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 THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

John W. Whitehead
Counsel of Record
Charles I. Lugosi
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because a decision adverse to the petitioners will sanction the use of the corporate juridical person to commit heinous universally condemned human rights violations that escape civil liability under the ATS. Moreover, a decision affirming the court below in effect results in an abdication of discretionary American domestic federal judicial authority in favor of international legal norms, a result that offends against sovereign independence, patriotism, judicial precedent, policy and statute. Finally, the Rutherford Institute is a staunch defender of the rule of law, and opposes private actor corporate immunity from crimes against humanity, for modern international human rights litigation since the Nuremberg Trials demands that all types of private, as well as public, actors be subject to the universal

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with the Court consenting to the filing of *amicus curiae* briefs in support of either party.

norms accepted by all civilized nations. Those norms demand that certain clear and identifiable crimes against humanity be subject to punishment, both civilly and criminally.

SUMMARY OF THE ARGUMENT

This Court must clarify the meaning of footnote 20 in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and set a bright line to establishing that all private actors, including corporations, are subject to the reach of the ATS. This Court must affirm the foundational principle that corporations are not above the rule of law and are not available as a vehicle to circumvent domestic or international laws that punish participation in egregious human rights violations.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DECLINING JURISDICTION UNDER THE ALIEN TORT STATUTE BY MISINTERPRETING THE DECISION IN *SOSA V. ALVAREZ-MACHAIN* AND FAILING TO APPLY THE PLAIN MEANING OF THE WORDS "TO THE PERPETRATOR BEING SUED" IN FOOTNOTE 20 OF *SOSA*

A. Interpretation by the Panel Majority

Chief Judge Jacobs and Judge Cabranes framed the controlling question in this case from the

text of footnote 20 in *Sosa*: "'Whether *international law* extends 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.'" *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 127 (2d Cir. 2010) (emphasis by court) (quoting *Sosa*, 542 U.S. at 732). They thus held it was modern norms of international law, not American law, that decides the scope of liability to any named defendant.

Their conclusion was justified by the concurring opinion of Justice Breyer (written for himself alone) in *Sosa*, 542 U.S. at 760, which restated footnote 20 by inserting the words, "type of." Jutice Breyer wrote: "The norm must extend liability to the type of perpetrator (*e.g.,* a private actor) the plaintiff seeks to sue." *Id.* The key passage now meant something new: "whether international law extends the scope of liability for a violation of a given norm to the *type of perpetrator* being sued, if the defendant is a private actor such as a corporation or an individual."(Emphasis added).

Judges Jacobs and Cabranes themselves reformulated the above wording in their majority opinion: "'The norm [of international law] must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.'" *Kiobel*, 621 F.3d at 127-28 (quoting *Sosa*, 542 U.S. at 760 (Breyer, J., concurring). They further justified this conclusion by relying on fact that the ATS did not specify who is liable; only that liability is imposed for a "violation of the law of nations." 28 U.S.C. §1350. Thus the majority reasoned that the question as to

corporate liability for crimes against humanity must be deferred to customary international law.

In finding that international law has never extended the scope of liability for human rights violations to a corporation, a type of private actor, the panel majority below concluded that the corporate defendants were not within the jurisdiction of the Court under the ATS, and dismissed the Petitioners' claims for lack of subject matter jurisdiction.

If affirmed, a two-part test rules, governed entirely by customary international law. First, is the kind of conduct complained of within the scope of the ATS, that is, a violation of the law of nations or a treaty of the United States? Second, does the scope of liability under the ATS extend to the alleged type of perpetrator of the tort? Yes, if a natural person or nation state; no, if a private corporate juridical person.

Once the majority concluded that international law controlled both branches of the foregoing test, it was a relatively simple matter for the Second Circuit to dismiss the Petitioners' action.

