No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM 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 AMBASSADOR DAVID J. SCHEFFER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international criminal law, corporate social responsibility, and international human rights law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997 to 2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993 to 1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. Ambassador Scheffer led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*]), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia. He has written extensively about the

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[1] All counsel have consented to the filing of this brief through a blanket consent filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

tribunals, including the International Criminal Court, and the negotiations leading to their creation, most recently in his book, *All the Missing Souls*. DAVID J. SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (2012).

Ambassador Scheffer submits this brief out of concern that the United States Court of Appeals for the Second Circuit errs in its analysis of the Rome Statute's exclusion of corporations, or juridical persons, from the personal jurisdiction of the International Criminal Court. He believes this brief is necessary to clarify the meaning of the Rome Statute with respect to the exclusion of corporate liability from its personal jurisdiction. The majority's judgment reflects serious misunderstandings of the Rome Statute and thus, when joined with the other arguments presented in the petitioners' brief that sustain corporate liability under the Alien Tort Statute, should lead this Court to reverse the judgment below.

SUMMARY OF ARGUMENT

The majority in the Second Circuit judgment seriously errs in its understanding of why the Rome Statute excludes corporations from the International Criminal Court's personal jurisdiction. The negotiators' decision in Rome to exclude corporations had nothing to do with customary international law and everything to do with a complex and diverse application of criminal (as opposed to civil) liability for

corporate conduct in domestic legal systems around the globe. Given that diversity, it was neither possible to negotiate a new standard of criminal liability with universal application in the time frame permitted for concluding the Rome Statute, nor plausible to foresee implementation of the complementarity principle of the treaty when confronted with such differences in criminal liability for juridical persons. Additionally, the negotiations in Rome steered clear of civil liability for tort actions by multinational corporations (as well as by natural persons), because civil liability falls outside of the jurisdiction of the International Criminal Court. Thus, no conclusion can be drawn either from the negotiations leading to the Rome Statute or from the absence of corporate criminal liability in the Rome Statute that would preclude national courts from holding corporations liable in civil damages for torts committed on national or foreign territory.

ARGUMENT

I. The Negotiations for the Rome Statute of the International Criminal Court Focused on Corporate Criminal Liability and Not Corporate Civil Liability

The Circuit Court draws from its misinterpretation of footnote 20 of *Sosa*,[2] *Sosa v. Alvarez-Machain*,

[2] Footnote 20 in *Sosa* reads, "A related consideration is whether international law extends the scope of liability for a

(Continued on following page)

542 U.S. 692, 732 n.20 (2004), the requirement that corporate liability be a "specific, universal, and obligatory" legal norm in order to hold Royal Dutch Petroleum Company or any other corporation liable under the Alien Tort Statute. *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 145 (2d Cir. 2010) (quoting *Sosa*, 542 U.S. at 732). In so misconstruing footnote 20, the Circuit Court requires that the character of the tortfeasor must be firmly established as a matter of international law. The Circuit Court then misinterprets the drafting history of the Rome Statute as revealing that the global community lacks a "consensus among States concerning corporate liability for violations of customary international law." *Id.* at 136-137. This reading of the negotiating history is seriously flawed. The lack of consensus at Rome concerned the varied state of corporate *criminal* liability among national laws and did not pertain to corporate civil liability under either national law or international law.

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violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." For an understanding of how the majority misinterpreted footnote 20 in *Sosa*, *see* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory,* 29 BERKELEY J. INT'L L. 334, 364-365 (2011).

A. The negotiators at Rome could not reach a consensus on criminal liability of juridical persons because, unlike that of civil liability, practice varies around the world

There was significant discussion during the Rome Diplomatic Conference in June and July 1998 about a proposal to include juridical persons in the personal jurisdiction of the International Criminal Court. The debate centered on whether the International Criminal Court should have the authority to prosecute corporations for violations of international criminal law and then impose criminal penalties on such juridical persons.

