No. 101491 JUN 6- 2011

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDINGS

All parties or petitioners are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

Page(s)

Questions Presented i

Parties to the Proceedings ii

Rule 29.6 Statement ii

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 2

Reasons for Granting the Writ 10

I. Review is Necessary Because the Majority's Decision Conflicts With This Court's Decisions Governing Subject Matter Jurisdiction 11

A. This Court's Decisions Condemn "Drive-By Jurisdictional Rulings" Exemplified By The Decision Below 11

B. Review Is Necessary Because The Second Circuit's Decision Conflicts With This Court's Cases and With Every Other ATS Appellate Decision Involving a Corporate Defendant 16

II. Review Is Necessary Because the Circuit Courts Are Split on the Issue of Corporate Liability Under the ATS and the Issue is One of National Importance 18

III. Review is Necessary Because the Decision Below Directly Conflicts With This Court's Decision in *Sosa* 21

A. The Decision Below Ignores the Plain Language, History and Purpose of the ATS 26

B. The Decision Below Rests on a Fundamental Misinterpretation of Footnote 20 31

C. This Court Decided That Federal Common Law Provides the Cause of Action in ATS Cases and Adopted Judge Edwards' View That International Law Leaves to Domestic Law the Methods by Which a Nation's International Obligations are Implemented Domestically 34

D. The Decision Below Ignored a Major Source of International Law Because General Principles of Law Provide For Corporate Liability For Serious Human Rights Violations in all Legal Systems 37

Conclusion 39

Appendix A A-1
Opinion, Court of Appeals, Second Dist.
Decided: September 17, 2010

Appendix B B-1
Opinion, United States Dist. Court,
Southern Dist. of New York,
Filed September 23, 2006

Appendix C C-1
Order Denying Rehearing en banc,
Filed February 4, 2011

Appendix D D-1
Order Denying Panel Rehearing
Filed February 4, 2011

Appendix E E-1
Orders Denying Amici Curiae Motions
for Leave to File Briefs in Support of
Rehearings, Filed November 1, 2010

TABLE OF AUTHORITIES

Page(s)

CASES

Abdullahi v. Pfizer, Inc.,
562 F. 3d 163 (2d Cir. 2009) 19

Aguinda v. Texaco, Inc.,
303 F.3d 470 (2d Cir. 2002) 19

Air Courier Conference of Am. v. Am. Postal Workers Union,
498 U.S. 517 (1991) 13

Aldana v. Del Monte Fresh Produce, N.A.,
416 F.3d 1242 (11th Cir. 2005) 18, 19

Alperin v. Vatican Bank,
410 F.3d 532 (9th Cir. 2005) 19

Arbaugh v. Y. & H Corp.,
546 U.S. 500 (2006) . . . 11-12, 12, 13, 14, 16

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989) 26

Balintulo v. Daimler AG,
No. 09-2778 -CV, 2009 U.S. App. LEXIS 29244 8

Bano v. Union Carbide Corp.,
361 F.3d 696 (2d Cir. 2004) 19

Barcelona Traction, Light and Power Co. (Belgium v. Spain),
1970 I.C.J. 3 (Feb 5) 38

Beanal v. Freeport-McMoran, Inc.,
197 F.3d 161 (5th Cir. 1999) 19

Bigio v. Coca-Cola Co.,
239 F.3d 440 (2d Cir. 2000) 19

Bowoto v. Chevron Corp.,
621 F.3d 1116 (9th Cir. 2011) 8

Carmichael v. United Technologies Corp.,
835 F.2d 109 (5th Cir. 1988) 19

Chowdhurry v. Worldtel Bangladesh Holding, Ltd.,
No. 08 - Civ. 1659-BMC (E.D.N.Y. Aug. 6, 2009) 8

City of Newport, Ky. v. Iacobucci,
479 U.S. 92 (1986) 17

Deutsch v. Turner Corp.,
324 F.3d 692 (9th Cir. 2003) 19

Doe v. Exxon,
No. 09-7125 (D.C. Cir. argued January 25, 2011) 20

Doe I v. Unocal Corp.,
395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005) 19

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 29

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 35

First National City Bank v. Banco Para El Comerico Exterior De Cuba,
462 U.. 611 (1983) 37,38

Flomo v. Firestone,
No. 10-3675 (7th Cir. argued June 2, 2011) 20

Flores v. S. Peru Copper Corp.,
414 F.3d 233 (2d Cir. 2003) 20, 39

Herero People's Reparations Corp. v. Deutsche Bank, A.G.
370 F.3d 1192 (D.C. Cir. 2004) 17, 19

Jota v. Texaco, Inc.,
157 F.3d 153 (2d Cir. 1998) 19

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 31, 36

Khulumani v. Barclay National Bank, Ltd.,
504 F.3d 254 (2d Cir. 2007) ... 7, 19, 32, 34

Kontrick v. Ryan,
540 U.S. 443 (2004) 11

Licea v. Curacao Drydock Co.,
584 F. Supp. 2d 1355 (S.D. Fla. 2008) 8

Morrison v. National Australia Bank,
130 S. Ct. 2869 (2010) 12, 13, 14, 16

Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,
429 U.S. 274 (1977) 13

Mujica v. Occidental Petroleum Corp.,
564 F.3d 1190 (9th Cir. 2009) 19

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
582 F.3d 244 (2d Cir. 2009) 3, 14

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 11, 12, 14, 16

Romero v. Drummond Co.,
552 F.3d 1303 (11th Cir. 2008) . 6, 8, 18, 34

Sarei v. Rio Tinto,
Nos. 02-56256 & 02-56390 (9th Cir.,
argued September 21, 2010) 20

Sarei v. Rio Tinto, PLC.,
550 F.3d 822 (9th Cir. 2008) 19

Sinaltrainal v. Cola Co.,
578 F.3d 1252 (11th Cir. 2009) 18, 19

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) ..... *passim*

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 13, 15

Swint v. Chambers Cty. Comm'n,
514 U.S. 35 (1995) 16

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 4, 19, 31, 32,35

The Case of the Jurisdiction of the House of Peers Between Thomas Skinner, Merchant, and the East-India Company (1666),
6 State Trials 710 (H.L.) 29

