UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION	**02 MDL 1499 (SAS)**
This Document Relates to:	
LUNGISILE NTSEBEZA , *et al.*, **Plaintiffs,** **-against-** **DAIMLER AG, *et al.*,** **Defendants.**	**02 Civ. 4712 (SAS)** **02 Civ. 6218 (SAS)** **02 Civ. 1024 (SAS)**
SAKWE BALINTULO, *et al.*, **Plaintiffs,** **-against-** **DAIMLER AG, *et al.*,** **Defendants.**	**03 Civ. 4524 (SAS)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER FINDING CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES & STATUTES

OTHER AUTHORITIES

Pursuant to this Court's request in its December 26, 2013 Order (ECF No. 256 at 4-5), the *Balintulo* and *Ntsebeza* Plaintiffs respectfully submit this memorandum in support of Plaintiffs' Motion for an Order Finding Corporate Liability Under the Alien Tort Statute ("ATS").

I. Introduction

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), called into serious question the Second Circuit's prior holding in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*") that corporations cannot be sued under the ATS, 28 U.S.C. § 1350. Like the other four circuits that have addressed the question, this Court should recognize that corporations may be held liable for violations of the law of nations, just as they can be for garden variety common law torts. Second Circuit precedent demonstrates that courts are not bound by prior decisions that have been called into question by the Supreme Court. *See, e.g.*, *United States v. Plugh*, 648 F.3d 118, 124 (2d Cir. 2011). Recognizing that *Kiobel II* undercut the rationale and holding of *Kiobel I*, in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), the Second Circuit remanded the question of corporate liability under the ATS, *id.* at 174. In light of *Licci*, this Court ordered additional briefing on whether a corporation may be liable under the ATS. *See* Order, 2013 WL 6813877 (Dec. 26, 2013).

Kiobel I is no longer binding law in the Second Circuit on the issue of corporate liability. By reaching extraterritoriality, which is a merits issue, *see Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), the Supreme Court in *Kiobel II* took jurisdiction over the corporate defendant. In taking jurisdiction over the corporate entity, the Court squarely contradicted the holding of the Second Circuit that, under the ATS, courts lack subject matter

jurisdiction over corporate defendants. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 94 (1998) (holding courts must resolve jurisdiction before addressing merits issues). Because *Kiobel I* relied entirely on the premise that corporate liability is a question of subject matter jurisdiction, its holding is no longer binding in light of *Kiobel II* and *Steel Co.*

Furthermore, it is clear that corporations may be liable under the ATS: *Kiobel II* itself provides such guidance. *See Kiobel II*, 133 S. Ct. at 1669 (discussing "corporate presence" and corporate defendants and noting that they may be liable under different factual circumstances). Moreover, *Kiobel I* now stands alone as the only circuit level opinion failing to recognize corporate liability under the ATS. Most recently, in *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013), the Ninth Circuit "conclude[d] that corporations can face liability for claims brought under the [ATS]," *id.* at 1049. Every other appellate court that has considered the issue of corporate liability has likewise held that corporations may be liable under the ATS. *Flomo v. Firestone*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747-48 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). In these cases, courts have recognized that corporate liability under the ATS is derived from federal common law, and that federal common law plainly permits corporate liability. The structure, history, and purpose of the ATS each further support that conclusion. Thus, this Court should find that corporations have no special immunity under the ATS.

II. Procedural History

The two cases before this Court allege that Defendant corporations are liable for violations of customary international law perpetrated in Apartheid South Africa. These

proceedings began as over a dozen distinct cases, only two of which remain. *See* Complaint, *Khulumani v. Barclays Nat'l Bank Ltd.*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 24, 2008); Complaint, *Ntsebeza v. Daimler AG*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 27, 2008). They were consolidated for pre-trial proceedings before this Court. In 2004, Judge Sprizzo granted Defendants' motion to dismiss on the grounds that aiding and abetting liability is not actionable under the ATS. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-55 (S.D.N.Y. 2004), *rev'd sub nom., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam). Plaintiffs appealed, and, in October 2007, the Second Circuit affirmed in part and reversed in part. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). The Circuit reinstated Plaintiffs' ATS claims, expressly holding that "a plaintiff may plead a theory of aiding and abetting liability under the ATS." *Id.* at 260. Moreover, the Circuit vacated the lower court's holding that prudential concerns warranted dismissal, remanding for further analysis. *Id.* at 261-64.[1]

After remand, Petitioners amended their complaints, withdrawing claims against dozens of defendant corporations. *See Khulumani* 2008 Complaint; *Ntsebeza* 2008 Complaint. Following subsequent motions to dismiss, this Court granted in part and denied in part Defendants' motions. *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009). The remaining Defendants asked the Court to certify certain issues for immediate interlocutory appeal, but the Court denied their motion. *In re S. Afr. Apartheid Litig.*, 624 F. Supp. 2d 336, 339 (S.D.N.Y. 2009).

[1] Defendants petitioned to the Supreme Court for certiorari, but four Justices recused themselves. As the Court was unable to muster the requisite quorum of six justices, it affirmed the Second Circuit decision in a non-precedential summary order. *See American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (affirming under 28 U.S.C. § 2109).

Defendants then appealed, arguing that the political question doctrine provided grounds for immediate appeal under the collateral order doctrine. *See* Brief of Appellants, No. 09-2778-CV (2d Cir. Aug. 14, 2009). Plaintiffs filed a motion to dismiss the appeal based on the lack of appellate jurisdiction. The panel did not reach the jurisdictional issue, instead reconstituting itself as a merits panel and requesting supplemental merits briefing. *See* Order Requesting Supplemental Merits Briefing, No. 09-2778-CV (2d Cir. Sept. 10, 2009). Following oral argument in January 2010, the appeal remained pending until the Supreme Court decided *Kiobel II*. Then, following the Supreme Court's decision in *Kiobel II*, the Second Circuit in April 2013 requested simultaneous supplemental briefing on the impact of that decision on the pending actions. *See* Order Requesting Supplemental Briefing on the Impact of *Kiobel*, No. 09-2778-CV (2d. Cir. Apr. 19, 2013).