Whereas it is universally accepted that corporations are subject to civil liability under domestic law,[3] practice varies considerably in national systems around the globe on the criminal liability of corporations and the penalties associated therewith. That presented a substantial problem for the negotiators, because the unique complementarity structure of the

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[3] *See, e.g.*, CODE CIVIL [C. CIV.] art. 1382-84 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, § 31 (Ger.); MINPŌ [MINPŌ] [CIV. C.] art. 709, 710, 715 (Japan); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011) ("Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood."). *See generally,* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity.

Rome Statute favors similarity on the most fundamental elements of criminal liability in States Parties' criminal law systems in order to lift much of the burden of prosecution from the International Criminal Court and devolve it to national courts.

A convicted person before the International Criminal Court must be punished with imprisonment, Rome Statute, art. 77(1), but the Court may also order the forfeiture of proceeds, property, or assets derived directly or indirectly from the crime for reparations to the victims. *Id*., art. 75, 77(2). There was no consensus among delegations in Rome about how to impose a criminal penalty comparable to imprisonment, or any other kind of criminal penalty, upon a corporate defendant, and that indecision severely undermined talks about how to extend the Court's criminal jurisdiction to juridical persons.

As Per Saland, the distinguished Swedish Chairman of the Working Group on the General Principles of Criminal Law, explained, it was impossible to reach a consensus on criminal liability of juridical persons in the time allotted:

> One [further difficult issue of substance] which followed us to the very end of the Conference was whether to include criminal responsibility of juridical persons alongside that of individuals or natural persons. This matter deeply divided the delegations. . . . Time was running out, and the inclusion of the criminal responsibility of juridical persons would have had repercussions in the part on

> penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome.

Per Saland, *International Criminal Law Principles, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy Lee ed., 1999). This disagreement before and during the Rome negotiations was centered upon whether corporations can be held criminally liable for the commission of atrocity crimes (namely, genocide, crimes against humanity, and war crimes)[4] or other torts. Negotiators were not addressing civil liability for anyone – natural or juridical persons – in the creation of the International Criminal Court.

B. There is a meaningful difference between civil and criminal liability in the history of the Rome Statute negotiations, in Alien Tort Statute precedent, and in international law

Contrary to the Circuit Court's erroneous reading of *Sosa*, the distinction between civil and criminal liability exists both in the history of the negotiations at Rome and in the Rome Statute itself. Whereas Justice Breyer's defense of the Alien Tort Statute in his

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[4] *See* DAVID J. SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 428-437 (2012).

Sosa concurrence explains that it is acceptable to recognize civil liability where criminal liability has been established internationally, 542 U.S. at 762, the Circuit Court mistakenly denies the antecedent by asserting that it is unacceptable to recognize civil liability where criminal liability has *not* been established internationally, as "international law does not maintain [a] kind of hermetic seal between criminal and civil law." *Kiobel*, 621 F.3d at 146 (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270 n.5 (2d Cir. 2007) (Katzmann, J., concurring) (citing *Sosa*, 542 U.S. at 762-763)). But *Sosa*'s language merely recognizes that civil liability is appropriate under the Alien Tort Statute where the greater justification required for criminal punishment has already been established. The Circuit Court errs in mistaking a sufficient condition for a necessary condition. More fundamentally, *Sosa*'s identification of a greater requisite justification for criminal liability leads not to a similarity between the two types of liability, but a significant difference.

While some countries permit certain civil penalties to arise within domestic criminal actions, *Sosa*, 542 U.S. at 762, the negotiators at Rome could not agree either on criminal liability for corporations or the punishment for "convicting" a corporation, including the formula for imposing civil penalties alongside mandatory criminal penalties. As a result, we decided to retain our narrow focus on criminal liability of natural persons only – under a treaty designed to create an international criminal court – and left civil

damages for both natural and juridical persons out of the discussion and of the court's jurisdiction. To read the failure to agree on and resulting omission of criminal liability for juridical persons under the Rome Statute as an "*express rejection* . . . of a norm of corporate liability in the context of human rights violations," *Kiobel*, 621 F.3d at 139 (emphasis in original), is incorrect.