The Paquete Habana,
175 U.S. 677 (1900) 24

United States v. Smith,
18 U.S. 153 (1820) 37

Wiwa v. Royal Dutch Petroleum Co.,
226 F.3d 88 (2d Cir. 2000) 19

STATUTES AND REGULATIONS

28 U.S.C.
§ 1254(1) 1
§ 1350 ..... *passim*

42 U.S.C.
§ 1983 13

OTHER AUTHORITIES

1 William Blackstone, Commentaries,
*474 (1765) 29

Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,*
109 Colum. L. Rev. 1094 (2009) 22

Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts,*
6 Nw. J. Human Rights., 304 (2008) 38

W. Casto, "*The Federal Courts' Protective Jurisdiction On Torts Committed in Violation of the Law of Nations,*"
18 Conn. L. Rev. 467 (1986) 28

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Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 Yale L. J. 550 (2008) 30

Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va. J. Int'l L. 977 (2011) 30

David Scheffer and 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 (2010) 33

Howard M. Wasserman, *The Demise of Drive-by Jurisdictional Rulings*, 105 Nw. U. L. Rev. Colloquy 184 (2011)11, 13

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Esther Kiobel, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at 621 F.3d 111 (2d Cir. 2010). The court of appeals' orders denying Plaintiffs' timely petition for rehearing and for rehearing *en banc* and the opinions filed with those orders (App. C and D) were entered February 4, 2011. The opinion of the district court (App. B) is reported at 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on September 17, 2010. A timely petition for rehearing and for rehearing *en banc* was denied on February 4, 2011. Justice Ginsburg granted Petitioners' application for an extension of time to file this petition up to and including June 6, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, 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.

STATEMENT OF THE CASE

1. This case was filed by twelve putative class representatives who alleged, on behalf of themselves and the putative class, Respondents' complicity in human rights violations committed against them in the Ogoni region of the Niger Delta in Nigeria between 1992 and 1995. These violations included torture, extra-judicial executions, and crimes against humanity.

The district court denied in part and granted in part Respondents' motion to dismiss Petitioners' claims in September 2006. App. B. However, the district court certified the issue of whether certain of Petitioners' substantive claims were actionable under this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), for an immediate interlocutory appeal. App. B 21-23. The appeal was argued on January 12, 2009.

At no point in the proceeding below did Respondents argue that corporations could not be sued under the ATS for violations of the law of nations. The district court did not address this issue, nor did it certify it for an interlocutory appeal. *Id.* In fact, respondents explicitly argued on appeal that the proper ATS defendant in this case was their Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd. As a result, the issue of corporate liability was not briefed or argued on appeal.[1]

2. On September 17, 2010, a sharply divided panel of the court of appeals held that corporations could not be sued for torts in violation of the law of nations under the ATS. App. A-15. The majority found that individual corporate executives could be sued for such violations under the statute. App. A-80. The panel did not decide any of the issues certified for appeal by the district court.

The majority found that footnote 20 in this Court's *Sosa* decision required that courts determine the "scope of liability" and that the language in footnote 20 of the *Sosa* decision created a new distinction between individual private actors and corporate private actors relevant to ATS liability

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[1] In contrast, the corporate liability issue was briefed and argued in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009), where the same panel declined to address the issue and exercised subject matter jurisdiction to decide the merits of the appeal.

where no such distinction had previously been recognized. App. A-28.

The majority then concluded that because the "scope of liability" under the ATS included the issue of whether corporate private actors could be sued under international law, this issue was one of subject matter jurisdiction enabling the majority to decide the issue despite the fact that it had been waived and it had never been presented, briefed, argued or decided at any point in the nearly decade long litigation below. App. A-25.

The majority opinion conducted a review of international sources it believed revealed the absence of an international norm of corporate liability. *Id.* at 40-79. The majority paid particular attention to international *criminal* law and institutions and the absence of an international consensus that *criminal* sanctions should be available against corporate entities, and not individual corporate officials, to redress corporate complicity in violations of customary international law. *Id.* at 80.

The majority also placed great emphasis on the purported absence of case law holding corporations accountable for violations of international human rights norms as such. *Id.* at 14. It ignored Judge Edwards's observation in *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984), endorsed by this Court in *Sosa*, 542 U.S. at 730-31, that international law generally leaves to each

State's domestic legal system the mechanism by which international obligations are enforced.

Unlike this Court's *Sosa* analysis, the majority did not examine the language, history, or purpose of the ATS in coming to its unprecedented conclusion because it believed this Court had directed lower courts in footnote 20 of the *Sosa* decision to apply customary international law to the issue of corporate liability, even though the majority recognized that footnote 20 did not address this issue. *Id.* at 31. Because the majority interpreted footnote 20 to require the international law analysis it followed, it did not consider the implications of this Court's holding that the cause of action recognized by the ATS for violation of established international norms was based on federal common law.

Judge Leval vehemently dissented from the majority's holding that corporations could not be sued under the ATS. App. A-82. He observed that "[t]he position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves the question to each nation to resolve . . . . the United States, through the ATS has opted to impose civil compensatory liability on violators and draws no distinctions between violators who are natural persons and corporations." App. A-87.

Judge Leval also disputed the majority's international law analysis. He viewed the exclusion of corporations from the scope of international

criminal liability in the last sixty years as *irrelevant* to the scope of civil liability provided for in the ATS. *Id.* at 86-87, 118-120. He also challenged the majority's assertion that corporations are not "subjects" of international law by pointing to Nuremberg jurisprudence, especially the I.G. Farben case, which recognized that corporations had obligations under international law and were capable of committing international law violations. *Id.* at 94, 149-150.

3. Petitioners sought rehearing and rehearing *en banc* on the grounds that they deserved an opportunity to brief and argue the issue of corporate liability for the first time in the case and that the issue was a merits issue that had been waived by respondents and was not an issue of subject matter jurisdiction that could be decided *sua sponte*. Petitioners also sought *en banc* review because the majority opinion brought the Second Circuit into direct conflict with this Court's decision in *Sosa* and with the Eleventh Circuit's decisions finding that corporations could be sued under the ATS, as well as the numerous ATS decisions involving corporations in federal courts around the country, like this one, where none of the parties thought this issue was substantial enough to raise.