Without oral argument, in August 2013, the panel denied Defendants' request for mandamus relief and declined to decide whether it had appellate jurisdiction under the collateral order doctrine. *Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013). In explaining its denial of mandamus relief, the panel discussed the application of the new *Kiobel II* extraterritoriality presumption to the allegations in Plaintiffs' complaints, suggesting that Defendants would prevail at the district court on a motion for judgment on the pleadings. *Id.* at 189-92. The panel also lifted the stay on proceedings in the District Court. *Id.* at 192. Plaintiffs petitioned for a rehearing or a rehearing *en banc*, which was denied in November 2013. Order Denying Petition for Rehearing En Banc, No. 09-2778(L)-cv (2d Cir. Nov. 7, 2013).

Defendants then submitted letters to this Court, requesting that the Court enter judgment in their favor. Letter from Defendants' Counsel to Court, *In re S. Afr. Apartheid Litig.*, No. 02 MDL 1499 (S.D.N.Y. Nov. 14, 2013); Letter from Defendants' Counsel to Court, *In re S. Afr.*

Apartheid Litig., No. 02 MDL 1499 (S.D.N.Y. Nov. 13, 2013). The *Balintulo* and *Ntsebeza* Plaintiffs opposed Defendants' request for dismissal and requested permission to brief unresolved issues, including the matter of whether corporate liability exists under the ATS. Letter from Petitioners' Counsel to Court, *In re S. Afr. Apartheid Litig.*, No. 02 MDL 1499 (S.D.N.Y. Nov. 26, 2013). This Court subsequently provided Plaintiffs an opportunity to brief whether a corporation may be liable for a violation of the ATS. Order, 2013 WL 6813877 (Dec. 26, 2013).

III. *Kiobel I* is No Longer Binding Law on the Question of Corporate Liability

Kiobel II directly conflicts with the Second Circuit's corporate liability holding in *Kiobel I* and thus casts serious doubt on the viability of *Kiobel I*. *See Kiobel II*, 133 S. Ct. at 1664, 1668; *Kiobel I* 621 F.3d at 145. In *Kiobel I*, the panel concluded that the ATS does not provide subject matter jurisdiction over claims against corporations. 621 F.3d at 149. By contrast, in reaching the merits issue of extraterritoriality in *Kiobel II*, the Supreme Court took subject matter jurisdiction over the corporate defendant—as it must to reach a merits issue. *See Steel Co.*, 523 U.S. at 88-89, 94-95 (jurisdiction must be established before reaching merits questions); *see also Morrison*, 130 S. Ct. at 2877 (holding that extraterritoriality is a merits question). In doing so, the Supreme Court in *Kiobel II* either found that 1) the question of corporate liability is one of subject matter jurisdiction, but unlike *Kiobel I*, that corporations may be liable, or 2) the question of corporate liability is a merits question.[2] Either way, the Court disregarded and contradicted the core holding of *Kiobel I*. Under these circumstances, the law of this Circuit permits this Court to reexamine the corporate liability issue. *See United States v.*

[2] *See* Brief of Civil Procedure Professors as *Amici Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) ("*Kiobel II*"), 2011 WL 6813564, at *7-16 (discussing scope of liability as merits issue).

Plugh, 648 F.3d 118, 123-24 (2d Cir. 2011). The *Licci* panel recognized that *Kiobel II* called *Kiobel I* into question, but in the absence of briefing at the appellate level, remanded the case to the district court to address the status of *Kiobel I* in the first instance. *See Licci*, 732 F.3d at 174. *Kiobel I* is thus no longer binding precedent on this Court.

A. Pursuant to the Rule That Second Circuit Precedent May Be Revisited After a Conflicting Supreme Court Decision, the Licci Court Recognized That Kiobel II Created Serious Doubt About the Holding of Kiobel I

An appellate panel in this Circuit is bound by a decision of a prior panel "unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or [the Second Circuit] *en banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (quoting *United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997)). Precedent should "not rigidly bind" courts, which may "depart from [their] prior legal pronouncements when the circumstances of the case warrant." *United States v. Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974). One such circumstance is when "there has been an intervening Supreme Court decision that casts doubt on [Second Circuit] controlling precedent." *Plugh*, 648 F.3d at 124 (quoting *Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007)); *see also Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004). Importantly, the intervening Supreme Court decision "need not address the precise issue decided by the panel." *Plugh*, 648 F.3d at 124 (quoting *In re Zarnel*, 619 F.3d 156, 168 (2d. Cir. 2010)). For instance, as Judge Cabranes explained, although a Supreme Court case may have only "subtly disturbed the law of [the] Circuit," *Wojchowski*, 498 F.3d 99 at108 (quoting *Binder & Binder PC v. Barnhart*, 399 F.3d 128, 134 (2d Cir. 2005)), the case's effect may be "nevertheless

fundamental" and require the panel to find a previous Second Circuit decision is no longer good law, *id.* at 108-09.[3]

The *Licci* panel applied this rule to reopen the corporate liability issue in the wake of *Kiobel II*. By remanding the case to the lower court, the *Licci* panel recognized the impact of *Kiobel II* on the Second Circuit's decision in *Kiobel I* regarding whether corporate liability is a question of subject matter jurisdiction:

> Because the issue of subject matter jurisdiction was not briefed on appeal [in the instant case], because the Supreme Court's opinion [in *Kiobel II*] did not directly address the question of corporate liability under the ATS, and in light of the other claims brought by the plaintiffs, we now think it best for the district court to address this issue in the first instance.

