No. 10-3675

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BOIMAH FLOMO, *et al.*,
Plaintiffs-Appellants,

v.

FIRESTONE NATURAL RUBBER CO., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:06-cv-627
The Honorable Jane Magnus-Stinson, Presiding Judge

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3675

Short Caption: Boimah Flomo, et al. v. Firestone Natural Rubber Company, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

(Amicus Curiae) Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter LLP; National Chamber Litigation Center, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: [signature] Date: April 5, 2011

Attorney's Printed Name: Lisa S. Blatt

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Attorney's Signature: John B. Bellinger III Date: April 5, 2011

Attorney's Printed Name: John B. Bellinger III

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Attorney's Signature: R. Reeves Anderson Date: April 5, 2011

Attorney's Printed Name: R. Reeves Anderson

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Attorney's Signature: Robin S. Conrad Date: April 5, 2011

Attorney's Printed Name: Robin S. Conrad

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STATEMENT OF INTEREST AND IDENTITY OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") has a direct and substantial interest in this case.[1] As the world's largest business federation, the Chamber directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. The Chamber's members transact business around the world; accordingly, they have been and may continue to be defendants in suits predicated on various theories of third-party liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

In the past two decades, various plaintiffs have filed more than 150 lawsuits against U.S. and foreign corporations in over twenty industry sectors and for business activities in roughly sixty countries. Dozens of major U.S. corporations have been targeted, especially with respect to their activities in developing and post-conflict countries. More than 50% of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions.

Lawsuits such as this one impose heavy burdens on defendant corporations. Mere allegations of human rights violations in ATS suits negatively impact stock values and debt ratings. The lawsuits trigger expensive and burdensome

[1] The Chamber, as *amicus curiae*, submits this brief pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this brief. In compliance with Rule 29(c)(5), no party's counsel authored the brief in whole or part, and no one other than the Chamber or its counsel contributed money for the preparation or submission of this brief.

international discovery and often continue for years of extensive jurisdictional motions. As a result, corporations sometimes elect to settle even dubious ATS lawsuits rather than defend protracted litigation.

Although the Chamber takes no position on the factual allegations in this case, the Chamber unequivocally condemns human rights abuses and unlawful child labor. To that end, the Chamber has repeatedly and resoundingly supported voluntary measures to respect human rights and to strengthen international corporate responsibility. The Chamber's Business Civic Leadership Center, founded in 2000, coordinates the Chamber's efforts to enhance corporate social responsibility and improve long-term social and economic conditions. However, before examining whether any human rights violations occurred in this case, the Court must first ask whether the ATS provides jurisdiction for private plaintiffs to sue corporate defendants who fall outside the scope of the relevant international law. The answer is no.

In this *amicus* submission, the Chamber explains the relevant international law applicable to corporate liability and the practical consequences of extending ATS liability to corporations in contravention of existing customary international law. The Chamber has participated as *amicus curiae* in many of the nation's most significant ATS cases over the past decade. Accordingly, the Chamber believes that its unique perspective can assist the Court in resolving this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court is considering for the first time whether, for purposes of an ATS action, international law extends the scope of liability to corporations. This basic question has lingered for more than two decades without careful examination by courts, even as courts have considered numerous other issues relating to the ATS. Appellants mistakenly interpret this lengthy period of judicial inattention as affirmative proof of corporate liability under customary international law. Pl. Br. 22-23. But international law establishes liability for States and individuals, and not for corporations. After extensive analysis, the Second Circuit arrived "inescapably" at this conclusion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010), and this Court should reach the same outcome here.

Other than the Second Circuit, only one federal court has thoroughly examined the question of corporate liability under the ATS, and it independently reached the same conclusion that an ATS suit cannot proceed against a corporation under customary international law. *Doe v. Nestle S.A.*, --- F. Supp. 2d ---, No. 05-5133, 2010 WL 3969615, at *57-75 (C.D. Cal. Sept. 8, 2010); *see also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321-26 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (concluding that the ATS does not extend to corporations, an issue not addressed in the *per curiam* opinion).[2] Two district

[2] Decisions preceding *Kiobel* did not analyze whether international law extends liability to corporations, or relied on inadequate sources of international law. *See Nestle*, 2010 WL 3969615, at *62-65 (cataloging and criticizing such cases); *Kiobel*, 621 F.3d at 138 (criticizing prior consideration of the issue). As a result, those cases provide little—if any—guidance to the legal question presented here. For example, the Eleventh Circuit concluded in *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252,

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courts in this Circuit subsequently followed *Kiobel*, including the decision below. *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 813-18 (S.D. Ind. 2010); *Viera v. Eli Lilly & Co.*, No. 09-cv-495, 2010 WL 3893791, at *2-3 (S.D. Ind. Sept. 30, 2010).