The Second Circuit declined to hear the case *en banc* by a five to five vote. App. C-2. Judge Lynch, joined by Judges Pooler, Katzmann and Chin, stated, "[b]ecause I believe that this case presents a significant issue and generates a circuit split, *see*

Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008), and because I believe, essentially for the reasons stated by Judge Leval in his scholarly and eloquent concurring opinion [citation omitted], that the panel majority opinion is very likely incorrect as to whether corporations may be found civilly liable under the Alien Tort Statute for violations of such fundamental norms of international law as those prohibiting war crimes and crimes against humanity, I would rehear this case *en banc*." App. C 2.

Judge Katzmann also dissented specifically to emphasize that the majority's reliance on his concurrence in *Khulumani v. Barclay National Bank,* 504 F.3d 254, 270 (2d Cir. 2007), to support its conclusion was erroneous and "that corporations, like natural persons, may be liable for violations of the law of nations under the ATCA." App. C-5.

All three members of the panel continued their heated debate in separate opinions filed in connection with the denial of the petition for rehearing. In an extraordinary opinion, Chief Judge Jacobs explained that his decisive vote to depart from precedent and exclude corporations from liability under the ATS was based on policy grounds. Judge Jacobs stated his view that American courts should not decide the kinds of issues involved in ATS cases alleging corporate complicity in egregious human rights violations. App. D-6. He referred to a now-superseded objection by the South African government in another pending case to exemplify the problem without acknowledging that the South

African government has dropped its objections to that pending case.[2] Judge Jacobs asserted that "[e]xamples of corporations in the atrocity business are few in history," (App. D-8) and stated his belief that the ruling would have the "considerable benefit of avoiding abuse of the courts to extort settlements." App. D-9.[3] He claimed that corporations should not

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[2] In September 2009, the Republic of South Africa withdrew its objections to the now substantially narrowed actions pending against a small number of corporations for their complicity in serious human rights violations during the Apartheid years. *Balintulo v. Daimler AG*, No. 09-2778-CV, 2009 U.S. App. LEXIS 29244 (2d Cir. argued Jan. 2010). This Court referred to the original complaints in these actions in *Sosa*. 542 U.S. at 733 n.21. The issue of corporate liability was briefed and argued in the still pending *Balintulo* appeal. The United States argued as *amicus curiae* in *Balintulo* that the Second Circuit lacked subject matter jurisdiction to decide this issue. Brief for United States as Amicus Curiae Supporting Appellees, at 2, *Balintulo v Daimler AG* (2d Cir.)(No. 09-2778-CV), *available at* http://www.saha.org.za/resources/docs/FINAL GREEN_brief.pdf

[3] Chief Judge Jacobs provides no indication of the basis for his beliefs about either the level of corporate complicity in human rights violations or his claim that human rights lawyers bring ATS suits to extort settlements. In fact, there have been only a handful of settlements in corporate ATS cases in the last two decades. There have been two trials in which defendants have prevailed. *See Bowoto v. Chevron Corp.*, 621 F. 3d 1116 (9th Cir. 2011) and *Romero v. Drummond Corp.*, 552 F. 3d 1303, 1315 (11th Cir. 2008). Plaintiffs have prevailed in one trial. *Chowdhurry v. Worldtel Bangladesh Holding, Ltd.*, No. 08- Civ. 1659-BMC), (E.D.N.Y. Aug. 6, 2009), ECF No. 48 ($1.5 million torture verdict against defendant holding company); *see also Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (entering judgment against a corporation involved in labor

be subjected to ATS suits because "American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, *provokes bad public relations or boycotts, threatens* exposure of dubious trade practices, and risks trade secrets." App. D-9. Judge Jacobs's sweeping policy pronouncements did not acknowledge that such arguments are properly addressed to Congress which has not acted to amend or repeal the ATS. Moreover, Judge Jacobs's policy arguments contravene the underlying purpose of the ATS to provide civil tort remedies for a small number of heinous violations of international law.

Judge Cabranes filed a separate opinion separating himself from Judge Jacob's policy-oriented rationale insisting that the majority's decision was mandated by international law and this Court's decision in *Sosa*. App. D-24.

Petitioners filed a second petition for rehearing *en banc* because newly sworn-in Judge Raymond Lohier did not participate in the *en banc* vote, although he was entitled to do so under the Second Circuit's Internal Operating Procedure Rule 35.1(b). This petition was denied on March 1, 2011. App. C-7.

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trafficking).

REASONS FOR GRANTING THE WRIT

The decision below asserts a radical overhaul of all existing ATS jurisprudence by transforming virtually every significant ATS issue into an issue of subject matter jurisdiction and by creating a blanket immunity for corporations engaged or complicit in universally condemned human rights violations. The majority decision is the first to treat the issue of corporate liability as an issue of subject matter jurisdiction and the first to exempt corporations from liability even for the most heinous human rights violations. The decision is contrary to this Court's decision in *Sosa* and has created a split in the Circuits, as the Eleventh Circuit has rejected arguments that corporations are immune from suit under the ATS, thus creating uncertainty for human rights victims and corporations alike concerning the future of ATS cases alleging serious human rights violations committed by corporate defendants.

In this era of globalization, ATS cases against corporations raise a host of issues of national and international importance. For the victims of human rights violations such cases often provide the only opportunity to obtain any remedy for their suffering and to deter future unlawful conduct. As the First Congress intended, these cases also involve issues of international law that require uniform treatment in the federal courts. Review would enable this Court to resolve these conflicts and eliminate the uncertainty surrounding these cases.

I. REVIEW IS NECESSARY BECAUSE THE MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING SUBJECT MATTER JURISDICTION.

A. This Court's Decisions Condemn "Drive-By Jurisdictional Rulings" Exemplified By The Decision Below.

The majority's *sua sponte* holding that the issue of corporate liability is an issue of subject matter jurisdiction is in direct conflict with this Court's holdings admonishing lower federal courts against "drive-by jurisdictional rulings" that miss the critical differences between "true jurisdictional conditions and nonjurisdictional causes of action." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010) (citing *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

The decision below is a paradigmatic "drive-by" jurisdictional ruling.[4] This Court has directed retreat from what it has termed the "profligate" and "less than meticulous" use of the term "jurisdiction" to label components of a federal statute. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006) (finding Title VII's employer numerosity requirement is not jurisdictional). It has explicitly and actively

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[4] Howard M. Wasserman, *The Demise of Drive-by Jurisdictional Rulings*, 105 Nw. U. L. Rev. Colloquy 184, 187 (2011).