732 F.3d at 174. In remanding the corporate liability issue, the Second Circuit exercised its authority to instruct the district court to evaluate whether the holding and reasoning of *Kiobel I* remain valid.[4] Importantly, the *Licci* court highlighted that its decision to remand was motivated by the Supreme Court's decision in *Kiobel II*. Moreover, the issues it remanded were among those expressly decided by the Second Circuit in *Kiobel I*. Had the *Licci* panel viewed *Kiobel I*'s holding on corporate liability to be binding, it could and should have decided that issue. The *Licci* panel thus indicated the inconsistency of the two decisions and reopened the corporate liability issue. Based on Second Circuit law regarding intervening Supreme Court opinions,

---

[3] Under the law of this Circuit, even the dictum of an intervening Supreme Court decision is entitled to significant deference. *See United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir. 1989) ("Nonetheless, the [Supreme Court] *Sedima* dictum was entitled to far greater deference than [Second Circuit] *Ianniello* gave it. Moreover, the language of the statute and the legislative history support the essential point of that dictum.").

[4] In *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), the Second Circuit denied a writ of mandamus, and thus did not take jurisdiction over the appeal, *id.* at 182. While opining on the meaning of *Kiobel II*, the *Balintulo* panel did not discuss whether *Kiobel I* remained binding. *See id.* at 181 n.6 (referring to *Kiobel I* only in passing in discussion of history of *Apartheid Litigation*).

Kiobel II, and the *Licci* panel's recognition that corporate liability is now an open question, *Kiobel I* is no longer binding on this Court.

B. In Reaching the Merits on Extraterritoriality, *Kiobel II* Contradicted *Kiobel I*'s Dismissal Based on Subject Matter Jurisdiction, Thereby Effectively Vacating the Second Circuit's Holding on Corporate Liability

The *Licci* panel correctly identified that *Kiobel II* contradicted *Kiobel I*'s dismissal. While the Supreme Court granted certiorari and heard arguments on the issue of whether corporate liability was a subject matter jurisdiction question, in its *Kiobel II* decision, the Court took jurisdiction over the corporate entity, focusing its opinion on a merits question—extraterritoriality—to dismiss the case. *See Kiobel II*, 133 S. Ct. at 1664. In deciding this merits issue, the Court found that corporate liability was not grounds for dismissal as a subject matter jurisdiction question, thus placing it in direct conflict with *Kiobel I*. *See Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)).

Under *Steel Co.*, a court must address non-merits issues—including questions pertaining to its or a lower court's subject matter jurisdiction—before proceeding to the merits. *See Steel Co.*, 523 U.S. at 94 ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *McCardle*, 74 U.S. (7 Wall.) at 514)).[5] Regardless of whether the court *explicitly* dealt with issues like subject matter jurisdiction, *Steel Co.* makes clear such issues must be resolved before

[5] Nonmerits issues are threshold questions—which include jurisdictional issues and issues such as *forum non conveniens*—and must be decided before reaching merits issues. Cases subsequent to *Steel Co.* have clarified that there is no mandatory sequencing of threshold questions so long as all nonmerits issues are considered before the court proceeds to the merits. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 584 (1999) (finding that *Steel Co.*'s "jurisdiction-before-merits principle" did not mandate a particular "sequencing of jurisdictional issues," and that "there is no unyielding jurisdictional hierarchy" requiring the federal court to adjudicate subject-matter jurisdiction before personal jurisdiction"); *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431-32 (2007) (holding that "a federal court has leeway 'to choose among threshold questions for denying audience to a case on the merits,'" and that *forum non conveniens* is one such ground (citing *Ruhgras*, 526 U.S. at 585)).

reaching the merits. *Steel Co.*, 523 U.S. at 94 (rejecting doctrine of hypothetical jurisdiction, under which court would "assum[e]" jurisdiction for purpose of deciding merits).[6]

In considering the cause of action in *Kiobel II*, the Court clearly reached a merits issue.[7] Specifically, *Kiobel II* considered the merits issue of extraterritoriality, relying squarely on *Morrison*. *See Kiobel II*, 133 S. Ct. at 1661. *Morrison*, a canonical case in modern extraterritoriality doctrine, firmly establishes that extraterritoriality is a merits issue. *Morrison*, 130 S. Ct. at 2877. Writing for the majority in that case, Justice Scalia explained that, "to ask what conduct [the statute in question] reaches is to ask what conduct [the statute] prohibits, *which is a merits question*." *Id.* (emphasis added). He then clarified that "[s]ubject-matter jurisdiction, by contrast, 'refers to a tribunal's 'power to hear a case.'"[8] *Id.* (quoting *Union Pac.*

[6] Before the Court declined to endorse this doctrine of hypothetical jurisdiction, courts of appeal had found it "proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied," 523 U.S. at 84.

[7] The Court has recognized that, while the ATS is a jurisdictional statute, ATS claims are not resolved entirely on jurisdictional grounds. *See Kiobel II*, 133 S. Ct. at 1665; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (rejecting argument that ATS "does no more than vest federal courts with jurisdiction"). Transforming all causes of action issues into jurisdictional questions would contradict the Supreme Court's instruction to differentiate between jurisdictional and merits issues. *See, e.g.*, *Morrison*, 130 S. Ct. at 2877. Whether a cause of action exists calls for a judgment on the merits, not on jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682 (1946). As the Court in *Steel Co.* explained, even where a jurisdictional statute contains some elements of the cause of action, "it is unreasonable to read this as making all of the elements of the cause of action . . . jurisdictional, rather than as merely specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil penalties." *Steel Co.*, 523 U.S. at 90. The *Kiobel II* Court held that the presumption "applies to *claims under* the ATS," not to the ATS itself. 133 S. Ct. at 1669 (emphasis added). Courts have similarly found that causes of action are not subject matter jurisdiction questions and that subject matter jurisdiction will exist for ATS claims so long as they are not "wholly insubstantial and frivolous". *See Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194 (D.C. Cir. 2004) (citing *Bell*, 327 U.S. at 682-83).