B. Opinion of Circuit Court Judge Leval

Judge Leval accused his brethren of quoting out of context footnote 20 of Justice Souter's opinion, and attributing to it a meaning opposite of what it intends. He wrote:

> 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 treated *identically*. If the violated norm is one that international law applies only against States, then "*a private actor, such as a corporation or an individual*," who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then "*a private actor, such as a corporation or individual*," has violated the law of nations and is subject to liability in a suit under the ATS. The majority's partial quotation out of context, interpreting the Supreme Court as distinguishing between individuals and corporations, misunderstands the meaning of the passage.

Kiobel, 621 F.3d at 165 (Leval, J., dissenting).

C. Argument

1. *Sosa*

Footnote 20 of *Sosa* arose in the context of the determination of what international norms satisfy federal judicial standards such that a cause of action will be sustained under the ATS's cautious and evolving jurisprudence interpreting international human rights litigation. A related but separate

matter is who can be sued as a defendant in such litigation. Footnote 20 compared an ATS claim against Libya that was dismissed due to a lack of a international legal consensus that torture was a violation, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), to a later genocide claim against a Serbian individual in 1995 in which the court determined there was sufficient international agreement that genocide violated a norm of international law. *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995). The point being made was that at different points in time there may or may not be a violation of a specific, universal and obligatory international norm, and causes of action brought under the ATS are subject to the vicissitudes of the international legal culture and climate.

In this specific context, a perpetrator, regardless of type, may or may not be subject to liability. Footnote 20 describes a potential defendant as a private actor, and specifically mentions the concept of a potential corporate defendant. However, there was no express or implied intent to exclude corporations as potential defendants.

This conclusion is verified by the contents of footnote 21 in *Sosa*, 542 U.S. at 733, which describes several pending class actions brought under the ATS against corporate defendants who were alleged to have committed violations of international human rights norms, by participation in or by abetting, the former apartheid regime in South Africa. *In re South African Apartheid Litigation*, 238 F.Supp.2d 1379

(J.P.M.L. 2002). The message of this footnote has everything to do with consideration of American foreign policy weighed against the interests of the plaintiffs in proceeding with a suit under the ATS, and nothing whatever to do with the scope of liability for the corporate defendants. Indeed, there is no mention whatsoever of any question of the liability of "juridical" persons under the ATS in footnote 21 of *Sosa*.

Only Justice Breyer, writing for himself in his concurring opinion, raises the slender reed of "type of perpetrator," writing "[t]he norm must extend liability to the type of perpetrator (*e.g.* a private actor) the plaintiff seeks to sue." *Sosa*, 542 U.S. at 760 (Breyer, J., concurring). If this concurrence stands for the proposition posited by the panel majority below, then the best that can be said for the panel majority's view is that it rests upon a single concurrence. Apart from this, there is no legal controlling authority supporting the conclusion reached by the panel majority below, a conclusion at odds with long-established precedent holding juridical persons responsible for the harm they cause.

2. Interpretation

Jurisdiction is conferred upon federal district courts to hear tort claims filed by aliens. Thus the first condition to be met to file suit is that the plaintiff is a foreign national. The second condition to be met to satisfy jurisdiction is either a violation of the law of nations or a treaty of the United States or both. The third condition that must be satisfied is that the claims must be brought in tort law. The

ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Significantly, the statute omits in the ATS is any limitation on the category or type of perpetrator. Congress deliberately left open the nature of the defendant under the ATS. Only Congress has the exclusive power to define or punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations. U.S. Const. Art. I, § 8.

Just as there is an enlightened evolving view of the kind of conduct that attracts universal condemnation, there is also a historical open-minded view with regard to fixing liability upon the responsible party, regardless of the legal character or legal personality of the defendant.

In 1795 Attorney General Bradford was of the opinion that a British corporation was an appropriate plaintiff under the ATS for damage sustained in Sierra Leone caused by American citizens and the French navy, who acted in violation of international law. 1 Op. Att'y Gen. 57 (1795). In 1907 the U.S. Attorney General Bonaparte concluded that an American corporation was a proper defendant in an ATS claim brought by Mexican nationals who complained about the wrongful diversion of water from the Rio Grande River, in violation of the principles of international law or by treaty. 26 Op. Att'y Gen. 252, 253 (1907).

