No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER, *et al.*,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

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

BRIEF OF AMBASSADOR DAVID J. SCHEFFER, NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law, where he teaches international criminal law and international human rights law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. Ambassador Scheffer led the U.S. delegation that negotiated the treaty creating that court (Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter "Rome Treaty"]), and its supplemental documents from 1997 to 2001.

On behalf of the U.S. Government, Ambassador Scheffer also negotiated the statutes of and coordinated support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia (the "war crimes tribunals"). He has written extensively about the war crimes tribunals, including the International Criminal Court, and the negotiations leading to their creation.

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

Ambassador Scheffer previously submitted three amicus briefs to the Court during the course of its deliberation of *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (2013) (hereinafter "*Kiobel II*"). *See* Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of the Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) (June 13, 2012); Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Support of the Petitioners, Esther Kiobel et al. v. Royal Dutch Petroleum Co., et al., 133 S. Ct. 1659 (2013) (No. 10-1491) (Dec. 20, 2011); Brief of David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* In Support of the Issuance of a Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) (July 12, 2011). The points raised in those briefs pertaining to corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350 (2012), are directly relevant to this case.

The lower court continued to err in this case when it affirmed its flawed analysis in *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d Cir. 2010) (hereinafter "*Kiobel I*"), particularly its interpretation of the Rome Treaty's exclusion of corporations, or juridical persons, from the personal jurisdiction of the International Criminal Court. This error remains significant because the court below affirmed the District Court's judgment "on the basis of the holding of *Kiobel I*." *In re Arab Bank, PLC Alien Tort Statute Litig.,* 808 F.3d 144, 158 (2d Cir. 2015) (hereinafter "*Jesner*").

In prior pleadings in this case, Respondent also distorted the general principle of law regarding corporate

civil liability and the origins of personal jurisdiction under the Rome Treaty in its Brief in Opposition (Dec. 14, 2016) ("Historical practice confirms the lack of any universal norm recognizing corporate liability.…The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court are all limited to 'natural persons.' *Kiobel I*, 621 F.3d at 136." Brief in Opposition, pp. 28-29) The Respondent apparently contends that personal jurisdiction covering natural persons under the modern war crimes tribunals and pertaining only to criminal liability precludes personal jurisdiction over juridical persons under a federal law pertaining solely to civil liability, namely, the Alien Tort Statute. Respondent may make this point in further pleadings before the Court.

In short, the lower court's judgment in *Kiobel I*, which the court below felt bound to follow in its judgment in *Jesner*, and when it denied an *en banc* hearing (*In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34 (2d Cir. 2016)), reflects serious misunderstandings of the Rome Treaty and its aftermath. Ambassador Scheffer is not aware of any other brief by or in support of the Petitioners that focuses exclusively on this flaw in the lower court's reasoning.

SUMMARY OF ARGUMENT

This case involves the dismissal of a lawsuit brought under the Alien Tort Statute for compensation for damages allegedly incurred as a result of armed attacks in Israel, the West Bank, and the Gaza Strip between January 1995 and July 2005. The court below, bound by

its earlier decision in *Kiobel I*, adhered to the prior view that the Alien Tort Statute does not allow suits against corporations. Though recognizing that this Court's decision in *Kiobel II* suggested that the Alien Tort Statute can be invoked against a corporate defendant, the court below nonetheless said it was bound by *Kiobel I* since this Court did not expressly overrule it.

This reliance assumes, wrongly, that the 1998 Rome Treaty, which exclusively and deliberately focused on the establishment of a criminal court, purposely reflected a widely accepted international consensus against all criminal and civil liability of corporations for crimes against the law of nations. That incorrect assumption is flatly refuted by the history of the Rome negotiations and the structure of the Rome Treaty itself, both of which expressly and solely address criminal liability. The court below next wrongly assumes that this purported international consensus (against holding corporations accountable in civil as well as criminal legal proceedings) continues to be accepted widely in customary international law. Even disregarding the fundamental error in its predicate assumption, the notion that there is a continuing consensus against civil liability is contradicted by the broad acceptance among legal systems that public law can provide remedies for corporate misconduct. Indeed, in addition to the widespread acceptance of civil liability, there is an increasing acceptance of criminal liability in the almost two decades since the Rome Treaty was completed.