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established rules that govern the recognition of new causes of action under the ATS. Any new causes of action must be based on "specific, universal, and obligatory" norms of international law, and international law governs whether liability extends to corporations. *Id.* at 732. The traditional sources of international law, including treaties and state practice, lack specific and universal principles of corporate liability. Indeed, the international community has purposefully *rejected* proposals to hold corporations liable for human rights violations. To recognize liability here would violate the Supreme Court's explicit directive in *Sosa* to exercise "great caution" before expanding the scope of the ATS. *Id.* at 727-28.

Given the damaging collateral consequences of ATS litigation, suits must be confined to the narrow scope articulated in *Sosa* and defined by international law. The Second Circuit faithfully applied these principles in *Kiobel*, as did the California district court in *Nestle*. For the reasons set forth below, this Court should adopt *Kiobel*'s holding and affirm the district court's decision in this case.

(continued…)
1263 (11th Cir. 2009), that the ATS extends to corporate defendants. However, that conclusion was based on a precedent that did not even address the issue of corporate liability: In *Sinaltrainal*, the Eleventh Circuit relied on *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), which in turn cited *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). *Aldana*, the source of the Eleventh Circuit's rule, did not consider the issue of corporate liability.

ARGUMENT

I. International Law, Not Federal Common Law, Defines Whether Corporations Are Subject to Liability Under the Alien Tort Statute

In *Sosa*, the Supreme Court concluded that the ATS provides jurisdiction for federal courts to hear "a very limited category" of private claims "defined by the law of nations." 542 U.S. at 712. The Court recognized that this requirement encompassed only a "narrow set of violations" because "'offences against this law [of nations] are principally incident to whole states or nations,' and not individuals seeking relief in court." *Id.* at 715, 720 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)). The Court concluded that the ATS was intended to provide jurisdiction for claims based on the 18th-century international law offenses of piracy, assaults on ambassadors, and violations of safe passage. Yet the Court left the door "ajar subject to vigilant doorkeeping" for a "narrow class" of new causes of action based on violations of the "present-day law of nations." *Id.* at 725, 729.

Setting a "high bar" for recognition of new private claims, the Court stated that any new claims must be based on international law norms universally "accepted by the civilized world" and "defined with a specificity" comparable to the 18th-century paradigms. *Id.* at 725, 727. These limitations were consistent with lower court decisions extending the scope of the ATS to crimes in which the perpetrator can be called "'*hostis humani generis*, an enemy of all mankind.'" *Id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). As described in Part III, *infra*, the Court also warned that judicial attempts "to craft remedies for

the violation of new norms of international law . . . should be undertaken, if at all, with great caution." *Id.* at 727-28.

To determine whether an alleged violation is sufficiently "specific, universal, and obligatory" to support ATS jurisdiction, *Sosa* directs lower courts to look to international law, not to federal common law. *Id.* at 732, 733 (An ATS "claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized."). Federal courts thus are limited to "recognizing" private causes of action for violations "defined by" or "derived from" international law norms. *Id.* at 712, 721, 725. In other words, federal courts, when exercising jurisdiction under the ATS, are "judicially applying *internationally generated* norms." *Id.* at 725 (emphasis added).

The Supreme Court specifically stated in *Sosa* that it is "international law" that must "extend[ ] the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. Concurring in *Sosa*, Justice Breyer confirmed that "[t]he norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." 542 U.S. at 760 (Breyer, J., concurring). "That language," the Second Circuit explained, "requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Kiobel*, 621 F.3d at 127; *id.* at 126 ("[I]nternational law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS.").

