons from Enforced Disappearance, art. 3, 4 & 6, May 1, 2007, 46 I.L.M. 441.

None of these treaties excludes corporations from the set of persons whom the State is required to regulate for the purpose of achieving complete protection of international human rights.

The principle of complementarity – which emphasizes national legal mechanisms as important instruments for enforcing both treaties and customary international law – is a rule of both necessity and good faith among nations, given the dearth of international mechanisms for enforcing international law. *See* Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory & Practice of Enforcement* 328 (2008).

The principle of complementarity that is consistently found in contemporary international human rights treaties comports fully with what Vattel described as a mutual duty of nations to support and promote the international order as the "society of the

human race." Emmerich de Vattel, *The Law of Nations* (Charles G. Fenwick trans.), Book II, chap. I, at 113-14 (1916). By virtue of this principle of customary international law, nations "owe one another all the duties which the safety and welfare of that society require." *Id.* at 113.

An interpretation of the Alien Tort Statute that encompasses corporate liability for violations of international human rights law, in accordance with ordinary U.S. domestic principles of corporate liability, is indeed an essential component of the complementarity between international law and its enforcement through domestic legal mechanisms.

V. Corporate Civil Liability is Consistent with the Idea of Orderly Redress of Grievances According to the Rule of Law

Finally, it is worth recalling recent events involving people who sought extra-legal solutions because they felt excluded from the rule of law. Such events reveal the folly of those who would place corporations beyond the rule of law when they are implicated in gross international human rights violations. Indeed, such events call to mind a crucial forewarning that motivated the adoption of the Universal Declaration of Human Rights in 1948 – an instrument correctly described by the late Lord Bingham of Cornhill as "the great post-war statement of principle associated with the name of Mrs. Eleanor Roosevelt." Tom Bingham, *The Rule of Law* 6 (2010). The Universal

Declaration expressed that warning in the following terms: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Universal Declaration, *supra*, Preamble. It would be mistaken to consider that oppression, in the manner of gross human rights violations, is the preserve of wicked governments, never effected or supported by powerful corporations.

Here, one recognizes the accuracy of the observation that "legal theory will never be as precise as physics." Thomas Smith, *The Uses and Abuses of Corporate Personality*, 2 Stan. Agora 69, 70 (2001). International law certainly shares this shortcoming, perhaps more so than any other branch of law. Yet international law, despite its imperfections, must be allowed a continued role as an avenue for orderly expression and resolution of grievances, in order to deny the powerless an excuse to resort to illegitimate means of settling scores with the powerful. In answering the question about the *raison d'être* of international law, Martti Koskenniemi reminds us that international law:

> provides the shared surface – the *only* such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion – 'outlawry' – of the other. Its value and its misery lie in its being the fragile surface of

> political community among social agents – States, other communities, individuals – who disagree about social purposes but do this within a structure that invites them to argue in terms of an assumed universality.

Martti Koskenniemi, *What is International Law For?*, *in International Law* 89, 110-11 (Malcolm D. Evans ed., 2003).

These considerations surely demonstrate the short-sightedness of the strategy of putting corporations beyond the rule of international law. It is simply not in anyone's best interest, least of all the corporations themselves.

CONCLUSION

For the reasons stated above, corporations should not be exempt from tort liability under the Alien Tort Statute for violations of the law of nations such as torture, extra-judicial killing and crimes against humanity.

Respectfully submitted,

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