Indeed, to reach that conclusion would contradict the purpose of Article 10 of the Rome Statute, which confirms that the treaty provisions of the Rome Statute are not designed to limit or prejudice "in any way existing or developing rules of international law." If we negotiators did not intend to prejudice international law in the treaty's express provisions, surely we did not intend to prejudice international law when the text of the treaty remains silent (such as regards corporate civil or criminal liability). To posit that one can infer, under *Sosa*, that lack of criminal liability for juridical persons in the Rome Statute should dictate a lack of civil liability for juridical persons under the Alien Tort Statute, or any nation's domestic laws, is a *non sequitur*, a misunderstanding of the negotiations at Rome, and an illogical reading of *Sosa*.

The U.S. delegation in Rome had no authority, and received no instructions, to negotiate any outcome that would have the effect of denying corporate civil liability under the Alien Tort Statute, particularly following years of federal jurisprudence embracing such corporate liability. If the majority's point of view – that the result of our negotiations would be the

denial of corporate civil liability under the Alien Tort Statute – had been presented to the U.S. delegation in Rome, two things would have happened. First, we instinctively would have denied any such purpose. But to be certain of U.S. intent when confronted with such a viewpoint, we at least would have attempted to seek explicit instructions from the Department of Justice to confirm or deny such an objective as the official policy of the U.S. Government in the Rome negotiations. Yet that scenario never unfolded. The Circuit Court's inference regarding the status of corporate liability in international law as of the close of the Rome negotiations in 1998 is based on an implausible interpretation of what actually transpired there.

However, if the issue simply had been one of civil remedies, and thus consistent with the Alien Tort Statute, the outcome might have been very different, and the proposal for corporate civil liability might well have survived in some fashion in the Rome Statute. In fact, I recently proposed negotiation of an amendment to the nine-year-old Rome Statute that would expand the jurisdiction of the International Criminal Court to include civil liability for corporations found complicit in, or directly committing, atrocity crimes. While corporate civil liability exists as a general principle of law for torts, incorporating into the Rome Statute this fundamental liability for the most egregious torts constituting atrocity crimes would help ensure that if national courts fail to hold corporations accountable domestically, particularly for complicity in or commission of atrocity crimes, the

International Criminal Court would have the jurisdiction to step in. David Scheffer, Ambassador at Large for War Crimes Issues, Address at the 5th Annual International Humanitarian Law Dialogs (Aug. 29, 2011), *available at* http://worldnewstwo.com/5thIHLDAmbDavidSchefferonAlienTortsandInternationalLaw_jCyOx5q2aGA.html. At Rome, however, holding corporations criminally responsible before the International Criminal Court for atrocity crimes and establishing what kind of criminal or civil penalties would ensue was simply a bridge too far, both in light of varied national practices and the time pressure under which we negotiators labored.

Thus, no conclusion about customary international law should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute. No timely political consensus could be reached among negotiators in 1998 to use this particular treaty-based international court to prosecute corporations under international criminal law for atrocity crimes.

II. While the Principle of Complementarity Discouraged Adoption of Corporate Criminal Liability Under the Rome Statute, the Current Trend is Towards More – Not Less – Corporate Criminal Liability

The interpretation of the Rome Statute espoused by the majority, concluding that the treaty purposely meant to express a principle of international law precluding national courts of law – either civil or

criminal – from proceeding against corporations for the commission of atrocity crimes or other violations of international law, is in error. *Kiobel*, 621 F.3d at 139. Negotiations on the Rome Statute operated on the basis of consensus, which meant that political compromises dictated the outcome of many disputes among delegations. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 16-22 (4th ed. 2011). Seeking consensus in such negotiations does not mean that the delegations were confirming a rule of customary international law on every issue set forth in every provision of the treaty. *See*, *e.g.*, Scheffer & Kaeb, *supra* note 2, at 364-365. Indeed, the opposite often occurred, namely, in order to achieve consensus, the result was *not* customary international law but instead a narrow political compromise unique to the creation of an international criminal court. As such, the D.C. Circuit recently concluded that "[t]he Rome Statute . . . is properly viewed in the nature of a treaty and not as customary international law." *Exxon*, 654 F.3d at 35.