Notwithstanding *Sosa*, Appellants maintain that this Court should instead look to federal common law, by which Appellants mean norms of domestic law. Pl. Br. 23-26. Appellants contend that "*Sosa* explicitly held that although jurisdiction under the ATS requires a violation of an international norm, federal common law supplies the contours of an ATS cause of action." Pl. Br. 24. This is incorrect. The only "explicit" reference to the issue of corporate liability in *Sosa* is footnote 20, which instructs the court to look to international law, not domestic common law.[3]

Moreover, federal courts have never ignored international law in deciding issues relating to the ATS in the way Appellants now propose. Courts have consistently looked to international law to resolve substantive questions of liability in ATS litigation, including secondary liability,[4] exhaustion of domestic remedies,[5] official immunity,[6] and legal responsibility.[7] Indeed, plaintiffs in ATS litigation

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[3] Even if the intent of footnote 20 was to reserve the question of whether private actors may be held liable under the ATS in the absence of governmental action, as Appellants argue, the Court nevertheless clearly stated that the question of "scope of liability" is governed by *international* law. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) ("[F]ootnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law.").

[4] *Talisman*, 582 F.3d at 259 ("We agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability.").

[5] *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 829-30 (9th Cir. 2008) (en banc) (looking to international law to determine the scope of an exhaustion requirement and its exceptions).

[6] *Swarna v. Al-Awadi*, 622 F.3d 123, 134 (2d Cir. 2010) ("[M]odern international law has adopted diplomatic immunity under a theory of functional necessity.").

[7] *Kadic v. Karadžić*, 70 F.3d 232, 239-40 (2d Cir. 1995) (looking to international law to determine whether "private individuals [may be] liable for some international law violations").

have urged reliance on international law sources, such as human rights treaties, when it inures to their benefit. But Appellants can show no reason why federal courts should now resort to domestic law to determine whether the ATS applies to particular defendants, especially when *Sosa* said the opposite. "It is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the ATS." *Kiobel*, 621 F.3d at 122.

Finally, using domestic law to determine the scope of liability for violations of international law would create the potential for corporate liability in some countries but not in others, thereby undermining the very principles of international comity upon which the ATS was fashioned. As Justice Breyer explained in *Sosa*,

> In applying [comity] principles [in ATS litigation], courts help ensure that "the potentially conflicting laws of different nations" will "work together in harmony," a matter of increasing importance in an ever more interdependent world. Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.

Sosa, 542 U.S. at 761 (Breyer, J., concurring) (quoting *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). Under the Appellants' approach, the determination of whether a corporate defendant qualifies as "an enemy of all mankind" would vary from border to border. That approach is fundamentally at odds with *Sosa*.

II. Neither Treaty Law nor Customary International Law Extends Liability to Corporations for Alleged Human Rights Violations

Appellants bear the burden of showing that international law extends liability to corporate defendants for human rights violations, *Kiobel*, 621 F.3d at

146; *Nestle*, 2010 WL 3969615, at *70, and they fail to meet the "high bar" established in *Sosa*. As Appellants properly note, the legitimate sources of international law to which this Court must look include—in hierarchical order—international treaties, state practice, and the opinions of judicial tribunals and scholars. Pl. Br. 28 (citing *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003), and the Statute of the International Court of Justice Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993); *see also Sosa*, 542 U.S. at 734-37 (analyzing applicable sources of international law). Appellants acknowledge that no treaty provides corporate liability for the specific claims in this case. Pl. Br. 35 (claiming authority under "customary international law"). The same is true of customary international law. None of the sources of customary international law establishes that corporations may be held liable for human rights violations. A review of these sources of international law "lead[s] inescapably to the conclusion that the customary international law of human rights has not to date recognized liability for corporations that violate its norms." *Kiobel*, 621 F.3d at 125; *id.* at 186 (Leval, J., concurring) (agreeing as a factual matter). None of the evidence offered by Appellants and their *amici* detracts from that conclusion.

A. Treaties

None of the major human rights treaties—including the Genocide Convention, the Convention Against Torture, the Apartheid Convention, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and the Convention on the Rights of the Child—impose duties or

liability on corporations. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, Dec. 9, 1948, 78 U.N.T.S. 277 ("*Persons* committing genocide or any other acts enumerated in article III shall be punished, whether they are constitutionally responsible *rulers*, *public officials*, or *private individuals*." (emphasis added)); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4(1), 6(1), 6(3), Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 3, Nov. 30, 1973, 1015 U.N.T.S. 243 (U.S. not a party) ("International criminal responsibility shall apply . . . to *individuals*, *members* of organizations and institutions[,] and *representatives* of the State." (emphasis added)); *see generally* CEDAW, Dec. 18, 1979, 1249 U.N.T.S. 13 (U.S. not a party) (obligations directed to States Parties); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (U.S. not a party) (same). Nor do the Geneva Conventions of 1949 provide for corporate liability. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31.