So, it is true, but irrelevant to the issue before this Court, that there was divergence among States and legal systems at the time of the Rome Treaty's negotiation

regarding the applicability of criminal statutes to juridical persons who cannot be subjected to the traditional criminal penalty of deprivation of liberty. Exclusion of corporations from International Criminal Court prosecution was inevitable not because States agreed that corporations are above the law as a matter of right or of principle, but because a fundamental underpinning of the Rome Treaty is the preference for and deference to domestic prosecution (the principle of complementarity) and the obligation of States Parties to undertake the capacity to prosecute. If a legal system did not hold juridical persons liable under criminal law, then under the Rome Treaty that national system likely would fail the test of complementarity. Given that diversity, it was not possible to negotiate a new standard of corporate criminal liability with universal application in the time frame permitted for concluding the Rome Treaty. Equally, it was not plausible to foresee implementation of the complementarity principle of the Rome Treaty in light of such differences in criminal liability for juridical persons among so many national jurisdictions.

Nor is there any significance in the omission in the Rome Treaty of provisions for civil proceedings against juridical persons. To the contrary, the negotiations in Rome leading to the creation of the International Criminal Court understandably steered clear of civil liability for tort actions -- by multinational corporations as well as by natural persons -- because civil liability fell outside of the self-described criminal tribunal. No conclusion can be drawn, either from the negotiations leading to the Rome Treaty or from the absence of corporate criminal liability in the Rome Treaty, that undermines a general principle of law regarding corporate civil liability or that

prevents national courts from holding corporations liable in civil damages for torts committed on national or foreign territory.

Nor have legal systems frozen in time. The Rome Treaty expressly accepted that legal systems and international law would evolve. Since 1998, corporate criminal liability has been growing rapidly across the globe. A significant number of nations that have ratified the Rome Treaty also enacted national implementing legislation that establishes corporate criminal liability for genocide, crimes against humanity, and war crimes (hereinafter "atrocity crimes"[2]) falling within the jurisdiction of the Rome Treaty or have adopted comparable laws for the same or other serious crimes. These States certainly did not act as if the Rome Treaty precluded expanding corporate liability into the realm of atrocity crimes. Indeed, one might speculate that the Rome Treaty, by focusing ratifying States' attention on atrocity crimes, provided an impetus to accord greater accountability within their domestic legal systems.

These developments point to the evolving codification of corporate criminal liability at the national level that aligns with the long-standing general principle of law of corporate civil liability for torts that is found in almost all jurisdictions, including the United States and, with respect to this case, the Alien Tort Statute. At the international level, the Special Tribunal for Lebanon, an international criminal tribunal, found in 2014 that corporate criminal liability has become a general principle of law. The United Nations International Law Commission is crafting a draft

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2. See David Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals 428-437 (2012).

Convention on Crimes Against Humanity that includes corporate criminal liability.

ARGUMENT

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

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)[3] (hereinafter "*Sosa*"), this Court noted but did not resolve the question "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." The court below misinterpreted footnote 20 to require that corporate liability should be a "specific, universal, and obligatory" legal norm in order to hold a corporation liable under the Alien Tort Statute. *Jesner* at 152, *relying on Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 145 (2d Cir. 2010). In so misconstruing *Sosa's* footnote 20, the court below required that the character of the tortfeasor (and not only the tort) must be firmly established as a matter of international law.

The court below also misinterpreted the drafting history of the Rome Treaty as revealing that the global community lacks a "consensus among States concerning

3. For an understanding of how the court below misinterpreted footnote 20 in *Sosa*, see David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under The Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory,* 29 Berkeley J. Int'l L. 334, 364-365 (2011).

corporate liability for violations of customary international law." *Kiobel I* at 136-137. This reading of the negotiating history is seriously flawed. The lack of consensus at Rome concerned the varied state of corporate *criminal* liability among national laws and did not pertain to corporate *civil* liability under either national law or international law.