[8] The applicability of the ATS to a corporate defendant—as opposed to whether a court may hear an ATS case involving a corporate defendant—should be considered a merits issue because it addresses the substantive reach of the statute. *See Morrison*, 130 S. Ct. at 2877. To decide

Ry. Co. v. Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region, 588 U.S. 67, 69 (2009), in turn quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006));[9] *see also* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel II*, 2011 WL 6425363, at *8-12 (concluding that corporate liability in tort action based on ATS does not implicate court's subject matter jurisdiction).[10]

The *Kiobel II* Court relied heavily on *Morrison* and its conclusion that extraterritoriality is a merits issue. *Kiobel II*, 133 S. Ct. at 1664. Moreover, the issue of whether the defendant's corporate status precluded jurisdiction was before the Court on certiorari. Under *Steel Co.*, the Court could not take "hypothetical jurisdiction" over the Defendant to reach a merits issue. For this reason, the *Kiobel II* Court could not have reached extraterritoriality without first concluding

---

whether corporate liability exists under the ATS, a court must determine whether corporate defendants may be held liable for ATS claims, not whether the federal court has power to hear a case involving a corporate defendant. Thus, *Morrison* strongly suggests corporate liability is a merits issue.

[9] Subsequent cases—including cases in the Second Circuit—confirm that extraterritoriality has been firmly established as a merits issue. Applying *Morrison*, the Second Circuit in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam) held that "whether a United States federal court can properly hear a claim under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 et seq., arising from allegations of a conspiracy which primarily involves foreign actors and foreign acts," *id.* at 30-31, was "properly considered as a question of whether the complaint states a claim for which a United States federal court can provide relief, not as a question of whether the court possesses subject matter jurisdiction to hear the claim," *id.* at 31. The Seventh Circuit reconsidered its prior holding that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") affected subject matter jurisdiction rather than the scope of coverage of the antitrust laws in light of *Morrison*. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). The Supreme Court's opinion in *Morrison* "provide[d] all the guidance [the court] need[ed] to conclude that . . . the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts." *Id.* at 852.

The Southern District of New York also has followed the *Morrison* rule in considering extraterritoriality as a Rule 12(b)(6), rather than 12(b)(1), issue. *See Loginovskaya v. Batratchenko*, 936 F. Supp. 2d 357 (S.D.N.Y. 2013); *Starshinova v. Batratchenko*, 931 F. Supp. 2d 478 (S.D.N.Y. 2013); *Liu v. Siemens A.G.*, No. 13 Civ. 317, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013). There was no discussion of Rule 12(b)(1) in *Loginovskaya* and *Liu*, indicating that this idea of extraterritoriality as a merits issue is firmly rooted in the case law.

[10] Courtesy copies of the *amicus* briefs referenced herein have been sent on a Compact Disc to the Court and Counsel of record via Federal Express.

that the fact that the defendant was a corporation did not bar jurisdiction. Thus, one must conclude—in contrast to *Kiobel I*—that corporate liability does not merit dismissal based on subject matter jurisdiction. To find otherwise would demand the conclusion that the *Kiobel II* Court disregarded *Steel Co.*[11] *Id.*; *see also Daimler v. Bauman*, No. 11-965, 2014 WL113486, at *12 (Jan. 14, 2014) (discussing possible application of *Kiobel II* presumption in ATS case involving corporate defendants without mention of corporate liability). Given the Supreme Court's reasoning, the Second Circuit's holding in *Kiobel I*, which explicitly concludes there is no corporate liability based on subject matter jurisdiction, can no longer be binding law.

IV. Corporations May Be Found Liable Under the ATS

For all the reasons set forth above, *Kiobel I* is no longer the law of this Circuit and this Court is not bound by it. Nor is there any reason to follow the *Kiobel I* panel's rationale. No other appellate court, either before or since *Kiobel II*, has found that corporations may not be liable under the ATS. The Supreme Court's decision in *Kiobel II* has only reinforced this consensus view. *See Nestle*, 738 F.3d at 1049 (noting that *Kiobel II* "suggest[ed] in dicta that corporations may be liable under ATS so long as presumption against extraterritorial application is overcome"). There is good reason for this unanimity in the Circuit courts. The text, history, and purpose of the ATS do not support a principle that excludes corporate defendants from liability under the statute. There is also no principle of corporate immunity whatsoever in international law or any domestic legal system. Corporate liability is a question of federal common law, and it has been a bedrock principle in the United States for centuries that corporations may be sued for the torts that they or their agents commit. *See* Brief of EarthRights

[11] The unlikely alternative is that the Court found corporate liability at the jurisdictional stage—without discussion on this original issue on which it granted certiorari for the case. *See* Brief of Petitioners, *Kiobel II*, 2011 WL 6396550, at *i (addressing question posed by Supreme Court of "[w]hether corporations are excluded from tort liability for violations of the law of nations.").

International as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6813562, at *5-14. In the alternative, should this Court determine that the corporate liability question must be determined on the basis of international rather than federal common law, international law dictates that corporations may be liable for tortious conduct. Every legal system provides for corporate liability for acts of the kind vindicated by the ATS. *See, e.g.*, International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), *available at* http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/. For all these reasons, this Court should recognize the existence of corporate liability under the ATS.