"encouraged federal courts and litigants to 'facilitate' clarity by using the term 'jurisdictional' only when it is apposite." *Reed Elsevier,* 130 S. Ct. at 1244.

This Court has recognized the risk of conflating jurisdictional and merits-based questions, and has made efforts to draw a sharp line between the two. In *Arbaugh*, "a threshold limitation on a statute's scope shall count as jurisdictional" only when "the Legislature clearly states" that it has that character. 546 U.S. at 515. On the contrary, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restrictions as non-jurisdictional." *Id.* at 516. Applying this test, this Court concluded that the restriction on the coverage of Title VII of the Civil Rights Act of 1964 to employers who have at least fifteen employees is a constraint on "a plaintiff's claim for relief, not a jurisdictional issue," since the fifteen-employee limitation appears in a provision that "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.*

In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), this Court again drew a clear line between subject matter jurisdiction and merits-based issues. In considering the extraterritorial reach of §10 (b) of the Securities and Exchange Act, Justice Scalia made clear that "to ask what conduct §10 (b) reaches is to ask what conduct §10 (b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power

to hear a case.'. . . It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison,* 130 S. Ct. at 2877. In correcting the Second Circuit's "threshold error," this Court made clear that the question of §10(b)'s extraterritorial reach did not raise a question of subject-matter jurisdiction and, therefore, could not be dismissed under Rule 12(b)(1). *Id.*

Post-*Morrison*, "any question of the reach of federal law—of whether Congress asserted regulatory authority to reach and prohibit the challenged conduct by the targeted actors—must be deemed a merits issue."[5] *Arbaugh*, *Morrison*, and numerous other cases decided by this Court make clear that subject matter jurisdiction does not turn on whether a defendant is subject to suit under a given cause of action.[6]

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[5] Wasserman, *supra*, note 4, at 189. *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89–92 (1998) (scope of statute goes to merits, and does not implicate court's power to adjudicate the case).

[6] *See Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (question of whether Congress intended to allow a cause of action against the Postal Service is not a question of subject matter jurisdiction); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277–79 (1977) (whether defendant is subject to suit under 42 U.S.C. § 1983 is not a question of subject matter jurisdiction).

In cases such as *Arbaugh*, *Morrison*, and *Reed Elsevier*, this Court has insisted that lower federal courts distinguish between issues of subject matter jurisdiction and merits-based issues. This Court unanimously rejected the Second Circuit's jurisdictional categorization in *Morrison* and *Reed Elsevier*. Yet in this case the majority repeated the same error by deciding the issue of corporate liability under the ATS *sua sponte* here when this is clearly not an issue of subject matter jurisdiction under this Court's cases.

The issue of whether corporations can be sued under the ATS is plainly a merits-based question, as the same panel implicitly recognized in *Talisman*, 582 F. 3d at 261 n.12. The question concerns the reach of the statute, not the court's adjudicatory authority to hear the case. In footnote 21, this Court treated the issue of corporate liability as a merits-related issue and not a matter of subject matter jurisdiction when it discussed the merits-issue of case specific deference in relation to cases brought against corporations for their complicity in apartheid. 542 U.S. at 733 n.21. Thus, the court of appeals' holding that there was no subject matter jurisdiction is also in direct conflict with this Court's view in *Sosa*. The majority erred by analyzing the issue of corporate liability as a jurisdictional question, without considering this Court's clear holdings on this issue.

The majority erroneously assumed that because this Court in *Sosa* deemed the ATS to be jurisdictional in nature, 542 U.S. at 724, everything

associated with the statute, including its reach, is a matter of subject matter jurisdiction. App. A-25. Contrary to the majority's flawed assumption, the jurisdictional nature of the ATS does not make every ATS issue a matter of subject matter jurisdiction. In *Steel Co. v. Citizens for Better Environmnent.*, 523 U.S. 83, 90 (1998), this Court explained that even where a jurisdictional statute contains some elements of the cause of action, "it is unreasonable to read this as making all of the elements of the cause of action . . . jurisdictional, rather than as merely specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil penalties."

The ATS does not indicate that the identity or nature of the defendant, unlike the citizenship of the plaintiffs, is a jurisdictional requirement. The majority acknowledged that the ATS "does not specify who is liable" and leaves open the "question of the nature and scope of liability—who is liable for what." App. A-18. Under this Court's cases this is a merits-based decision and not an issue of subject matter jurisdiction.

The majority's approach would transform nearly every issue in an ATS case into an issue of subject matter jurisdiction with serious consequences for the efficient processing of these cases at the district court and appellate level. The appellate courts would be required to resolve a wide range of merits-related issues in ATS cases because they allegedly pertain to the "scope of liability" even where

these issues, as here, were never raised by the parties or decided by district courts. This is precisely the result that this Court has been determined to avoid in its recent cases.

B. Review Is Necessary Because The Second Circuit's Decision Conflicts With This Court's Cases and With Every Other ATS Appellate Decision Involving a Corporate Defendant.

This Court should grant certiorari to address the conflict between the court of appeals' assertion of subject matter jurisdiction *sua sponte* over the issue of corporate liability under the ATS and this Court's decisions in *Arbaugh*, *Morrison* and *Reed Elsevier* prohibiting such jurisdictional mislabeling. The majority ignored the limits on its authority, in an interlocutory appeal, deciding an issue not previously addressed in this litigation in order to restrict the scope of the ATS based on policy reasons.[7] App. D-6 (Jacobs, C. J.). Even if one agreed with the ends sought to be achieved by the majority, this assertion of jurisdiction contradicts this Court's subject matter jurisdiction jurisprudence.