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

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

Whereas it is universally accepted, as a general principle of law, that corporations are subject to civil liability under domestic law,[4] see *Doe v. Exxon Mobil*

4. *See, e.g.*, *Kiobel I*, 621 F.3d at 166 (Leval, J., concurring); Code civil [C. civ.] art. 1382-84 (Fr.); Bürgerliches Gesetzbuch [BGB][Civil Code], Aug. 18, 1896, § 31 (Ger.); Minpō [Minpō][Civ. C.] art. 709, 710, 715 (Japan). *See generally,* International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity; Brief of Amici Curiae International Law Scholars In Support of Petitioners at 24-25, *Esther Kiobel et al. v. Royal Dutch Petroleum Co., et al., 133 S. Ct. 1659 (2013) (No. 10-1491) (Dec. 21, 2011);* Beth

Corp., 654 F.3d 11, 53 (D.C. Cir. 2011) ("Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood"), practice varies considerably in national systems around the globe on the criminal liability of corporations and the penalties associated therewith. That presented a substantial problem for the negotiators, of whom I was one representing the United States, because the unique complementarity structure of the Rome Treaty favors similarity on the most fundamental elements of criminal liability in States Parties' criminal law systems; indeed, a key point underlying the International Criminal Court was that States agreed to undertake the primary burden of prosecution in their national courts.

A convicted person before the International Criminal Court must be punished with imprisonment, Rome Treaty, art. 77(1). There was no consensus among delegations in Rome about how to impose a criminal penalty comparable to imprisonment upon a corporate defendant, and that indecision severely undermined talks about how to extend the International Criminal Court's criminal jurisdiction to juridical persons.

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

Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations,* 27 YALE J. INT'L L. 1,4 (2002).

> One [further difficult issue of substance] which followed us to the very end of the Conference was whether to include criminal responsibility of juridical persons alongside that of individuals or natural persons. This matter deeply divided the delegations . . . . Time was running out, and the inclusion of the criminal responsibility of juridical persons would have had repercussions in the part on penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome.

Per Saland, *International Criminal Law Principles, in* The International Criminal Court: The Making of the Rome Statute 189, 199 (Roy Lee ed., 1999). This disagreement before and during the Rome negotiations was centered upon whether corporations can be held criminally liable for the commission of atrocity crimes, particularly in national jurisdictions across the globe, and not about civil liability for any tort of any character. Negotiators did not address civil liability for anyone—natural or juridical persons—in the creation of the International Criminal Court.

B. There is a meaningful difference between civil and criminal liability in the history of the Rome Treaty negotiations and in international law

Contrary to the lower court's mistaken reading of *Sosa*, the distinction between civil and criminal liability exists both in the history of the negotiations at Rome and in the Rome Treaty itself. Whereas Justice

Breyer's explanation of the Alien Tort Statute in his *Sosa* concurrence acknowledged that it is acceptable to recognize civil liability where criminal liability has been established internationally, 542 U.S. at 762, the Second Circuit mistakenly interpreted that acknowledgement to mean that it is unacceptable to recognize corporate civil liability because corporate criminal liability has *not* been established internationally, as "international law does not maintain [a] kind of hermetic seal between criminal and civil law." *Kiobel*, 621 F.3d at 146 (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270 n. 5 (2d Cir. 2007) (Katzmann, J., concurring) (citing *Sosa*, 542 U.S. at 762-63)). But *Sosa*'s language merely recognizes that civil liability is appropriate under the Alien Tort Statute where the greater justification required for criminal punishment already has been established. The court below erred in mistaking a sufficient condition for a necessary condition.

While some countries permit certain civil penalties to arise within domestic criminal actions, *Sosa*, 542 U.S. at 762, the negotiators at Rome could not agree either on criminal liability for corporations or the punishment for "convicting" a corporation, including the formula for imposing penalties not involving the deprivation of liberty alongside mandatory and traditional criminal penalties. Nor was anyone interested in establishing a broader or a parallel process in the criminal case for determining related civil penalties. Rather, we negotiators decided to retain our narrow focus on criminal liability of natural persons only—under a treaty designed to create an international criminal court—and left civil damages for both natural and juridical persons out of the discussion and the International Criminal Court's jurisdiction. To read the failure to agree on and resulting omission of

criminal liability for juridical persons under the Rome Treaty as an "*express rejection* . . . of a norm of corporate liability in the context of human rights violations," *Kiobel*, 621 F.3d at 139 (emphasis in original), is incorrect.