A. The principle of complementarity posed significant obstacles to the negotiation of corporate criminal liability at Rome even though corporate civil liability has long been a general principle of law for corporate wrongdoings

The issue before the negotiators of the Rome Statute was whether corporations should be held criminally liable for the same atrocity crimes for which

natural persons can be prosecuted before the International Criminal Court. The fact that negotiators ultimately rejected corporate liability under the Rome Statute had nothing to do with rules of customary international law and everything to do with whether national legal systems already held corporations criminally liable or would be likely to under the principle of complementarity of the Rome Statute.[5]

Complementarity is the fundamental principle enshrined in the Rome Statute that regulates the jurisdictional relationship between the International Criminal Court and States Parties or, in some instances, nonparty states. The expectation of negotiators – as confirmed in Articles 17, 18, and 19 of the Rome Statute pertaining to admissibility – was that national legal systems either 1) would ensure relative conformity in their criminal codes to the subject matter and personal jurisdiction of the International Criminal Court and then exercise the political will to investigate and prosecute atrocity crimes as defined in the Rome Statute against accused perpetrators

[5] "[I]t is clear that [when treaties] establish the possibility of establishing an international court . . . such compacts [are] drafted under the assumption that the international crimes they cover will be prosecuted by national courts. . . . Accordingly, parties to such treaties are obligated to make certain international acts domestic crimes pursuant to domestic law and, at least to the extent the relevant crimes are committed by their nationals or in the territory, are bound to prosecute them." José E. Alvarez, *Alternatives to International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 25, 28 (Antonio Cassese ed., 2009).

falling within the jurisdiction of national courts, or, lacking such political will or capability, 2) would face the reality that the International Criminal Court may proceed with its own investigations and prosecutions. The ideal world, one day, would be an empty docket at the International Criminal Court because national criminal courts are exercising the full responsibility to bring such persons to justice.

This formulation of "complementarity" was expressed in the preamble of the Rome Statute: "*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, pmbl. National courts would be given preference to exercise jurisdiction provided 1) their criminal codes cover the atrocity crimes found in the Rome Statute, and 2) there is a demonstrated will and capability to investigate and prosecute such crimes perpetrated by persons falling within the domestic jurisdiction of that nation.

To have extended the complementarity concept to juridical persons would have required a much higher degree of confidence among delegations that national legal systems across the globe already (in 1998) exercised or would soon have the capacity to exercise criminal jurisdiction over corporations for the commission of atrocity crimes (although there had been acknowledgement of corporate criminal liability in international law even at Nuremberg). *See* Scheffer & Kaeb, *supra* note 2, at 363; *Kiobel*, 621 F.3d at 179-180 (Leval, J., concurring) (describing the liability of

IG Farben as predicate for individual responsibility). Such criminal jurisdiction today exists in an impressive number of national systems, but it was by no means as pervasive in 1998.

Professor William Schabas has written in his landmark textbook about the International Criminal Court:

> Proposals that the Court also exercise jurisdiction over corporate bodies in addition to individuals were seriously considered at the Rome Conference. While all national legal systems provide for individual criminal responsibility, their approaches to corporate criminal liability vary considerably. With a Court predicated on the principle of complementarity, it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law. During negotiations, attempts at encompassing some form of corporate liability made considerable progress. But time was simply too short for the delegates to reach a consensus and ultimately the concept had to be abandoned. (citations omitted)

WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-225 (4th ed. 2011). The Circuit Court majority overlooked all of these realities to assume, erroneously, that the negotiators of the Rome Statute rejected corporate criminal liability because of their failure to discover a rule of customary international law mandating it as such. The

omission of juridical persons from the Rome Statute does not mean that corporations enjoy virtual immunity under international law from either civil or criminal liability; it simply means that, because of the principle of complementarity and its expectation of the uniformity of domestic laws with the Rome Statute, the International Criminal Court was established without corporations being subject to its heavily negotiated criminal jurisdiction.