A. Other Circuits and Kiobel II Each Support Corporate Liability Under the ATS

The jurisprudence on corporate liability in other circuits is clear: Every other circuit that has considered the issue of corporate liability, both before and after *Kiobel II*, has explicitly recognized that corporations may be held liable under the ATS. The Seventh, Ninth, Eleventh, and D.C. Circuits each independently concluded that corporate liability exists. *See Sarei*, 671 F.3d at 748, 759-61, 764-65 (finding that ATS "contains no such language and has no such legislative history to suggest that corporate liability was excluded" and concluding that *jus cogens* prohibition of genocide extends to corporations and that international law recognizes corporate liability for war crimes); *Flomo*, 643 F.3d at 1019, 1021 (finding that "corporate tort liability is common around the world" and ultimately concluding that corporate liability is possible under ATS); *Exxon*, 654 F.3d at 41 (establishing that "corporate liability is consistent with the purpose of the ATS, with the understanding of agency law in 1789 and the present, and with sources of international law"); *Drummond*, 552 F.3d at 1315 (finding that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this Circuit is that this

statute grants jurisdiction from complaints of torture against corporate defendants" (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1242 (11th Cir. 2005))).

Several circuits have specifically criticized the *Kiobel I* majority's view on corporate liability. In *Sarei*, the Ninth Circuit concluded *en banc* that Judge Leval's concurrence in *Kiobel I*, which rejected the majority's corporate liability analysis, was the "sounder view." 671 F.3d at 747. In *Flomo*, Judge Posner, writing for a Seventh Circuit panel, criticized the *Kiobel I* majority for relying on incorrect factual premises, 643 F.3d at 1017, misinterpreting *Sosa*'s footnote 20, *id.*, and misconstruing and neglecting to consider crucial international law precedents, *id.* at 1017-19; *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004); *see also* Brief of the Rutherford Institute *Amicus Curiae* in Support of the Petitioners, *Kiobel II*, 2011 WL 6813558, at *5-10 (discussing international precedents). In finding no bar to corporate liability under the ATS, these circuits looked to the text, history, and purpose of the ATS to demonstrate that corporations are permissible defendants under the ATS; and found nothing in federal common law or international law that would provide corporations with immunity from civil liability for claims under the ATS.

The Supreme Court's decision in *Kiobel II* also supports corporate liability. In discussing the facts specific to the case, the Supreme Court in *Kiobel II* concluded that "mere corporate presence" did not suffice to displace the presumption against extraterritoriality. 133 S. Ct. at 1669. Given the question of corporate liability before it, the Court could not have simply overlooked the antecedent question of whether corporations can be held liable at all. Instead, inclusion of the word "corporate" was an acknowledgement of corporate liability under the ATS where something more than presence is found. *Kiobel II* thus indicated that, in some

circumstances where the claims against corporations "touch and concern" the United States beyond "mere corporate presence," the corporate defendants could be liable under the ATS.

B. The Text, History, and Purpose of the ATS Demonstrate that Corporations Are Permissible ATS Defendants

The text of the ATS explicitly limits the category of *plaintiffs* to "aliens," 28 U.S.C. § 1350, but it imposes no comparable limitation on the universe of *defendants*. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (observing that ATS "by its terms does not distinguish among classes of defendants"). That its text excludes no category of tortfeasor from liability underscores that the First Congress intended no differentiation between natural and juridical persons among ATS defendants. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Any natural person or juridical entity responsible for a tort committed in violation of the law of nations is within the scope of tort liability authorized by the ATS. By contrast, in other sections of the First Judiciary Act, Congress did restrict the universe of defendants. *See, e.g.*, An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (limiting defendants to "consuls or vice-consuls"); *see also Exxon*, 654 F.3d at 46 ("Clearly the Judiciary Act evidences that the First Congress knew how to limit, or deny altogether, subject matter jurisdiction over a class of claims and declined to do so with respect to torts in violations of the law of nations and treaties when brought by aliens."); Brief of *Amici Curiae* Professors of Legal History Barbara Aronstein Black et al. in Support of Petitioners, *Kiobel II*, 2011 WL 6813563, at *4-7 (discussing how text, history, and purpose of ATS support recognition of corporate liability).

Congress expressly provided *only* for civil *tort* actions in the ATS. *See Sosa*, 542 U.S. at 720. The lawyers of the era, including Oliver Ellsworth, the drafter of the ATS, fully understood that "tort" referred to a variety of civil wrongs that were actionable against all tortfeasors without

the need for further statutory authorization. *See id.* at 719. In addition, the liability of corporations and other juridical entities for the torts of their agents or employees was well-established by the time of the First Judiciary Act. 1 William Blackstone, *Commentaries* *469. As the D.C. Circuit concluded in *Exxon*, the factors that motivated the First Congress to pass the ATS apply with equal weight to juridical entities as they do to natural persons. 654 F.3d at 47 ("The historical context . . . suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e. corporations, to do so."). The D.C. Circuit thus concluded in that case that "by 1789 corporate liability in tort was an accepted principle of tort law in the United States."[12] *Id.* at 47-48.

The history of the ATS indicates that a central purpose of the statute was to provide an impartial federal forum to adjudicate civil tort actions brought by aliens who had suffered damages attributable to violations of the law of nations. *Sosa*, 542 U.S. at 719-20, 724, 739. The purpose was to ensure that aliens had a federal forum in which to pursue such international law claims free from the parochial prejudices perceived in the state courts of the revolutionary era.[13] *See Sosa*, 542 U.S. at 722 (noting that state common law recognized remedies for

[12] Interpreting the text shortly after its enactment in the context of a claim that U.S. citizens had aided and abetted a French attack on the British colony in Sierra Leone, the 1795 opinion of Attorney General Bradford, cited in *Sosa*, 542 U.S. at 721, acknowledges that a corporation was an appropriate plaintiff under the ATS without any suggestion that juridical persons would not be appropriate parties in an ATS case or that the plaintiff corporation would have to prove its capacity to sue under international law. *See Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57, 59 (1795). If, for example, the raid on Sierra Leone had been aided or abetted by a corporation, Bradford's analysis makes clear that Congress would not have intended to exclude the corporation from liability under the ATS.