Indeed, to reach that conclusion would contradict the purpose of Article 10 of the Rome Treaty, which confirms that the treaty provisions of Part 2 are not designed to limit or prejudice "in any way existing or developing rules of international law." If negotiators did not intend to prejudice international law in the treaty's express provisions, surely we did not intend to prejudice international law when the text of the treaty remains silent (such as regards corporate civil or criminal liability). To posit that one can infer, under *Sosa*, that lack of criminal liability for juridical persons in the Rome Treaty should dictate a lack of civil liability for juridical persons under the Alien Tort Statute, or any nation's domestic laws, is a *non sequitur*, a misunderstanding of the negotiations at Rome, and an illogical reading of *Sosa*.

The U.S. delegation in Rome had no authority, and received no instructions, to negotiate any outcome that would have the effect of denying corporate civil liability under the Alien Tort Statute and thus de facto overruling years of federal jurisprudence embracing such corporate liability. If the lower court's point of view—that the result of our negotiations would be the denial of corporate civil liability under the Alien Tort Statute—had been presented to the U.S. delegation in Rome, two things would have happened. First, we instinctively would have denied any such purpose. But to be certain of U.S. intent when confronted with that possibility, the U.S. delegation at least would have attempted to seek explicit instructions

from the Department of Justice to confirm or deny such an objective as the official policy of the U.S. Government in the Rome negotiations. Yet that scenario never unfolded. The lower court's inference that the negotiators of 148 States set out to reframe the status of corporate liability in international law through the choices made in Rome in concluding the treaty for a criminal court reflects a fanciful and false interpretation of what actually transpired there.

Moreover, if the negotiators in Rome had instead overtly considered civil remedies and not an exclusively criminal process, a proposal for corporate civil liability consistent with the Alien Tort Statute might well have survived in some fashion in the Rome Treaty. This possibility, though hypothetical, is not whimsical: incorporating into the Rome Treaty this fundamental liability for the most egregious torts would have helped ensure that if national courts fail to hold corporations accountable domestically, particularly for complicity in or commission of atrocity crimes, the International Criminal Court would have the jurisdiction to step in.

At Rome, however, for negotiators to hold corporations criminally responsible before the International Criminal Court for atrocity crimes and to establish criminal or civil penalties in the wake of such criminality was simply a bridge too far, both in light of varied national practices on criminal responsibility and the limited time left in the negotiations. No conclusion about customary international law can or should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Treaty. The issue of customary international law was irrelevant to the far more relevant issues of complementarity under the Rome Treaty and of how to prosecute and penalize corporate defendants.

C. The Principle of Complementarity Discouraged Adoption of Corporate Criminal Liability Under the Rome Treaty

The interpretation of the Rome Treaty espoused by the court below, that the treaty purposely expressed a principle of customary international law precluding national courts—either civil or criminal—from proceeding against corporations for atrocity crimes or other violations of international law, is in error. *Kiobel I*, 621 F.3d at 139. Negotiations for the Rome Treaty operated on the basis of consensus among 148 States, which meant that political compromises, sometimes made by the majority of States to ensure the continued support of a small minority, necessarily dictated the outcome of disputes. William Schabas, An Introduction to the International Criminal Court 16-22 (5th ed. 2017) Seeking consensus in negotiations did not mean that the delegations were confirming or establishing customary international law on every contentious issue set forth in every provision of the treaty. *See*, *e.g.*, Scheffer & Kaeb, *supra* note 3, at 364-365. Indeed, the opposite often occurred, namely, in order to achieve consensus, the result was *not* customary international law but instead a narrow political compromise unique to the creation of an international criminal court. As such, the D.C. Circuit concluded that "[t]he Rome Statute . . . is properly viewed in the nature of a treaty and not as customary international law." *Exxon*, 654 F.3d at 35.