Professor James Crawford of the University of Cambridge, a "renowned international law scholar"[8] and a Member of the United Nations International Law Commission from 1992-2001,[9] surveyed these and other human rights treaties and

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[8] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003).

[9] The International Law Commission is the premier international organization tasked with codifying existing international law and promoting international law's progressive development. Statute of the International Law Commission, art. 1(1),

Footnote continued on next page

concluded, "As a matter of existing international law, the human rights conventions including the Genocide Convention and the Geneva Conventions do not reach conduct by corporations." Brief of *Amicus Curiae* Professor James Crawford in Support of Conditional Cross-Petitioner at 4-8 ("Crawford Amicus Br."), *Presbyterian Church of Sudan v. Talisman Energy*, 131 S. Ct. 79 (2010) (No. 09-1418). That these treaties do not impose duties or liability on corporations constitutes powerful evidence that States have not intended corporations to be held liable for human rights violations or war crimes.

Appellants cite only one treaty as evidence of a "universal" norm of corporate liability: the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. Pl. Br. 26. But Article 6 of the Convention, upon which Appellants rely, imposes no obligations on corporations. Rather, it requires "*States Parties*" to provide "effective protection and remedies . . . against any acts of racial discrimination which violate" certain rights guaranteed by the Convention. Thus, while Article 6 permits States to impose corporate liability under *domestic* law, it certainly does not to require it under *international* law. International agreements that "do[ ] not of [their] own force impose obligations as a matter of international law" "have little utility under the standard set out in [*Sosa*]." *Sosa*, 542 U.S. at 734.

(continued…)
U.N. Doc. A/CN.4/4/Rev.2 (1982). The 34 members on the Commission are elected by the General Assembly based on their expertise in international law.

Amici Curiae International Law Scholars suggest nine treaties that purportedly reveal a custom of civil corporate liability. ILS Br. 13-15. Six of those treaties were never ratified by the United States,[10] notwithstanding *amici*'s citations implying that the United States is a party to the Apartheid Convention, CEDAW, and the Convention on Civil Liability for Oil Pollution Damage.[11] Refusal by the United States and other Western democracies to ratify a treaty refutes the notion that the treaty establishes a norm of customary international law. *See Flores*, 414 F.3d at 256.[12] In any event, these treaties impose no direct liability on corporations. Instead, the treaties provide that States shall enact domestic legislation "in accordance with [the State's] domestic legal principles" (or similar language). That formulation thus leaves it up to each State to decide whether and

[10] [1] Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196; [2] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126 (signed by the United States but not ratified); [3] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973, 1015 U.N.T.S. 243; [4] CEDAW, Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by the United States but not ratified); [5] International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 (signed by the United States but not ratified); [6] Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251.

[11] *Amici*'s "U.S.T." citations for these conventions—suggesting that the U.S. is party to these agreements—actually refer to entirely different treaties. ILS Br. 15.

[12] *See also United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003) ("[I]t is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle.").

to what extent to establish civil corporate liability, and that discretion underscores that the treaties do not impose norms of *international* law.[13]

Amici's remaining three treaties impose obligations on corporations only in the context of each treaty's particular, narrow subject matter. In joining the Convention Against Transnational Organized Crime, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the International Convention for the Suppression of the Financing of Terrorism, States Parties specifically agreed to subject their corporations to the duties explicitly set forth in those accords. It is far different to assume that these States (and especially non-party States) agreed to impose liability on corporations for *unrelated* norms of human rights law. Thus those three treaties "tell[ ] us nothing about whether corporate liability for, say, violations of *human rights*, which are not a subject of those treaties, is universally recognized as a norm of *customary international law*." *Kiobel*, 621 F.3d at 138. When the district court in *Nestle* collectively considered many of *amici*'s treaties, it concluded, "treaty-based international law provides a rather compelling (although not definitive) argument *against* treating corporate liability as an actionable rule of international law." *Nestle*, 2010 WL 3969615, at *70 (emphasis in original).