[13] The ATS tort remedy was one of the First Congress's specific responses to the inability of the Continental Congress to redress violations of the law of nations. *See Sosa*, 542 U.S. at 716-17;

international law violations). Excluding entity tort liability from the ambit of the ATS would close the federal courts to claims implicating international law. *See Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (High Ct. Err. & App. Pa. 1784). Thus, excluding corporations from the universe of permissible ATS defendants would have the perverse effect of sending alien tort plaintiffs to state courts, precisely the opposite of the drafters' intent, without any basis for such an exclusion in the law of the time. Given the ATS's remedial purpose, there is no reasonable justification to exclude corporations, or any other category of tortfeasor, from its scope. *See Exxon*, 654 F.3d at 47.

Further, *Kiobel II* does not restrict the nature or identity of ATS defendants. The *Kiobel II* Court did not reach the corporate liability question on the merits and placed no restrictions on the class of defendants that can be held liable under the ATS. Indeed, the Court considered only "whether a *claim* may reach conduct occurring in the territory of a foreign sovereign." *Kiobel II*, 133 S. Ct. at 1664 (emphasis added). Additionally, to overcome the presumption against extraterritoriality, the plaintiffs' *claims* must touch and concern the territory of the United States with sufficient force to displace the presumption. *Id.* at 1669. Thus, it is the nature of the claims, *not* the identity of the defendant that determines whether a court can find liability under the ATS.

---

see also William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490, 493 (1986). Congress authorized aliens to bring federal common law tort actions in federal courts for violations of the law of nations to avoid the diplomatic problems that may otherwise result from adjudication of these civil claims in more partial state courts. *See, e.g.*, Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 481-82 (1989); Casto, *supra*, at 492 (citing 27 Journals of the Continental Congress 502-04 (G. Hunt ed., 1912)). Vattel, the leading eighteenth-century scholar on the law of nations, underscored that providing a private remedy for foreigners injured by violations of international or domestic law was an essential means of reducing friction between nations. *See* 2 Emmerich de Vattel, *Law of Nations*, ch. 6 §§ 71-72 (Joseph Chitty, trans. and ed., T. J. W. Johnson & Co. 1867) (1758).

C. The Cause of Action in an ATS Case is Derived from Federal Common Law and Corporate Liability Exists Under Federal Common Law

Among the flaws in *Kiobel I*'s corporate liability analysis were 1) its failure to recognize that the ATS was enacted on the premise that states determine the precise domestic remedial framework for enforcing universally prohibited norms, and 2) its failure to look to federal common law with regard to the question of corporate liability since it is related to loss allocation and rules of decision about the U.S. remedial framework. Courts have explicitly rejected the *Kiobel I* approach on both fronts—recognizing that federal common law is the appropriate source to answer questions about corporate liability and acknowledging that such liability has been established for centuries. *See, e.g.*, *Sarei*, 671 F.3d at 747-54; *Flomo*, 643 F.3d at 1015-21; *Exxon*, 654 F.3d at 40-57.

To effectuate the drafters' desired remedial purpose, the *Sosa* Court held that a tort cause of action recognized under the ATS derives from federal common law, not international law. *Sosa*, 542 U.S. at 719-21. The drafters of the ATS understood that the rules of decision in ATS cases would be found in the common law. *Id.* at 714, 720-21, 724. *See* Brief of *Amici Curiae* Professors of Legal History, *Kiobel II*, 2011 WL 6813563, at *11-14. Although the ATS requires a violation of the law of nations to trigger subject matter jurisdiction, federal common law supplies the rules governing the scope of tort remedies. *Sosa*, 542 U.S. at 714, 720-21, 724. This is precisely the manner in which common law judges handled law of nations cases when the ATS was enacted, and for centuries, corporations have been held liable under the common law.[14]

[14] During the eighteenth century, as now, the law of nations did not provide universal rules governing the domestic litigation of law of nations claims. Where the law of nations did not provide answers, the courts turned to domestic law. *See, e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159 (1795) (Iredell, J.) (finding that rights of French privateer were determined by law of nations but domestic law governed whether captain was privateer); *Booth v. L'esperanza*, 3 F.

Sosa made clear that each State in the international legal system is responsible for implementing its international law obligations in accordance with its own domestic law and institutions. *Sosa*, 542 U.S. at 714, 729-30.[15] *See* Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, *Kiobel II*, 2011 WL 6780141, at *32-34 (discussing nations' obligations to enforce law of nations); Brief of *Amicus Curiae* Navi Pillay, the United Nations High Commissioner for Human Rights in Support of Petitioners, *Kiobel II*, 2011 WL 6780142, at *4-16 (discussing nations' obligations to enforce law of nations). Thus, in implementing this nation's obligations to enforce the law of nations, Congress had the discretion to impose tort liability on any person, natural or juridical, responsible for violating the law of nations, or to exempt juridical entities from this form of liability if it so chose. Congress created no such exception to ATS liability for corporations.[16]

Cas. 885-86 (D.S.C. 1798) (No. 1647) (applying domestic agency principles to law of nations case). Similarly, historically and today, domestic law has governed the tort principles applied in ATS cases once a violation of the law of nations has been found.

[15] The absence of international enforcement mechanisms regarding corporations does not mean there is no corporate liability because international law leaves remedial enforcement issues to domestic legal systems. *See Sosa*, 542 U.S. at 714, 729-30; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-78 (D.C. Cir. 1984) (Edwards, J., concurring) ("[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws."); *Exxon*, 654 F.3d at 42 (quoting *Tel-Oren*, 726 F.2d at 778) (adopting Judge Edwards's concurrence).