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

fact that negotiators ultimately rejected corporate liability under the Rome Treaty had nothing to do with a consensus on corporate liability in customary international law and everything to do with whether national legal systems already held corporations *criminally* liable or would be likely to under the principle of complementarity of the Rome Treaty.[5]

Complementarity is the fundamental principle enshrined in the Rome Treaty that regulates the jurisdictional relationship between the International Criminal Court and States Parties or, in some instances, nonparty States. The expectation of negotiators—as confirmed in Articles 17, 18, and 19 of the Rome Treaty pertaining to admissibility—was that national legal systems either 1) would ensure relative conformity in their criminal codes to the subject matter and personal jurisdiction of the International Criminal Court and then exercise the political will to investigate and prosecute atrocity crimes as defined in the Rome Treaty against accused perpetrators falling within the jurisdiction of national courts, or 2) lacking such political will or capability, would face the reality that the International

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

Criminal Court itself would investigate and prosecute atrocity crimes. The ideal world, one day, would be an empty docket at the International Criminal Court because national criminal courts, preferring to avoid the ignominy of granting impunity for atrocity crimes, are exercising the full responsibility to bring such persons to justice.

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

To have extended the complementarity concept to juridical persons would have required a much higher degree of confidence among delegations that national legal systems across the globe already (in 1998) exercised or would soon have the capacity to exercise criminal jurisdiction over corporations for the commission of atrocity crimes. There had been acknowledgement of corporate criminal liability in international law even at Nuremberg, s*ee* Scheffer & Kaeb, *supra* note 3, at 363; *Kiobel I*, 621 F.3d at 179-180 (Leval, J. concurring) (describing the liability of IG Farben as predicate for individual responsibility), but the inclusion of this idea in national criminal codes was not universal. Such criminal jurisdiction today exists in an impressive number of national systems, but it was by no means as pervasive 19 years ago.

Professor William Schabas has written on this point:

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

WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 211 (5th ed. 2017).

The court below overlooked these realities to assume, erroneously, that the negotiators of the Rome Treaty rejected corporate criminal liability not for practical reasons, but because it was not supported by a rule of customary international law mandating it. The omission of juridical persons from the Rome Treaty does not mean that corporations enjoy virtual immunity under international law from either civil or criminal liability, and no one so argued in Rome; it simply means that, because of the principle of complementarity and its expectation of

the uniformity of domestic laws with the Rome Treaty, the International Criminal Court was established without corporations being subject to its heavily negotiated criminal jurisdiction.

II. Codification of Corporate Criminal Liability Has Been Growing since 1998

The *Kiobel I* and lower court view of corporate liability is out of step with the progressive development of international practice since 1998 towards more—not less—corporate criminal liability. This trend is due largely to domestic legislation in countries around the world that have implemented the Rome Treaty, as well as other international treaties embracing corporate liability. *See generally* Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 The Geo. Wash. Int'l L. Rev. 351 (2016) (hereinafter "*Kaeb*").

Even by 1998, one could point to common law jurisdictions like the United States, United Kingdom, Canada, New Zealand, and Australia that enforced criminal law against corporations, albeit under varied approaches and generally not yet for atrocity crimes. Joanna Kyriakakis, *Corporate Criminal Liability and the Comparative Law Challenge*, 2009 Neth. Int'l L. Rev. 333, 340-342 (hereinafter "*Kyriakakis*"). Despite a more reluctant attitude about corporate criminal liability among civil law jurisdictions, by 1998 a significant number of these countries also had codified some form of criminal liability for juridical persons, including Denmark, Finland, France, Iceland, Indonesia, Japan, the Netherlands, Norway, the People's Republic of China, Portugal, and South Africa. *Id.* at 341-342.

But a large number of countries, many of which had strong voices in the Rome negotiations, had not yet legislated corporate criminal liability into their national criminal codes. These included Argentina, Austria, Belgium, Brazil, Bulgaria, Germany, Greece, Hungary, Italy, Luxemburg, Mexico, the Slovak Republic, Spain, Sweden and Switzerland. *Id.* at 336-348. That simple fact ensured the impossibility at Rome of reaching a consensus on the issue of corporate criminal liability that would be enforceable domestically under the complementarity principle. Because corporate criminal liability remained a deeply fractured practice from an international perspective, such liability of juridical persons was not incorporated into the Rome Treaty. Even States that had long embraced general principles of corporate criminal liability, like the United States, had not expressed an interest in extending the treaty's jurisdiction to corporations given the rarity, as of 1998, of corporate *criminal* liability for atrocity crimes. Such criminal liability was far more ambitious than the International Criminal Court's original design.