When these specific opinions are considered in the historical context of civil liability for all corporate tortfeasors who violate the laws of nations

(see, e.g., *The Case of the Jurisdiction of the House of Peers between Thomas Skinner, Merchant, and the East-India Company* (1666), 6 State Trials 710, 711 (H.L.), it reaffirms that the clear intent of the ATS is to provide broad remedies against all potential defendants under the federal common law of the United States.

Judge Leval correctly identified that corporate liability was found at Nuremburg as part of the process in assigning individual criminal responsibility to corporate officers and employees of Farben, Krupp, and Flick at Nuremburg for corporate violations of the Laws of Nations: IX Trials of War Criminals Before the Nuernberg Military Tribunals (1950) (Krupp); VII, VIII Trials of War Criminals Before the Nuernberg Military Tribunals (1952)(Farben); VI Trials of War Criminals Before the Nuernberg Military Tribunals (1952) (Flick).

The Military Tribunals found that both juridical persons and natural persons were jointly responsible and accountable for unlawful acts that violated international law, and after making that finding, imposed penalties upon those individuals who were criminally responsible. No civil penalties were imposed on the corporations, because no civil claims were made, as the mandate of the Tribunals was confined to criminal subject matter jurisdiction.

Judge Leval observed that scholar Michael Koebele, recognizes that the imposition of tort liability upon a corporation under the ATS is "entirely consistent with international law." Koeble writes: "the ATS, although incorporating international law, is still governed by and forms part

of torts law which applies equally to natural *and legal persons* unless the text of a statute provides otherwise," and there is no bar in international law to prevent a nation state from imposing tort liability on international corporations "because international law leaves individual liability (as opposed to state liability), be it of a natural *or a legal person*, largely to domestic law." Michael Koebele, *Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law Through U.S. Torts Law*, at 208 (Nijhoff 2009). Judge Leval also noted that "when the legal accountability of a company entity is sought, the law of civil remedies may often provide victims with their only legal avenue to remedy. This is because *the law of civil remedies will always have the ability to deal with the conduct of companies, individuals and state authorities*." *Kiobel*, 621 F.3d at 169 (Leval, J., concurring in judgment; quoting 3 Int'l Commission of Jurists, *Corporate Complicity and Legal Accountability: Civil Remedies* 5 (2006) (emphasis added by Leval, J.)

II. CORPORATE TORT LAW IMMUNITY UNDER THE ATS VIOLATES THE RULE OF LAW

The panel majority below violated the rule of law by placing one type of private actor, transnational corporations, above the law governing modern international human rights, while subjecting another type of private actor, natural persons, to liability under the law. The immunity granted to private corporate actors from liability, accountability

and responsibility for participating in and causing egregious human rights violations and crimes against humanity is wholly irrational and contrary to fundamental standards imposed by the rule of law.

A. Corporate Personhood Demands Reciprocal Obligations

Corporations cannot have it both ways: either a corporation is a juridical person with rights and reciprocal responsibilities invested in it under U.S. Const. Amend. 14, or it is time to revisit the issue of conferring legal personhood on corporations, which was, in the opinions of Justices Black and Douglas, wrongfully bestowed, contrary to the original intent of the drafters of the 14th Amendment: *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black J. dissenting); *Wheeler Steel Corp. v. Glander*, 337 U.S. 562, 577 (1949) (Douglas J. and Black J. dissenting); see also Charles I. Lugosi, *If I were a Corporation, I'd be a Constitutional Person Too*, 10 Tex. Rev. L. & Pol. 427, 447 (2006).

Juridical personhood was extended to corporations under the 14th Amendment on the theory that equal protection and due process required this to conform to the rule of law, because corporations were just another way natural persons conducted their business affairs, and their property interests required protection. If the opinion of the panel majority below prevails, and tort liability for violations of international law is restricted to individuals, but not corporations, then an exception to the rule has been created. Personhood is a

package deal: without rights and responsibilities, there is an aberration from the rule of law.