Appellants also point to a U.N. General Assembly ("UNGA") resolution and comments by several U.N. "[e]ntities" to bolster their position. Pl. Br. 27-28.

[13] As explained above, CEDAW and the Apartheid Convention did not impose any form of liability on corporations, contrary to the suggestion of the *Amici* International Law Scholars. ILS Br. 14-15.

However, UNGA documents "are not proper sources of customary international law." *Flores*, 414 F.3d at 259. As the Second Circuit has explained, "[b]ecause General Assembly documents are at best merely advisory, they do not, on their own and without proof of uniform state practice, . . . evidence an intent by member States to be legally bound by their principles, and thus cannot give rise to rules of customary international law." *Id.* at 261.

In any event, the non-binding UNGA resolution cited by Appellants (Pl. Br. 27) simply recognizes the non-controversial principle that States should provide reparations for serious human rights abuses; it does not address the existence of corporate liability under international law. Comments of the U.N. Human Rights Committee ("UNHRC"), cited by Appellants (*id.* at 27-28), are similarly non-binding and reflect the personal views of a handful of individuals, not States. Neither the UNGA resolution nor the UNHRC statements reflect or establish a "specific, universal, and obligatory" international law norm of corporate liability for human rights violations. *Sosa*, 542 U.S. at 732. To the contrary, the Special Representative of the U.N. Secretary General—whose work is cited by Appellants as evidence of a "consensus regarding corporate liability for violations of international law" (Pl. Br. 28)—specifically acknowledges the absence of an obligatory international norm, concluding in 2007 that "States have been unwilling to adopt binding international human rights standards for corporations." Report of the Special Representative of the Secretary-General on the Issue of Human Rights

and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007), ¶ 44.

B. State Practice

There is no state practice—much less a "universal" state practice—of extending liability to corporations for violations of international law.[14] Appellants have identified no country in the world with a domestic law that allows corporations to be held liable for violations of international law. Moreover, when confronted with the opportunity to adopt such a norm on the international level, States have consistently refused to grant international tribunals the jurisdiction to impose liability on corporations. *Kiobel*, 621 F.3d at 136-37. For example, the International Military Tribunal at Nuremberg was authorized to punish only those "*persons* who, acting in the interests of the European Axis countries, whether as *individuals* or as *members* of organizations," committed international crimes. London Charter, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288 (emphasis added).

The charters establishing the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") likewise limit liability to "natural persons." ICTY Statute, arts. 2-6, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); ICTR Statute, arts. 2-5, S.C. Res. 955, U.N.

[14] "[W]here there is no treaty . . . resort must be had to the customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *accord Sosa*, 542 U.S. at 734. Like international treaties, "the usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law." *Flores*, 414 F.3d at 250.

Doc. S/RES/955 (Nov. 8, 1994). The U.N. Secretary General has specifically stated that the phrase "natural persons" in the ICTY Statute was used "to the exclusion of juridical persons." *Kiobel*, 621 F.3d at 136. And the Special Court for Sierra Leone—a so-called "hybrid" tribunal—also lacks jurisdiction to impose liability on corporations. Statute for the Special Court for Sierra Leone, arts. 1-7, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (limiting jurisdiction to "persons of 15 years of age"). The absence of jurisdiction over corporations in these international tribunals reflects a decision by the international community that criminal liability for war crimes and human rights violations should not extend to corporations.

The drafting history of the 1998 Rome Statute of the International Criminal Court ("ICC") "provides particularly compelling evidence that there is *not* a global consensus of corporate responsibility for human rights violations under international law." *Nestle*, 2010 WL 3969615, at *70. States specifically rejected a proposal by France to grant the ICC jurisdiction over corporations and other juridical persons. Opponents of the proposal included delegations from the United States, Australia, Ukraine, Cuba, Argentina, Singapore, Venezuela, Algeria, Denmark, Finland, Portugal, Korea, China, Lebanon, Sweden, Mexico, Thailand, Syria, Greece, Egypt, Poland, Slovenia, El Salvador, Yemen, and Iran. *Id.*

A primary objection to the proposal was "the disparity in practice among states." *Id.* According to the Chairman of the drafting committee, "[m]any delegations had difficulty accepting any reference to 'legal persons' or 'criminal organizations,' the reasons given being the problem of implementation in domestic

law, the difficulty of finding acceptable definitions, the implications for the complementarity principle, [and] the possible creation of new obligations for States." *Id.* at *70 n.68 (quoting 2 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, at 135 (2002)). Accordingly the jurisdiction of the ICC is limited to "natural persons." Rome Statute, art. 25(1), July 17, 1998, 37 I.L.M. 1002, 1016. The negotiating history of the Rome Statute "shows that the global community has been unable to reach a consensus regarding corporate responsibility for international human rights violations." *Nestle*, 2010 WL 3969615, at *70; *accord Kiobel*, 621 F.3d at 136-37.