Predictably, the majority's subject matter jurisdiction decision also conflicts with virtually

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[7] *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50-51 (1995) (confirming traditional rule that courts of appeals may not exercise jurisdiction over issues not raised in the interlocutory appeal).

every other ATS decision involving a corporate defendant. The decision below is the first appellate decision to consider the issue of corporate liability to be an issue of subject matter jurisdiction, thus creating a conflict with every other Circuit that has considered a corporate ATS case. *See Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F. 3d 1192, 1195 (D.C. Cir. 2004).

If the majority's reasoning is followed, virtually every significant issue in an ATS case is transformed into an issue of subject matter jurisdiction enabling any Circuit panel to render decisions on virtually any issue without prior notice, briefing, or decision in the district court. This can only lead to ongoing uncertainty in the law for all parties, as this decision has engendered, and will inevitably result in more requests for this Court to resolve Circuit conflicts on an increasing number of issues.[8] This Court should grant the petition to resolve this conflict and eliminate the uncertainty created by the decision below.

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[8] Alternatively, given the majority's disregard for this Court's decisions, this Court would be justified in summarily reversing the decision and remanding the appeal for decision on the issues actually presented in the appeal. *See City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 95-96 (1986) (summarily reversing where the court of appeals misinterpreted this Court's precedent).

II. REVIEW IS NECESSARY BECAUSE THE CIRCUIT COURTS ARE SPLIT ON THE ISSUE OF CORPORATE LIABILITY UNDER THE ATS AND THE ISSUE IS ONE OF NATIONAL IMPORTANCE.

The decision below creates a direct conflict with a line of decisions in the Eleventh Circuit, which holds that corporations are subject to suit under the ATS in the same manner as any other private defendant.[9]

In *Romero*, the Eleventh Circuit expressly rejected the argument that the ATS does not permit suits against corporations. 552 F.3d at 1315. There, the court reinforced its decision in *Aldana,* 416 F. 3d at 1253, that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants." *Id.* In *Sinaltrainal* the Eleventh Circuit once again stated categorically: "we have also recognized corporate defendants are subject to liability under the ATS . . . ." 578 F.3d at 1263.

Other circuits have, without exception, considered ATS suits against juridical entities without questioning whether corporations could be

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[9] *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009), *Romero v. Drummond Co.* 552 F.3d at 1315; *Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242, 1253 (11th Cir. 2005).

sued under the ATS or whether the identity or nature of a particular defendant raised an issue of subject matter jurisdiction.[10] Until the sharply divided decision below, the Second Circuit had routinely considered ATS suits against corporations and other juridical entities.[11] Indeed, in *Abdullahi v. Pfizer, Inc.*, 562 F. 3d 163, 174 (2d Cir. 2009), the Second Circuit stated that it understood *Khulumani* to hold "that the ATS conferred jurisdiction over multinational corporations" that abetted apartheid in South Africa.

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[10] See, e.g., Herero People's Reparations Corp., 370 F.3d at 1195; *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Sinaltrainal* , 578 F.3d at 1263; *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Aldana*, 416 F.3d at 1253; *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Tel-Oren v. Libran Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

[11] *Khulumani v. Barclay Nat'l. Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

The issue of corporate liability under the ATS is now pending before the D.C.,[12] Seventh,[13] and Ninth Circuits.[14] In light of *Kiobel*, corporate defendants are likely to raise this issue as a defense in every pending ATS case. Moreover, human rights victims are likely to initiate ATS claims against individual corporate officials out of an abundance of caution in case other appellate courts follow the decision in this case.

Today corporations may be sued under the ATS for their complicity in egregious international human rights violations in Miami or Atlanta, but not in New York or Hartford. This is contrary to the congressional intent that the ATS ensure uniform interpretation of international law in federal courts in cases involving violations of the law of nations. Review by this Court is necessary to eliminate the uncertainty created by this conflict for both corporations and victims of human rights violations, especially when so many corporations could be subject to jurisdiction in almost any federal court.

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[12] The issue is pending in *Doe v. Exxon*, No. 09-7125 (D.C. Cir. argued January 25, 2011).

[13] The issue is pending in *Flomo v. Firestone*, No. 10-3675 (7th Cir. argued June 2, 2011). The *Flomo* case was dismissed based upon *Kiobel* on October 5, 2010, even though the defendants had not raised the issue previously.

[14] The issue is pending in *Sarei v. Rio Tinto*, Nos. 02-56256 & 02-56390 (9th Cir. argued September 21, 2010) (en banc).

More fundamentally, as this Court found in *Sosa*, the ATS was enacted so that the federal courts would be empowered to enforce the law of nations by means of civil tort actions. Corporate tort liability was part of the common law landscape in 1789 and is firmly entrenched in all legal systems today. The notion that corporations might be excluded from liability for their complicity in egregious human rights violations is an extraordinary and radical concept. The court of appeals' decision, if allowed to stand, severely undermines the ATS's deterrence of international law violations. It invites corporations to violate universal international norms with impunity, and is thus in conflict with *Sosa*, Congress' purpose and international law.

III. REVIEW IS NECESSARY BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *SOSA*.

The majority's decision conflicts with this Court's decision in *Sosa* in several respects.

First, the decision fails to consider the language, history, and purpose of the ATS. This Court grounded its *Sosa* decision on an in-depth analysis of the language, history, and purpose of the statute. *Sosa*, 542 U.S. at 712, 718, 724. The ATS's text does not support the majority's decision. The ATS, by its terms, does not exclude any category of defendant. Any natural or non-natural person is capable of committing acts which constitute slavery, genocide, war crimes or other serious human rights

violations, or which aid or abet such human rights violations. This Court need not look further for proof of that than the examples of I. G. Farben in Nazi Germany.[15] But even if this Court were to look beyond the plain language of the statute, there is nothing in the ATS's history or purpose, the common law of the Eighteenth century, or international law that supports the majority's decision. Had the majority carefully examined the sources this Court looked to in *Sosa*, it would have found no authority to support its extraordinary conclusion that corporations are excluded from the scope of the ATS.