At a minimum, the rule of law means that no public or private person is above the law, exempt or immune from responsibility for any offense that constitutes a crime against humanity, such as torture or genocide, for this behavior is universally condemned as an intolerable breach of international acceptable norms of behavior.

The rule of law is rooted in natural law, and has at its core a moral component that seeks justice as its paramount goal. The "rule of law" is defined as government by laws that people of moral conscience willingly obey, because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. In this society, no individual or juridical person is above the law.

The "rule by law" is the antithesis of the "rule of law," meaning to be governed in any society, including democratic societies, where the government may exercise arbitrary executive powers and may abridge at will constitutional civil liberties. In this society, inequality exists and juridical persons can be immune from liabilities and responsibilities that result in injustice and the lack of accountability.

The main difference between these opposite

concepts in that justice is the defining characteristic in a society governed by "rule of law," and deferential obedience is the defining characteristic in a "rule by law" society. See Charles I. Lugosi, *Rule of Law or Rule By Law: The Detention of Yasser Hamdi*, 30 Am. J. Crim. L. 225, 228 n.17 (2003).

Democratic societies may publicly proclaim government by the rule of law but in fact govern by rule by law. For example, in a rule by law society a private actor, such as a transnational corporation, may successfully circumvent the rule of law by using positive law as a shield from corporate liability for acts or omissions that directly or indirectly contribute to a violation against the Law of Nations.

In this case, permitting corporations to escape civil liability for crimes against humanity is a fundamental departure from the constitutional theory of the rule of law upon which the U.S. Constitution rests. This nation would not have revolted against the King of Great Britain but for the injustice that accompanied the absence of the rule of law in colonial America. See *Declaration of Independence* (listing the "repeated injuries and usurpations" that impelled the Declaration as including "Quartering large bodies of armed troops among us," rendering them "superior to the Civil power" and "protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States"). While historically there have been swings in the struggle between the supremacy of the rule of law versus the rule by law in the United States, as illustrated by the injustice in the *Dred Scott* case and the triumph

of justice in *Brown v. Bd. of Ed. of Topeka, Kan.*, 349 U.S. 294 (1955), to now retreat in favor of positive law and injustice in this case is to invite international scorn and disrespect. There is no principled reason compatible with the rule of law for abandoning the lofty ideals that Americans aspire to, and shaming this nation by putting the administration of justice into disrepute by exempting powerful and wealthy transnational corporations from the rule of law, and deserting the poor and oppressed who suffer cruel, inhuman, and unconscionable oppression whom the ATS was intended to serve.

B. Implied Incorporation and Supremacy of Natural Law

A violation of the law of nations means that the conduct complained of is an egregious human rights violation such as torture, genocide, human slavery or any generally accepted crime against humanity that is universally condemned by the international community. This kind of conduct can never be legalized by nation state positive law, for the lesson of Nuremberg is that natural law always prevails and that any defense by natural persons based upon obedience to lawful orders must be rejected. An actionable tort violation of the law of nations is heinous conduct that is contrary to specific definable universal and obligatory norms and stigmatizes the perpetrator as an enemy of all mankind.

The purpose of the ATS is to provide a civil tort remedy for criminal or other acts, committed in violation of the law of nations or treaties. It follows

from that purpose that the operation of the ATS must conform to the rule of law so that natural law is paramount to positive law.

C. Violating the Law of Nations and Treaties

Examples of acts that violate the law of nations include piracy, infringement of the rights of ambassadors and violation of safe conducts. 4 Blackstone, Commentaries on the Law of England 68 (1769). Since the early years of the ATS, federal courts discarded ancient paradigms in favor of recognizing contemporary violations of the norms of international character accepted by the civilized world as grounds for ATS claims. This covers acts such as the following: torture; extrajudicial killing; cruel, inhuman and degrading treatment of human beings; arbitrary arrest; indefinite detention without charge or trial; forced exile; slavery; war crimes; and any other conduct that falls within the general category of a crime against humanity. It is significant that treaties to which this nation is obligated setting forth these accepted standards of conduct do not limit responsibility or exclude juridical persons.