Appellants also claim that there is a "uniform recognition across domestic legal systems that corporations may be subject to liability." Pl. Br. 28. This unsubstantiated claim is contradicted by the negotiating history of the Rome Statute. Even if it were true, it would not demonstrate evidence of a rule of customary *international* law. As the Second Circuit has explained,

> [T]he mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . (into) the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.

Filartiga, 630 F.2d at 888 (quoting *IIT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir.

1975)).[15] There is no indication that nations have enacted domestic corporate liability rules out of a sense of mutual legal obligation toward other States. In any event, domestic rules cannot override the many international human rights treaties that consistently convey the opposite principle under international law.

C. Judicial Decisions

Surveys of national and international decisions also demonstrate the lack of corporate liability under international law. Professor James Crawford was unable to find a single non-U.S. court decision holding a corporation liable for a violation of international law. Declaration of James Crawford S.C., dated Jan. 22, 2009, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-16) ¶¶ 5-10; *see also* Crawford Amicus Br. at 2 ("There is so far no basis in general international law for attributing international legal responsibility to a corporation."). Sir Christopher Greenwood, a preeminent British international law scholar who was elected in 2008 to serve on the International Court of Justice, likewise concluded that courts do not presently hold corporations liable for violations of international law. Brief of *Amicus Curiae* Professor Christopher Greenwood, CMG, QC in Support of Defendant-Appellee at 14 ("Greenwood Amicus Br."), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.

[15] Contrary to the assertion of the *Amici* International Law Scholars (ILS Br. 11-13), *Kiobel*'s requirement that plaintiffs must show evidence of an international law norm of corporate liability does not conflict with the Second Circuit's prior holding in *Filartiga*. While individual perpetrators of torture may not have been subject to civil liability for their offenses prior to *Filartiga*, it was universally accepted that torture committed by individuals violated a specific and obligatory norm of international law.

2009) (No. 07-16), 2007 WL 7073751. Appellants have not identified a single judicial decision of a national or international tribunal outside the United States that imposes liability on corporations for violations of international human rights law. Even if Appellants could find such a case, they still could not show a uniform state practice.

D. Commentary of Scholars

Appellants and their *amici* cite several scholars opining that the Alien Tort Statute and/or international law should provide civil liability for corporations. But scholarly writings "are resorted to by judicial tribunals, not for the *speculations* of their authors concerning what the law ought to be, but for trustworthy *evidence of what the law really is*.'" *Sosa*, 542 U.S. at 734 (quoting *The Paquette Habana*, 175 U.S. at 700) (emphasis added). In contrast to the factual *surveys* of the present state of international law by Professor Crawford and Judge Greenwood, *opinions* expressed by legal scholars are entitled to limited weight as sources of customary international law, constituting a "subsidiary means for the determination of rules of [international] law." ICJ Statute, art. 38(1)(d). "[A]lthough scholars may provide accurate descriptions of the *actual* customs and practices and legal obligations of States, only the courts may determine whether these customs and practices give rise to a rule of customary international law." *Flores*, 414 F.3d at 265. As this Court itself has noted, "'Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations.'" *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir.

2001) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring)).

Without actual evidence of customary international law, Appellants have not sustained their burden to demonstrate that corporate liability is part of a specific, universal, and obligatory norm of international law. Appellants have it exactly backwards in presuming that a "violation of customary international law can be attributed to *any defendant* unless, and until, a norm of customary international law declares otherwise." *Kiobel*, 621 F.3d at 146 (criticizing that presumption); Greenwood Amicus Br. at 18 ("Since international law is primarily an inter-State system, there is no presumption that non-State actors incur liability under international law."). Like the Supreme Court in *Sosa*, this Court, too, must reject ATS liability predicated on "an aspiration that exceeds any binding customary rule having the specificity [the Supreme Court] require[s]." *Sosa*, 542 U.S. at 738.