[16] *Kiobel I* erred in reading *Sosa*'s footnote 20 to require courts to determine the "scope of liability" in ATS cases by reference to only international human rights law. *Kiobel I* also mistakenly stated that the "scope of liability" included the identity of every kind of potential defendant responsible for the violation. Ignoring the federal common law foundation for ATS causes of action, the *Kiobel I* court found that, under footnote 20, customary international law must identify the particular category of private actor subject to suit under the ATS. *See Kiobel I*, 621 F.3d at 128. As Judge Leval observed in his concurrence, however, "Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are to be treated *identically*." *Id.* at 165 (Leval, J., concurring) (emphasis in original). Because *Kiobel I* interpreted footnote 20 to require the international law analysis it followed, it did not consider the inconsistency between its analysis and *Sosa*'s holding that the cause of action recognized by the ATS is based on federal common

Indeed, tort liability for juridical entities in the United States and England was known to the drafters of the ATS in 1789 and was applied to such entities before and after the ATS. *See, e.g.*, *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 711, 719, 724-25 (H.L.) (awarding tort damages against company for assault and other injuries); *see also Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 125-26 (2003) (citing sources dating to 1793 confirming "common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued"); 1 Blackstone, *supra*, at *463 (among capacities of a corporation are "[t]o sue and be sued"). Juridical entities, like corporations, have historically been subject to civil liability for the acts of their agents. Corporate liability, reflecting the evolution of ancient loss allocation principles in privately enforceable international law,[17] is now a bedrock principle of every modern legal system. *See* Brief for the United States, *Kiobel II*, 2011 WL 6425363, at *22-31.[18]

In direct contrast to *Kiobel I*, corporate liability under federal common law has been recognized by the other circuits to consider the issue because it is such a well-established principle of domestic law within the United States. *See, e.g.*, *Sarei*, 671 F.3d at 747 (quoting *Kiobel I*, 621 F.3d at 153 (Leval, J., concurring)) (agreeing with Judge Leval that "[n]o principle of domestic . . . law supports the . . . conclusion that the norms enforceable through the ATS . . .

---

law. *See* Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, *Kiobel II*, 2011 WL 6780141, at *13-14 (analyzing *Sosa* footnotes 20 and 21).

[17] *See* Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6813580, at *8-15 (arguing that corporate liability under ATS creates appropriate incentives to enhance global economic efficiency).

[18] *Amici* in *Kiobel II* authored briefs showing that corporations are permissible defendants under federal common law. *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6813560, at *7-11; Brief of Former United States Government Counterterrorism and Human Rights Officials as *Amici Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6949344, at *21-26.

apply only to natural persons and not to corporations, leaving corporations immune from suit"); *Flomo*, 643 F.3d at 1015-21; *Exxon*, 654 F.3d at 40-57.

D. Even If Corporate Liability is a Question of International Law, Corporations are Permissible Defendants Under the ATS

Corporate liability also exists under international law principles. Virtually all countries' legal systems provide mechanisms for corporations to be held liable for wrongful conduct. *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, *supra*. Courts determine the content of international law, in part, by reference to general principles, which are derived from the content of national legal systems.[19] *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003) (citing Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat 1055, 1060). U.S. courts have recognized that the ability to sue corporations is a general principle of international law. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 633 (1983) ("FNCB") (discussing veil piercing as general principle of international law, which implies existence of corporate liability); *see also* Brief for *Amicus Curiae* Navi Pillay, *Kiobel II*, 2011 WL 6780142, at *24-38 (discussing significance of general principles of corporate civil liability and general principles in international law). The modern international system has also recognized that juridical entities are not immune from international sanction since at least Nuremberg. *See* Brief of *Amici Curiae* Nuremberg Scholars Omer Bartov et al. in Support of

[19] *Exxon*, 654 F.3d at 54 ("Unlike the manner in which customary international law is recognized through common practice or usage out of a sense of legal obligation, a general principle becomes international law by its widespread application domestically by civilized nations."); *see also* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 24 (2006). General principles constitute international law unless contradicted by custom or treaty. *See* Bin Cheng, at 393. There is no such contradiction relating to corporate liability. *See generally* Brief of *Amici Curiae* International Human Rights Organizations and International Law Experts in Support of Petitioners, *Kiobel II*, 2011 WL 6780140.

Petitioners, *Kiobel II*, 2011 WL 6813570, at *18-30 (discussing legal framework created at Nuremberg that provided for actions under international law against corporations); *see also* Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6425362, at *11-15 (discussing corporate liability for crimes against humanity at Nuremberg and in subsequent international instruments). Thus, even if the statute's remedial framework is derived from international law, rather than federal common law, it is clear that corporate liability is permissible under the ATS.

The fact that all modern legal systems impose liability on corporations for wrongs assures that United States courts are applying universally accepted precepts and not merely American tort principles.[20] As a universal feature of the world's legal systems, corporate liability for serious harms qualifies as a general principle of law.[21] There is no modern legal system that does not impose some form of tort, administrative, or criminal liability on corporations for the types of harms alleged in this case. *See generally* Brief of *Amici Curiae* International Human Rights Organizations and International Law Experts in Support of Petitioners, *Kiobel II*, 2011 WL 6780140; *see also* Brief of *Amici Curiae* International Law Scholars, *Kiobel II*, 2011 WL 6780141, at *15-16; Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l L. 45, 67 (2002). Corporate liability is not an idiosyncratic

[20] The *Kiobel I* majority erroneously categorized general principles as a "secondary" source. 621 F.3d at 141 n.43. General principles are equivalent in stature to treaties and customary international law in Article 38 of the Statute of the International Court of Justice. *See* Restatement (Third) of United States Foreign Relations Law, § 102(1)(c)(1987)("[A] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.").