Second, the majority misinterpreted footnote 20 of *Sosa*. 542 U.S. at 732 n.20. Footnote 20 made no broad holding about the law governing any issue in ATS cases other than the issue it specifically addressed: whether a particular law of nations violation required a direct showing of state action or if it could be committed by a private actor. Indeed, the language of footnote 20 affirms that corporations are to be treated in the same manner as other private actors for these purposes. The issue of corporate liability was not an issue in *Sosa* and nothing in this Court's opinion even hints that the universe of ATS defendants is limited in any way.

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[15] *See* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,* 109 Colum. L. Rev. 1094 (2009). Prominent Holocaust scholars sought to file an *amicus* brief outlining the majority's errors in analyzing Nuremberg precedents but the majority refused to allow their brief to be filed. App. E-8.

Third, the decision below conflicts with this Court's fundamental decision in *Sosa* that the cause of action in ATS cases is based on federal common law and that international law leaves the means by which international law obligations are to be implemented within States to each domestic legal system. *Sosa*, 542 U.S. at 730-31. International law simply does not address whether the United States, or any other nation, should or should not hold corporations accountable in civil tort law for violations of the law of nations.[16]

Moreover, federal common law has always provided for corporate tort liability. The First Congress exercised its constitutional authority to

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[16] Judge Leval noted the inconsistency in the majority's selective reading of international law. "Because international law generally leaves all aspects of the issue of civil liability to individual nations, there is no rule or custom of international law to award civil damages in any form or context, either as to natural persons or as to juridical ones. If the absence of a universally accepted rule for the award of civil damages against a corporation means that U.S. courts may not award damages against a corporation, then the same absence of a universally accepted rule for the award of civil damages against natural persons must mean that U.S. courts may not award damages against a natural person. But the majority opinion concedes (as it must) that U.S. courts may award damages against the corporation's employees when a corporation violates the rule of nations. Furthermore, our circuit and others have for decades awarded damages, and the Supreme Court in *Sosa* made clear that a damage remedy does lie under the ATS. The majority opinion is thus internally inconsistent and is logically incompatible with both Second Circuit and Supreme Court authority." App. A-88.

employ civil tort remedies to redress violations of the law of nations. Nothing in international law, whether in 1789 or now, immunizes corporations or precludes Congress from authorizing tort liability against all persons, natural or non-natural, who are responsible for law of nations violations.

Finally, even if the majority was correct that courts should look to international law to determine the issue of corporate liability, it mistakenly limited its analysis of international law to international *criminal* law and failed to follow the *Sosa* Court's reliance on privately enforceable international norms which routinely apply tort liability to non-natural persons, such as corporations (*e.g.*, admiralty). 542 U.S. at 732.[17]

The majority also failed to consider the fact that corporate tort liability is a general principle of law accepted in all legal systems. The majority's misplaced focus on international criminal law and institutions prevented it from examining all relevant international law and it thus rendered a decision in conflict with this Court's decision in *Sosa*, established federal common law principles, and international law itself.

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[17] "And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from ancient usage among civilized nations, 'beginning centuries ago, and gradually ripening into a rule of international law . . . .'" *Sosa*, 542 U.S. at 715 (citing *The Paquete Habana*, 175 U.S. 677, 686 (1900)).

The ATS is explicitly a civil *tort* statute enacted to provide broad remedies for violations of the law of nations at a time when the Founders sought to address a glaring weakness of federal authority prior to the ratification of the Constitution. *Sosa*, 542 U.S. at 713, 715-17. The majority's view that the restricted jurisdiction of international criminal tribunals limits the remedial scope of the ATS is far-fetched and unjustified by anything in the statute, *Sosa* or international law.

Any decision that would immunize the Nazi corporations that enabled the Holocaust from tort liability for the most serious human rights violations known to humanity requires some extraordinary explanation. App. A- 82-83. No other appellate court had ever questioned whether corporations could be subject to civil tort liability under the ATS for such crimes, yet the majority below placed the responsibility for its unprecedented decision on a misreading of footnote 20 of this Court's *Sosa* decision. It now requires a decision from this Court to make it clear that footnote 20 was meant to include corporations in the category of private actors subject to ATS jurisdiction, and was not intended to provide a blanket immunity to the future I.G. Farben's of the world, nor to any other corporation, partnership, or other juridical person, complicit in the handful of egregious human rights violations this Court has found actionable in *Sosa*.

Resolving this issue is a matter of grave national and international importance given the

involvement of private corporations in a wide range of military and security activities in which there have been reported serious human rights violations. The decision below provides immunity from tort liability to even the most egregious corporate human rights violator in conflict with this Nation's international human rights obligations and with the central purpose of the ATS itself.

The policy concerns that led to this extraordinary decision should be addressed to Congress. 542 U.S. at 726-27. The majority's policy-based, results-driven exclusion of corporate liability has no historical or legal basis. Allowing this decision to stand undermines the separation of powers, the rule of law and basic principles of justice for the victims of egregious human rights violations.

A. The Decision Below Ignores the Plain Language, History and Purpose of the ATS.

As this Court observed in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), "[The ATS] by its terms does not distinguish among classes of defendants." The ATS explicitly limits the category of plaintiffs to "aliens" but there is no comparable limitation on the universe of defendants. Any natural person or juridical entity responsible for the claimed tort committed in violation of the law of nations may be sued based on the plain language of the statute.

The majority's analysis also reads the word "tort" out of the statute with its almost exclusive emphasis on international criminal law and institutions. App. A-10-13. Far from limiting the ATS to crimes or to criminal law, Congress expressly provided *only* for civil "tort" actions in the ATS, with no requirement that a violation of criminal law be claimed or proved.

The controversial issues surrounding the debates over corporate criminal liability simply do not exist in the context of civil tort liability. By allowing for tort claims and tort remedies, Congress eschewed the limits the Second Circuit imposed on the statute. *See Sosa*, 542 U.S. at 720.