III. Extending the ATS to Corporations in Contravention of International Law Would Flout *Sosa*'s Directive to Exercise "Great Caution"

In *Sosa*, the Supreme Court repeatedly admonished federal courts to exercise discretion in expanding the scope of the ATS based on present-day norms of international law. On a dozen separate occasions, the majority opinion describes the ATS's scope as "narrow," "modest," or "limited." 542 U.S. at 712, 715, 720, 721, 724, 729, 732. Ten times the Supreme Court instructed lower courts to be "wary" of efforts to expand the scope of the ATS, or to exercise "caution," "restraint," and "vigilance." *Id.* at 725, 727, 728, 729, 733. The Seventh Circuit thus observed in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir 2005), that *Sosa* "emphasize[d] that

'great caution' must be taken to adapt the laws of nations to private rights." 408 F.3d at 885 (quoting *Sosa*). To extend liability to corporations under the ATS in the absence of any basis in international law would flout *Sosa*.

The Supreme Court offered several "good reasons" for judicial restraint. *Sosa*, 542 U.S. at 725. First, the concept of judicial participation in the development of common law has eroded since the enactment of the ATS in 1789. The Court observed that the current "general practice has been to look for legislative guidance before exercising innovative authority over substantive law" and that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 726-27. Second, the Court recognized that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. Third, the Court warned that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." *Id.* These concerns prompted Justice Breyer in concurrence to call for even greater caution, questioning "whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Id.* at 761 (Breyer, J., concurring).

The Supreme Court in *Sosa* was well aware that its decision would, as a practical matter, limit the availability of remedies under the ATS for certain violations of international human rights law. The Court recognized that "modern

international law is very much concerned with [the limits on the power of foreign governments over their own citizens], and apt to stimulate calls for vindicating private interests in [ATS] cases." *Id.* at 727. Nevertheless, the Supreme Court instructed that "attempts by federal courts to craft remedies for the violation of new norms of international law . . . should be undertaken, *if at all*, with great caution." *Id.* at 727-28 (emphasis added). Appellants' proposal to expand the scope of the ATS to reach corporations is flatly inconsistent with the Supreme Court's instruction.

IV. ATS Litigation Chills Overseas Business Activity, Undermines Economic Development, and Interferes with the Foreign Relations of the United States

Arguments to extend the ATS to corporations are at bottom based on a policy preference for more robust international regulation of multinational corporations. Over the last two decades, more than 150 ATS lawsuits have been filed against corporations, wherein plaintiffs usually allege that a corporate defendant aided and abetted primary violations by a foreign government against its own nationals.[16] ATS litigation has touched nearly every major industry sector—extraction, financial services, food and beverage, transportation, manufacturing, communications—and various plaintiffs have targeted international business operations in over sixty countries.[17] Seemingly no American business operation abroad is beyond the specter of an ATS lawsuit. Although only three cases have resulted in judgments

[16] Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. Chamber Institute for Legal Reform, June 2010, p. 17.

[17] *Id.* (cataloging cases).

(two by default) against corporations,[18] the explosion of ATS litigation has caused enormous harms to U.S. companies and their international activities.

ATS lawsuits hurt American businesses in two distinct ways. First, mere allegations of human rights violations in ATS suits cause great financial and reputational damage to corporate defendants. Second, these costs, in turn, deter U.S. business activity abroad. Because American corporations are especially attractive targets for ATS litigation (compared to foreign competitors over which personal jurisdiction might not attach in U.S. courts), ATS lawsuits disproportionately burden and tax American business activities.

The financial and reputational costs for U.S. companies to defend ATS lawsuits are substantial. Courts have permitted ATS lawsuits based on vague allegations of wrongdoing and have employed variable, unpredictable legal standards regarding third-party liability. This uncertainty invites stigmatizing lawsuits that are hard to dismiss even when companies have done nothing wrong. ATS plaintiffs understand that even vexatious lawsuits can taint corporations doing business abroad, damage corporate identities, and chill foreign investment. Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009). Indeed, just filing a complaint can negatively impact a defendant company's stock value and debt rating. Joshua Kurlantzick, *Taking Multinationals*

[18] *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, No. 08-cv-1659 (E.D.N.Y. Aug. 6, 2009) (jury verdict); *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (default judgment); *Aguilar v. Imperial Nurseries*, No. 07-cv-193, 2008 WL 2572250 (D. Conn. May 28, 2008) (default judgment).

to Court: How the Alien Tort Act Promotes Human Rights, World Pol'y J., Spring 2004, at 63.