B. The *Kiobel* majority's view is out of step with the progressive development of international practice since 1998 towards more – not less – corporate criminal liability

The trend in international law since the conclusion of the negotiations on the Rome Statute has been toward more corporate criminal liability, not less, both at the national level and in multilateral treaties. This trend is due largely to domestic legislation in countries around the world that implement the Rome Statute, as well as other international treaties. If guided by the *Kiobel* majority's view, the United States will be turning against the tide and heading in the opposite direction.

Even by 1998, one could point to such common law jurisdictions as the United States, United Kingdom, Canada, New Zealand, and Australia as enforcing criminal law against corporations, albeit under varied approaches and generally not yet for atrocity

crimes. Joanna Kyriakakis, *Corporate Criminal Liability and the Comparative Law Challenge*, 2009 NETH. INT'L L. REV. 333, 340-342. Despite a far more reluctant attitude about corporate liability among civil law jurisdictions, by 1998 a significant number of these countries also had codified some form of criminal liability for juridical persons, including the nations of Denmark, Finland, France, Iceland, Indonesia, Japan, the Netherlands, Norway, the People's Republic of China, Portugal, and South Africa. *Id*. at 341-342.

But a large number of countries, many of which had strong voices in the Rome negotiations in 1998, had not legislated corporate criminal liability into their national criminal codes. These included Argentina, Austria, Belgium, Brazil, Bulgaria, Germany, Greece, Hungary, Italy, Luxemburg, Mexico, the Slovak Republic, Spain, Sweden and Switzerland. *Id*. at 336-348. That simple fact ensured the impossibility at Rome of reaching a consensus on the issue of corporate criminal liability that would be enforceable domestically under the complementarity principle. Further, some nations that had long embraced general principles of corporate criminal liability, like the United States, had not expressed any interest in extending the treaty's jurisdiction to corporations given the rarity, as of 1998, of corporate criminal liability for the commission of atrocity crimes. Such criminal liability was far more ambitious than the court's originally intended design.

In any event, there was only scant attention paid to civil liability for corporations responsible for

atrocity crimes, despite the fact that corporate civil liability is a general principle of law in national legal systems. Instead, the negotiations remained firmly concentrated on criminal liability and punishment for perpetrators of atrocity crimes. Because corporate criminal liability remained a deeply fractured practice from an international perspective, such liability of juridical persons was not incorporated into the treaty.[6]

Since the conclusion of the Rome Statute in July 1998, a number of additional countries have adopted laws enforcing or expanding corporate liability for a range of international crimes, including atrocity crimes. With respect to the latter category of crimes, this liability often has been established through the adoption of domestic implementing legislation related to their ratification of the Rome Statute. *Id.* at 334-335. Examples of these countries include Australia, Belgium, Canada, the Netherlands, and the United

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[6] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15 – July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* 31 n.71, UN Doc. A/CONF.183/13 (Vol. III) ("There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed.").

Kingdom.[7] Elsewhere, countries such as France, India, Japan and Norway have incorporated at least one or more of the Rome Statute's crimes into their domestic laws with potential application for corporations, Ramasastry & Thompson, *supra* note 7, while other countries, including Austria, Luxemburg, Spain and Switzerland have recently introduced forms of corporate criminal liability, although not necessarily in the context of atrocity crimes. Kyriakakis, *supra* note 7, at 336-348; B.O.E. 2010, 152 (Spain); CODE PÉNAL [C. PÉN.] art. 34 (Lux.).