At Rome there was only scant attention paid to civil liability, even of individuals, much less to civil liability for corporations responsible for atrocity crimes. The reason for this is clear -- despite the fact that corporate civil liability is a general principle of law in national legal systems, we negotiators were focused on building a criminal court, not one inviting civil actions. The negotiations remained firmly concentrated on criminal liability and punishment for perpetrators of atrocity crimes.

However, since the conclusion of the Rome Treaty in July 1998, a number of additional countries have adopted laws providing or expanding corporate liability for a range

of international crimes, including atrocity crimes. With respect to the latter category of crimes, this liability often has been established through the adoption of domestic implementing legislation related to their ratification of the Rome Treaty. *Id.* at 334-335. Countries such as France, India, Japan, and Norway have incorporated at least one or more atrocity crimes into their domestic laws with potential application for corporations, while other countries, including Austria, Luxemburg, Spain, and Switzerland, have codified forms of corporate criminal liability, although not necessarily in the context of atrocity crimes. *Kyriakakis* at 336-48; B.O.E. 2010, 152 (Spain); CODE PÉNAL [C. PÉN.], art. 34 (Lux.).

The lower court judgment in *Kiobel I*, affirmed in *Jesner*, that abandons corporate liability under the Alien Tort Statute contradicts not only long-standing federal law on both civil and criminal liability for juridical persons, but also stands in stark contrast to the growing number of nations that are moving to expand and embrace corporate liability for atrocity crimes. Rather than witnessing a retreat from corporate liability in international practice since 1998, there has been a marked progression towards adoption of corporate criminal liability among nations, particularly those joining the International Criminal Court. This trend complements the general principle of law of corporate civil liability that existed in 1998 in practically all legal systems.[6]

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6. Judge Richard Posner aptly concluded: "[W]hile it is true that outside the Anglo-American sphere, it would move quickly from periphery to center if corporate civil liability were unavailable; and even though civil liability is available, the resistance (outside the Anglo-American sphere) to corporate criminal liability is eroding. [citations omitted] It is neither surprising nor significant that corporate liability hasn't figured

If, however, one correctly interprets footnote 20 of *Sosa*,[7] then the exposure of corporations as tortfeasors and the type of liability they are subjected to under national law falls squarely within the four corners of the Alien Tort Statute. Other nations have used either independently-conceived national law or the Rome Treaty implementation process to extend criminal liability to corporations. Under such laws, some of these nations now entertain civil[8] and/or criminal liability for extraterritorial corporate conduct as well.

Thus, the following 29 States Parties to the Rome Treaty provide for corporate criminal liability (frequently joined with civil liability) for varying types of crimes, often including atrocity crimes:

1. Australia (*Criminal Code Act, 1995* (Cth) pt 2.5, div 12.1; *Id.* at div 268; *Id.* at dictionary);[9]

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in prosecutions of war criminals and other violators of customary international law. That doesn't mean that corporations are exempt from that law." *Flomo v. Firestone Nat'l Rubber Co.,* 643 F.3d 1013, 1019 (7th Cir. 2011).

7. *See* Scheffer & Kaeb, *supra* note 3, at 364-65.

8. For a discussion of civil liability of corporations for crimes in the European Union under the Brussels I Regulation, *see id.* at 369-372 ("Often times, civil damages can be attached to criminal proceedings such as under the concept of *constitution de partie civile* under French and Belgian law. France, Belgium, Germany, the Netherlands, Italy, and Spain provide criminal liability of corporations or 'quasi-criminal and/or administrative penalties that accompany criminal actions and effectively serve as punitive sanctions.'" *Id.* at 370-71 (citations omitted)).