The United States of America signed on April 18, 1988 and ratified on October 21, 1994 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. Article 1 defines torture and assigns responsibility for infliction, instigation, with consent or acquiescence to a public official or "other person acting in an official capacity." Person is not defined,

nor is it limited. Article 2 provides that not even an exceptional circumstance, such as a public emergency, may be invoked as a justification of torture. As in the Law of Nations, natural law is supreme over positive law, for Article 2 removes the defense of obeying positive law, explicitly stating "an order from a superior officer or a public authority may not be invoked as a justification of torture."

Moreover, Article 14 requires that each State party to the treaty, without exception, "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. If the death of the victim is as a result of an act of torture, his dependants shall be entitled to compensation." Article 16 prohibits undefined acts of "cruel, inhuman or degrading treatment or punishment" that does not fall within the precise definition of torture.

On December 11, 1948 the United States of America signed and on November 25, 1988 ratified the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277. Article 2 defines genocide to include, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Arguably, environmental damage creating conditions of life that puts at risk the survival of a group of people may fall within the scope of this definition. Article 3 broadly defines criminal responsibility to cover acts, attempts, conspiracy and complicity.

Moreover, Article 4 does not limit the assignment of responsibility for genocide, but gives examples of those who could be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Article 5 enables Contracting Parties to enact enabling legislation to "give effect to the provisions of the present Convention" as well as to provide effective penalties for persons guilty of genocide and Article 3 offenses. The use of the words, "and, in particular" link dual obligations of the United States to "give effect" to the Genocide Convention and to criminally punish those parties found guilty. The Convention Against Genocide was inspired by the Holocaust and adopts as its fundamental principle, natural law, the higher law that supersedes all defenses based on positive law.

These two examples of ratified treaties constitute binding law in the United States. Congress meets its responsibility in part with respect to civil remedies to give effect to the Convention Against Torture and the Convention Against Genocide by permitting alien victims to remedy wrongs by utilizing the provisions of the ATS. International treaties establish the wrong; domestic law provides the mechanism to address the civil wrong, and to assign responsibility, regardless of the tortfeasor's juridical status or juridical classification.

Similarly, violations of the Law of Nations define the wrong, and domestic law provides the substance, and governs the enforceability of remedies against the responsible parties. The ATS establishes jurisdiction. The supremacy of the

United States in terms of its independent sovereignty over internal matters in the administration of justice is not abdicated or surrendered. This view is confirmed by this Court in *Sosa*, and is the position of the Rutherford Institute.

The correct interpretation of the ATS in this case is that expressed by Judge Leval in his concurrence below and should be adopted by this Court. As Judge Leval wrote, once it has been determined that (1) the plaintiff is an alien, (2) a proper cause of action has been stated in tort, and (3) the conduct complained of constitutes a violation of the laws of nations or an international treaty, jurisdiction is conferred upon the federal courts. Thereafter, domestic federal common law as defined and explained in *Sosa* governs and corporations are proper defendants. This position is consistent with the rule in *Sosa*, as set out in footnotes 20 and 21 of that decision, and the decisions of the 11th Circuit Court of Appeals. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009), and *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

CONCLUSION

The Second Circuit wrongfully declined jurisdiction under the ATS in this case because of an erroneous interpretation of footnote 20 of this Court's decision in *Sosa.* The decision below and the rule the immunity it establishes for juridical persons who commit acts in violation of universal standard of human rights do not conform to the rule of law, placing one type of private actor, transnational

corporations, above the law. This result is not only contrary to principles deemed fundamental by this nation, but establishes a dangerous precedent that human rights abuses are beyond the reach of the law of this country if perpetrated under the corporate form. By reversing the decision below and establishing that juridical persons are subject to the same standards of law applicable to all other persons, this Court will help deter the kind of abuses universally condemned by the law of nations.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Charles I. Lugosi
Douglas R. McKusick

THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for *Amicus Curiae*