In *Sosa*, this Court engaged in an extensive analysis of the history and purpose of the ATS to determine its meaning and scope. The majority, in direct conflict with this Court's *Sosa* methodology, ignores the history and purpose of the ATS in eliminating corporate liability under the statute. The majority makes no attempt to glean what the Founders intended or how corporate tort liability relates to the remedial purpose of the statute. Nor does the majority explain why private individuals may be held liable in tort for acts such as genocide but corporations purposefully engaged in such gross violations of international human rights may not.[18]

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[18] "The majority's rule encompasses conduct that indisputably does violate the law of nations, including, for example, slavery, genocide, piracy and official torture (done

The historical sources cited by this Court in *Sosa* support the consistent refusal to find any limitation on the category of defendants in prior ATS decisions. Indeed, the breadth of the ATS remedy was one of the First Congress' answers to the inability of the Continental Congress to respond to violations of treaties or the law of nations that might escalate into war. *Sosa*, 542 U.S. at 716. *See* W. Casto, *The Federal Courts' Protective Jurisdiction On Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490 (1985-1986).[19] The Founders would have been familiar with the use of tort remedies against corporations when the ATS was enacted.[20]

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under the color of state law) – conduct for which the natural person tortfeasors will be held liable under the ATS, but for which the majority insist, a corporation that caused the conduct to be done and profited from it, cannot be held liable. Nothing in *Sosa* inferentially supports or even discusses this question." App. A-144.

[19] The 1795 opinion of Attorney General Bradford, cited in *Sosa*, 542 U.S. at 721, 1 Op. Att'y. Gen. 57 (1795), finds that a corporation was an appropriate plaintiff under the ATS without any suggestion that a corporation would not be an appropriate defendant or that the plaintiff corporation would have to prove its capacity to sue under the law of nations rather than the common law. In 1907 the Attorney General found that the ATS allowed Mexican nationals to bring a tort claim against a United States corporation. 26 Op. Att'y Gen. 250 (1907).

[20] *See 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.) (awarding tort damages against the company for assault and other injuries);

There is nothing in the historical record to support the remarkable notion that the Founders intended to exclude corporations from tort liability for violations of the law of nations under the ATS. Corporate tort liability existed in 1789 and became even more established as time went on and corporations proliferated. Corporate liability was always and remains a traditional feature of maritime law, which also forms part of the law of nations. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 472 (2008). The majority ignores the well-established liability of corporations and other entities in the law merchant and maritime law, both integral parts of the law of nations at the time the ATS was enacted.

Indeed, *in rem* jurisdiction over ships for violations of the law of nations has been a feature of American jurisprudence since the Nation's founding. A ship is not a natural person, yet there is no doubt that an ATS action would lie in tort against a ship used to commit a tort in violation of the law of nations. These cases make clear that *in rem* proceedings against ships often turned precisely on the issue of how to ensure that there was a remedy for a law of nations violation even when the court lacked jurisdiction over the individuals actually responsible.[21]

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see also 1 William Blackstone, Commentaries,*474 (1765) (among the capacities of a corporation is "[t]o sue and be sued").

[21] For a summary of the myriad cases involving private actors and entities in litigation involving the law of nations *see* Jordan J. Paust, *Nonstate Actor Participation in International*

Indeed, the majority's myopic view of international law is plainly inconsistent with history. Virtually every type of natural and non-natural person has been subject to international law and remedies for the violation of international norms. For example, the history of international enforcement efforts against the slave trade include awards by international tribunals applying international law norms against a range of private actors, persons and entities, involved in violating international norms prohibiting the slave trade.[22] The majority's highly selective analysis of international law simply does not address this history.

The purpose of the ATS was to provide for broad remedies for law of nations violations against any tortfeasor. The majority's limitation on the types of defendants who may be subjected to tort liability under the ATS undermines this overriding purpose. There is no justification for such a limitation in the language, history, or purpose of the ATS and the majority offers none.

Law and the Pretense of Exclusion, 51 Va. J. of Int'l L. 977, 987 n.38 (2011). Many of the legal historians this Court relied on in *Sosa* attempted to bring this information to the Second Circuit's attention at the petition for rehearing stage but their *amicus* brief was rejected. App. E-6.

[22] *See, e.g.*, Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 Yale L. J. 550, 578, 582, 596 (2008).

B. The Decision Below Rests on a Fundamental Misinterpretation of Footnote 20.

The primary, if not exclusive, basis for the majority's decision that an ATS plaintiff must find a basis in international law to sue any particular defendant is this Court's footnote 20 in *Sosa*. The decision rests on a fundamental misinterpretation of footnote 20.[23] As Judge Leval observed, "[f]ar from implying that natural persons and corporations are treated differently for purposes of civil liability under ATS, the intended inference of the footnote is that they are to be treated identically."[24] App A- 117.

As the decision below acknowledges, the *Sosa* case had nothing to do with whether a particular type of non-state actor could be sued under the ATS let

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[23] The full text of footnote 20: "A related consideration is 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." *Compare Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J. concurring)(insufficient consensus in 1984 that torture by private actors violates international law), *with Kadic v. Karadzic*, 70 F. 3d 232, 239-241 (2d Cir. 1995)(sufficient consensus in 1995 that genocide by private actors violates international law)."

[24] Judge Edwards' concurrence in *Tel-Oren* reiterates this point. Despite the status of the PLO as a defendant in that case, Judge Edwards treated legal persons and natural persons identically for the purpose of determining liability under the ATS. *Tel-Oren*, 726 F. 2d at 791-93.

alone with corporate liability.[25] App. A-34 n31. Instead, footnote 20 addressed the much litigated question of whether a particular law of nations violation required state action or not.[26] It is wrong to suggest that footnote 20 was intended to prescribe that international law supplies the answer to any issue other than the specific issue this Court was actually addressing. This is especially so given this Court's clear decision in *Sosa* that the ATS provides subject matter jurisdiction for federal common law causes of action for certain universally condemned international human rights violations.

Thus, review is necessary to address this fundamental misinterpretation of footnote 20 in *Sosa*. There is no basis in any other ATS decision for the majority's view that international law governs the issue of corporate liability under the ATS other than the question of whether a particular norm may be violated by a private party be they an individual or a corporation. No other appellate decision has excluded corporations from all ATS liability. No other ATS case has ever required the plaintiff to prove that a particular defendant was appropriate

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[25] In fact, this Court questioned whether a private defendant could be sued for arbitrary arrest in the absence of state action but obviously did not believe that this issue affected the Court's subject matter jurisdiction. 542 U.S. at 737.