The Circuit Court majority's judgment abandoning corporate liability under the Alien Tort Statute contradicts not only long-standing federal law on both civil and criminal liability for juridical persons, but also stands in stark contrast to the growing number of nations that have embraced corporate liability for atrocity crimes. Rather than witnessing a retreat from corporate liability in international practice since 1998, there has been a marked progression towards adoption of corporate criminal liability among nations joining the International Criminal Court. This trend complements the general principle of civil liability

[7] Some domestic legal systems do not make a distinction between legal persons and natural persons. Joanna Kyriakakis, *Corporate Criminal Liability and the Comparative Law Challenge*, 2009 NETH. INT'L L. REV. 333, 334. *See also*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries*, FAFO, 2006.

firmly established by 1998 for corporate wrongdoing found in practically all legal systems.[8]

The Rome Statute has been a major impetus in the trend towards corporate criminal liability, but so have the many recent multilateral treaties confirming corporate criminal liability for such crimes as terrorism, bribery of foreign public officials in international business transactions, protection of the environment, transnational organized crime, corruption, and perhaps the unauthorized transboundary movement of hazardous wastes.[9] Thus, the *Kiobel* majority's claim, in their misreading of *Sosa*'s footnote 20, that they cannot find a rule of international law

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[8] Judge Richard Posner of the Seventh Circuit Court of Appeals aptly concluded recently: "[W]hile it is true that criminal punishment of corporations is a peripheral method of social control, adopted by few countries outside the Anglo-American sphere, it would move quickly from periphery to center if corporate civil liability were unavailable; and even though civil liability is available, the resistance (outside the Anglo-American sphere) to corporate criminal liability is eroding. [citations omitted] It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of customary international law. That doesn't mean that corporations are exempt from that law." *Flomo v. Firestone Nat'l Rubber Co.,* 643 F.3d 1013, 1019 (7th Cir. 2011).

[9] Joanna Kyriakakis, *Corporate Criminal Liability and the Comparative Law Challenge*, 2009 NETH. INT'L L. REV. 333, 348 ("In contrast to the ICC Statute, there are a number of international and regional instruments that explicitly require States Parties or member states to provide for the liability of categories of legal persons, including corporations, within their national legal systems.").

subjecting corporations to civil liability for the commission of atrocity crimes creates the unfortunate impression of the Second Circuit as an outlier. It is a circuit being driven in reverse gear from the direction long traveled by national courts worldwide for corporate civil liability under general principles of law – the heartbeat of international law itself – and by the growing adoption of corporate criminal liability in a number of legal systems consequent to their implementing legislation for the Rome Statute and ratification of multilateral treaties dealing directly with the critical global issues of our time.

CONCLUSION

The majority in the Second Circuit judgment errs in fundamentally misinterpreting the Rome Statute of the International Criminal Court and the negotiations leading to its conclusion in the summer of 1998. The personal jurisdiction of the Rome Statute is limited to natural persons because no consensus was reached among delegations as to the criminal liability of juridical persons in national legal systems throughout the world. Such a finding would be critical for the necessary operation of the complementarity principle under the Rome Statute. No one, however, was disputing civil liability for juridical persons as a general principle of law in national legal systems globally, which is a significantly different point under a correct reading of *Sosa*. *Sosa* does not reasonably support the proposition that disagreements about international

criminal procedure would negate such a well-accepted general principle of civil liability.

Since the International Criminal Court has no civil liability within its jurisdiction – even over natural persons – the issue of corporate civil liability should prove irrelevant. Further, the omission of corporate liability under the Rome Statute simply reflected the diverse views of delegations about criminal liability for corporations under their national legal systems. It was not a judgment about the status of corporate civil liability as a general principle of law enforceable against corporations in national courts for the commission of torts, including particularly egregious torts that would meet the *Sosa* test for violations of international law under the Alien Tort Statute.

Because the majority misinterpreted the Rome Statute of the International Criminal Court and the negotiations leading to its final text in 1998, and for the other reasons argued in the petitioners' brief, this Court should reverse the judgment below.

Dated: December 20, 2011

Respectfully submitted,

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