Once underway, such lawsuits trigger expensive and burdensome international discovery, complicated by the fact that liability often depends on relationships among multiple corporate entities throughout the globe, as well as those firms' connections with a foreign government. ATS suits drag on for many years; it is not uncommon to take a decade or longer to resolve threshold jurisdictional issues. As a result, corporations sometimes elect to settle even dubious ATS lawsuits rather than defend protracted litigation and its concurrent repercussions in the court of public opinion.

As a direct result of these financial and reputational costs, ATS corporate lawsuits chill business activity abroad. The modern business world is growing increasingly globalized. American businesses routinely engage in operations across the world, often with the active encouragement of the United States government to further policies of economic engagement in developing or post-conflict countries. Among other benefits, American businesses that engage in business activities abroad export best business practices that serve as models for indigenous enterprises. However, American businesses operating in those environments face significant risks. "[K]idnappings in Colombia, drug wars in Mexico and violence in Venezuela highlight the risks that persist even in countries that have worked hard to promote stability for business." Brenda Bouw, *The Risky Business of Resources in Conflict Zones*, Globe and Mail, Mar. 8, 2011.

ATS suits against corporations compound those challenges and deter economic development where it is needed most. For example, last summer the United States announced the discovery of massive, untapped mineral deposits in Afghanistan valued between $1 trillion and $3 trillion. The deposits could "fundamentally alter the Afghan economy and perhaps the Afghan war itself."[19] Mining and extraction efforts would "help drive economic growth and reduce unemployment,"[20] "providing the possibility of jobs that could distract from generations of war."[21] As a result, U.S. government officials have publicly called on American businesses to assist in extraction and development efforts.[22] American businesses must weigh those requests against the risk of ATS lawsuits brought by activists that oppose strategic business engagement in Afghanistan.[23] Accordingly, the prospect of ATS litigation harms U.S. global competitiveness and may deter American corporations from investing in post-conflict societies like Afghanistan, even when they are actively encouraged to do so by the U.S. Government.

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[19] James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. Times, June 14, 2010, at A1.

[20] Eltaf Najafizada, *U.S., Afghan Study Finds Mineral Deposits Worth $3 Trillion*, Bloomberg, January 29, 2011.

[21] Risen, *supra* note 19.

[22] U.S. Department of Defense Task Force for Business and Stability Operations, *Mineral Resource Team 2010 Activities Summary*, Jan. 29, 2011, p. 3.

[23] *See generally* Drimmer, *supra* note 16 (examining the use of tactical ATS lawsuits against businesses to penalize and discourage international business activities); Holzmeyer, *supra*, at 290-91 (discussing "synergy between [ATS] litigation and other tactics" and noting how ATS lawsuits expand the "tactical repertoires of grassroots activists as well as those of litigators").

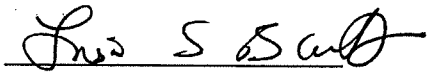
* * *

If U.S. corporations are to be held liable for violating international law—notwithstanding the adverse practical consequences to American business and foreign policy—that policy decision is best left for Congress, which is free to amend the ATS at any time. *Kiobel*, 621 F.3d at 149. In contrast, federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations," *Sosa*, 542 U.S. at 728, especially considering "Congress as a body has done nothing to promote" ATS suits since 1789. *Id.* Given the general practice of federal courts "to look for legislative guidance before exercising innovative authority over substantive law . . ., [i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.* at 726.

CONCLUSION

The Chamber respectfully submits that the district court's opinion should be affirmed.

Respectfully submitted,



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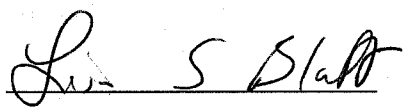

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I, Lisa S. Blatt, hereby certify, pursuant to Circuit Rule 31(e), that a digital version of this brief was furnished to the Court at the time the paper brief was filed. The CD-ROM furnished herewith is free of viruses.

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