[26] Footnote 20 addressed only direct liability claims and not claims based on aiding and abetting liability. *See Khulumani,* 504 F. 3d at 269 (Katzmann, J., concurring).

under international law as a matter of subject matter jurisdiction.

International law provides for some immunity from civil liability (e.g., diplomatic or head of state immunity) and other immunities or limitations on liability are codified by statute (e.g., foreign sovereign immunity) or judicial decision (e.g., act of state doctrine). However, corporations have no claim to any immunity under international law, even under the international criminal law relied on by the majority below. No such immunity exists. Although corporations have been excluded from the recently-created international criminal enforcement mechanisms such as the International Criminal Court, many states have included corporations as appropriate defendants under the implementing legislation passed to comply with their obligations under the Rome Statute.[27] Even for criminal offenses, the issue of corporate liability for international law violations is left to each State to decide. The plain language of the ATS indicates that

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[27] *See* Kathryn Haigh, *Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns*, 14 Austl. J. Hum. Rts., No. 1, 199, 204 n.7 (2008)(noting that Belgium, Italy and Switzerland have imposed criminal liability on corporations in legislation implementing the Rome Statute). *See* David Scheffer and 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 (2010).

first Congress did not exclude juridical entities, such as corporations or ships, from the scope of tort liability.

C. This Court Decided That Federal Common Law Provides The Cause of Action in ATS Cases and Adopted Judge Edwards' View That International Law Leaves To Domestic Law The Methods By Which a Nation's International Obligations Are Implemented Domestically.

The *Sosa* court held that the tort cause of action recognized under the ATS derives from federal common law, not international law. *Sosa*, 542 U.S. at 720-21. The drafters of the ATS understood that the rules of decision in ATS cases would be found in common law. *Id.* at 714, 720-21, 724. The ATS requires a violation of the law of nations to trigger subject matter jurisdiction, but federal common law supplies the rules governing the scope of tort remedies and the other rules governing ATS litigation. The majority's reasoning is fundamentally in conflict with this Court's view of the ATS in *Sosa*.[28]

In deciding that the ATS recognized federal common law causes of action, this Court adopted Judge Edwards' view in the long simmering debate initiated in the *Tel-Oren* case. *Sosa*, 542 U.S. at 724,

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[28] The Eleventh Circuit applies federal common law rules of liability in ATS cases. *See, e.g., Romero, supra*; *see also, Khulumani,* 504 F.3d at 284, 286 (Hall, J., concurring).

731. In his opinion in *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring), Judge Edwards emphasized that the structure of the international legal system is based on the general principle that each State is responsible for implementing its international law obligations in accordance with its own domestic law and institutions. *Id.* at 798. The Founders chose common law tort remedies to enforce the law of nations. *Sosa*, 542 U.S. at 724.

In contrast, Judge Bork would have required ATS plaintiffs to identify a cause of action for damages in international law before an ATS claim would be allowed to proceed. *Tel-Oren*, 726 F.2d at 799. (Bork, J., concurring). International law does not ordinarily address domestic tort law remedies or provide a uniform approach to the domestic enforcement of international norms, so Judge Bork's view would have rendered the ATS a dead letter from its passage, a position explicitly rejected by this Court in *Sosa*, 542 U.S. at 729-30.

Indeed, Judge Bork's view would overrule *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a result in conflict with this Court's approval of *Filartiga*. 542 U.S. at 731. The majority's reasoning would also overturn *Filartiga* because there are equally no cases imposing civil liability on individual torturers under international law, as such, for the same reasons there are no such cases against corporations. International law leaves the implementation of international human rights norms to the discretion of domestic legal systems.

This Court rejected Judge Bork's view in *Sosa*, 542 U.S. at 730-31, adopting Judge Edwards' view that domestic law (e.g. federal common law) supplies the rules by which ATS claims would be litigated in U.S. courts, provided an ATS plaintiff based his claim on a violation of the law of nations. *Id.* at 714, 719, 724.

The majority opinion in *Kiobel* rests on a variation of Judge Bork's view looking to international law to find rules concerning proper defendants that international law leaves to the discretion of each domestic legal system in contrast to the Second Circuit's prior case law. *See Kadic,* 70 F.3d at 246 ("The law of nations generally does not create private causes of action").

It is up to each State to determine whether to provide corporate tort liability for violations of the law of nations and to determine how such remedies are framed and applied. App. A-135, 138-140. The First Congress did not restrict the universe of tort defendants in the ATS. There is no apparent reason why they would have done so given the remedial purposes of the ATS.

D. The Decision Below Ignored a Major Source of International Llaw Because General Principles of Law Provide For Corporate Liability For Serious Human Rights Violations in All Legal Systems.

General principles of law common to all legal systems are unquestionably a source of international law for use in ATS litigation. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003) (citing the Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat 1055, 1060, 33 U.N.T.S. 993). Such principles are established routinely by using a comparative law approach. This is essentially the methodology employed by this Court in cases such as *United States v. Smith*, 18 U.S. 153, 163-80 (1820), *cited in Sosa*, 542 U.S. at 732. If all legal systems provide for corporate civil liability in these circumstances, United States courts can be confident that they are applying universally accepted principles and not idiosyncratic American tort principles.

Legal systems throughout the world recognize that corporate legal responsibility accompanies the privilege of corporate personhood. *First National City Bank v. Banco Para El Comerico Exterior De Cuba*, 462 U.S. 611 (1983). In *First National Bank* this Court held a corporation liable for the violation of international law, precisely what the Second Circuit

said could not be done. 462 U.S. at 623, 633.[29] The majority's decision to ignore these general principles of law accepted in all legal systems undermines the "humanitarian objectives" of international law by permitting corporations a "free pass to act in contravention of international law's norms." App. A-93.

Corporate liability for serious harms is a universal feature of the world's legal systems and qualifies as a general principle of law.[30] There is no legal system which does not impose some form of tort, administrative or criminal penalties against corporations for the harms alleged in this case.

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[29] This Court applied general principles of law to the issue of corporate veil-piercing in *First National City Bank*, 462 U.S. at 628-29 n.20 (citing *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb.5)).

[30] 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. *See also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. J. Human Rights., 304, 322 (2008).

CONCLUSION

For all these reasons, this Court should grant the Petition on the questions presented.

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