[21] *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, *supra*; *see also* Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of Petitioners, *Kiobel II*, 2011 WL 6813576, at *11 ("[N]o conclusion about customary law should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute.").

American principle. Including corporations within the universe of permissible ATS defendants is fully consistent with the way in which all legal systems treat corporations for civil liability purposes. *See Exxon*, 654 F.3d 11 (noting, as support for claim that corporate liability is general principle of international law, that "[c]orporate personhood has been recognized by the ICJ upon considering 'the wealth of practice already accumulated on the subject in municipal law'" (quoting *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3, 38-39 (Feb. 20))).

The Supreme Court has already recognized this principle. In *FNCB*, the Supreme Court employed general principles of law relating to corporate veil piercing to hold a corporation liable for a tort in violation of international law. *See* 462 U.S. at 622-25, 630-34. The Court relied on customary international law to establish the primary violation, *id.* at 622-23, but relied on general principles of law to support corporate liability for that violation, *id.* at 628-31. The Supreme Court did not search for an exact, universal symmetry across civilized nations regarding veil piercing as the *Kiobel I* majority did. Instead, the *FNCB* Court recognized that all legal systems shared similar principles and applied those principles to the international law issue at hand. *Id.* at 628-31. *FNCB*'s holding that, under international law, an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances" and that veil piercing is a principle of international law, 462 U.S. at 628 n.20, necessarily presumes that corporations can be sued in their own right under international law. Corporate liability under the ATS is appropriate because international law applies general principles of corporate responsibility to determine the liability of corporate entities created by domestic law.[22]

[22] *Amici* in *Kiobel II* authored numerous briefs demonstrating that corporate liability exists under international law. *See* Brief *Amicus Curiae* for the Brennan Center for Justice at NYU School of Law in Support of Petitioners, *Kiobel II*, 2011 WL 6813566, at *16-20; Brief *Amici Curiae* of

The experience at Nuremberg in the wake of World War II reinforces that corporations are not immune from sanction under international law. *See Exxon*, 654 F.3d at 52-53; *Flomo*, 643 F.3d at 1017-18. At the end of the Second World War, the Allied powers dissolved and seized the assets of German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law. *See, e.g.*, Control Council Law No. 2, "Providing for the Termination and Liquidation of the Nazi Organizations," Oct. 10, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945); Control Council Law No. 9, "Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof," Nov. 30, 1945, reprinted in 1 *id.* 225, *available at* www.loc.gov/rr/frd/Military_Law/enactments-home.html (last visited Jan. 24, 2014) (ordering dissolution of I.G. Farben); *see also* Brief of *Amici Curiae* Nuremberg Scholars, *Kiobel II*, 2011 WL 6813570 (discussing Nuremberg-era jurisprudence). The treatment of I.G. Farben demonstrates that corporations had obligations under international law and were capable of committing international law violations. *See Kiobel I*, 621 F.3d at 179-180 (Leval, J., concurring). The *Kiobel I* court thus wrongly concluded that because German corporations were not criminally prosecuted for their transgressions during World War II, corporate liability does not exist in international law. *Kiobel I*, 621 F.3d at 132-36; *see Flomo*, 643 F.3d at 1017 (finding that *Kiobel I*'s "factual premise" that "corporations

---

Former UN Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in Support of Neither Party, *Kiobel II*, 2012 WL 2165330, at *4-10; Brief of *Amici Curiae* International Human Rights Organizations and International Law Experts in Support of Petitioners, *Kiobel II*, 2011 WL 6780140, at *16-26.

have never been prosecuted, whether criminally or civilly, for violating customary international law" was "incorrect").[23]

V. Conclusion

Given the grave doubt that *Kiobel II* casts on *Kiobel I*, the only way for this Court to respect Second Circuit rules is to reconsider the issue of corporate liability. Precedent demands that this Court conclude that corporations are not immune from liability under the ATS.

January 24, 2014

Respectfully submitted,

/s/ Michael D. Hausfeld

Michael D. Hausfeld
mhausfeld@hausfeldllp.com
Kristen M. Ward
kward@hausfeldllp.com
Hausfeld LLP
1700 K St. N.W. Suite 650
Washington, D.C. 20006
(202) 540-7200
Counsel for Balintulo Plaintiffs

[23] That the governing statutes of international criminal tribunals do not provide for corporate liability is inapposite to the question of whether corporations may be held *civilly* liable. *See Flomo*, 643 F.3d at 1019; *Kiobel I*, 621 F.3d at 172 (Leval, J., concurring). In contrast to international criminal law, there is universal consensus that corporations are civilly liable for the torts of their agents. *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 322-23 (2008) ("[C]ustomary international law has long held that injuries caused by violations of international norms require reparation, including monetary compensation when full restitution is not possible."). Criminal liability for abhorrent conduct is not the sole or most effective means of social control of corporations; civil liability is an alternative means of holding a corporation liable by compensating the victims of such conduct. *Flomo*, 643 F.3d at 1018-19. The goals of criminal law are fundamentally different from the goals of tort law. *Kiobel I*, 621 F.3d at 166-68 (Leval, J., concurring).

/s/ Paul L. Hoffman
Paul L. Hoffman, Esq.
Schonbrun DeSimone Seplow Harris & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Counsel for Ntsebeza Plaintiffs

Jeannine M. Kenney
jkenney@hausfeldllp.com
Hausfeld LLP
1604 Locust St., 2nd Floor
Philadelphia, PA 19103
(215) 985-3270

Tyler R. Giannini
Susan H. Farbstein
International Human Rights Clinic
Harvard Law School
6 Everett Street, Third Floor
Cambridge, MA 02138
(617) 496-7368
On the brief:
Samuel Birnbaum (Harvard Law School '14)
Lynnette Miner (Harvard Law School '14)
Ariel Nelson (Harvard Law School '15)