9. *See* Anita Ramasastry & Robert C. Thompson, Fafo, Commerce, Crime and Conflict, Legal Remedies for Private

2. Austria (Verbandsverantwortlichkeitsgesetz [VbVG] [Law on the Responsibility of Associations]);[10]

3. Belgium (Code Pénal [C.Pén.] [Criminal Code] art. 5);[11]

4. Bosnia and Herzegovina (Krivični zakon Bosne i Hercegovine [Criminal Code of Bosnia and Herzegovina] arts. 10, 13(3), 143, 144(3), 171, O.G. 3/03, 32/03, 37/03);

5. Canada (Crimes Against Humanity and War Crimes Act S.C. 2000, c 24);[12]

6. Czech Republic (Zákon o trestní odpovědnosti právnických osob a řízení proti nim [Act on Criminal Liability of Corporations and Proceedings against Them] (1 January 2012, as amended on 1 December 2016);[13]

Sector Liability for Grave Breaches of International Law: A Survey of Sixteen countries 13, 30 (2006); Clifford Chance, Corporate Criminal Liability 53-56 (2016).

10. *See* Megan Donaldson & Rupert Watters, Allens Arthur Robinson, 'Corporate Culture' as a Basis for the Criminal Liability of Corporations 47-48 (2008).

11. *See* Ramasastry & Thompson, *supra* note 9, at 13, 30; Clifford Chance, *supra* note 9, at 15-17.

12. *See* Donaldson & Watters, *supra* note 10, at 24-28; Ramasastry & Thompson, *supra* note 9, at 13, 30.

13. *See* Clifford Chance, *supra* note 9, at 18-19.

7. Denmark (Straffeloven [Strfl] [Criminal Code] Ch. 5, ss 27(1), 309, Act 474 of 12 June 1996);[14]

8. Estonia (Karistusseadustik [Criminal Code] § 92, 93, RT I 2002, 86, 504);

9. Fiji (Crimes Decree No. 44/2009 [Criminal Code] § 51, 10 G.G. 1021, 1065);

10. Finland (39/1889 Rikoslaki [Criminal Code] Ch. 9);[15]

11. France (Code Pénal [C. Pén] [Criminal Code] arts. 121-2, 213-3);[16]

12. Iceland (General Penal Code Act No. 19 art. 19);[17]

13. Ireland (Companies Act 2014 (Act No. 38/2014) *see* e.g., ss 68, 82, 87, 101, 102, 132, 248, 281-286, 702);[18]

14. Italy (Decreto Legistativo n. 231 2001 [LAW 231]);[19]

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14. *See* Donaldson & Watters, *supra* note 10, at 53.

15. *See id.,* at 39-43.

16. *See* Clifford Chance, *supra* note 9, at 21; Ramasastry & Thompson, *supra* note 9, at 13, 30.

17. *See* Donaldson & Watters, *supra* note 10, at 54.

18. *Id.*

19. *See* Clifford Chance, *supra* note 9, at 24-26.

15. Japan (more than 500 provisions in various laws pertinent to corporate entities prescribing their criminal liability);[20]

16. Kenya (The International Crimes Act No. 16 (2008), The Laws of Kenya, Revised Edition § 2(1));

17. Latvia (Krimināllikums [Criminal Code] §§ 70.1, 71);

18. Luxembourg (Loi du 3 mars 2010 - Introduisant la responsabilité pénale des personnes morales dans le Code Pénal et dans le Code d'instruction criminelle et modifiant le Code Pénal, le Code d'instruction criminelle et certaines autres dispositions législatives, Mémorial A – N°36, 11 March 2011 [Law of 3 March 2010 - Introducing the criminal liability of legal persons in the Penal Code and in the Code of Criminal Procedure and amending the Penal Code, the Code of Criminal Procedure and certain other legislative provisions]);[21]

19. Malta (Criminal Code cap. 9, arts. 121D, 248E);

20. Netherlands (Wetboek van Strafrecht [Sr] s 51, Stb. 1991, p. 100);[22]

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20. *Id.* at 65-66.

21. *See id.,* at 20-22.

22. *See* Donaldson & Watters, *supra* note 10, at 57-58; Clifford Chance, *supr*a note 9, at 42-44; Ramasastry & Thompson, *supra* note 9, at 13, 30.

21. New Zealand (Crimes Act 1961, s 2, Interpretation Act 1999 s 29);[23]

22. Norway (Straffeloven [Criminal Code] Ch. 3a); [24]

23. Poland (Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Act on the Liability of Collective Entities for Acts Prohibited Under Penalty], Dziennik Ustaw 2002 nr. 197, poz. 1661);[25]

24. Romania (Codul penal [Criminal Code] arts. 135-151;[26]

25. Slovakia (Zákon o trestnej zodpovednosti právnických osôb a o zmene a doplnení niektorých zákonov [Act No. 91/2016 Coll. on Criminal Liability of Legal Persons]);[27]

26. South Africa (Criminal Procedure Act 51 of 1977 s 332);[28]

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23. *See* Donaldson & Watters, *supra* note 10, at 58-59.

24. *See id.*,at 59-60; Ramasastry & Thompson, *supra* note 9, at 13, 30.

25. *See* Clifford Chance, *supra* note 9, at 29-31.

26. *See id.,* at 32-33.

27. *See* Clifford Chance, *supra* note 9, at 36-38.

28. See Donaldson & Watters, *supra* note 10, at 55-56.

27. Spain (Código Penal [Criminal Code] B.O.E. 1995, 281 (as amended with Organic Law 5/2010, of 22 June 2010 (B.O.E. 2010, 152)) arts. 197, 251, 251bis, 261, 264, 288, 302, 310bis, 319. 327, 328, 399bis, 427, 430, 445, 576bis);[29]

28. Switzerland (Code pénal suisse [Swiss Criminal Code] art. 102);[30]

29. United Kingdom (Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1(1) (a)-(b) (Eng.); Interpretation Act, 1978, c. 30, § 5, sch. 1, (Eng.); *Id.* at § 22, sch. 2.; International Criminal Court Act, 2001, c. 17, § 51(1)).[31]

These States implicitly rejected the notion that corporate criminal liability is beyond the reach of domestic legal systems.

In addition, although Rwanda has not ratified the Rome Treaty, that country was within the territorial jurisdiction of the International Criminal Tribunal for Rwanda and has chosen, in the aftermath of the genocide of 1994, to enforce corporate liability for atrocity crimes. Repressing the Crime of Genocide, Crimes against Humanity, and War Crimes, No. 33 (2003), arts. 4, 7 (Rwanda).

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29. *See* Clifford Chance, *supra* note 9, at 39-41.

30. *See* Donaldson & Watters, *supra* note 10, at 34-38.

31. *See id.,* at 18-23; Clifford Chance, *supra* note 9, at 47-51; Ramasastry & Thompson, *supra* note 9, at 13, 30.

There is considerable variance in the law and practice of each of these national legal systems, but the basic principle of corporate liability for serious crimes, including the atrocity crimes of the Rome Treaty in many of the above-listed jurisdictions, has been implemented at the national level.

III. Recognition of Corporate Criminal Liability by International Bodies

Significantly, since the Court's judgment in *Kiobel II*, the Appeals Panel of the Special Tribunal for Lebanon, an international criminal tribunal located in The Hague and significantly supported in its operations by the United States Government, examined international law and practice and ruled, in a contempt case, that corporations as well as natural persons are liable before the tribunal as a general principle of law. *In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat*, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 74 (Special Trib. for Leb. Oct. 2, 2014). *See Kaeb* at 352-354, 364-371. As explained by scholar Caroline Kaeb:

> The Appeals Panel found that there has been "a concrete movement on an international level backed by the United Nations for . . . corporate accountability" for human rights which manifests in state practice providing for corporate criminal liability. Granted, national laws across different jurisdictions are not identical; yet, the Appeals Panel found that they are "sufficiently similar" to signify a

> major trend, and "[i]ndeed, corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as [a] general principle of law." (citations omitted) *Kaeb* at 366.

Last year the Appeals Panel affirmed its earlier finding with respect to corporate criminal liability while deferring to the procedural requirements for any such finding under Lebanese law. *In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat*, STL-14-05/PT/AP, Public Redaction Version of Judgement on Appeal, F0028, at ¶190 (Special Trib. for Leb. March 8, 2016).

Recently the United Nations International Law Commission has been drafting and finalizing the text of a Convention on Crimes Against Humanity. The draft Convention includes corporate criminal liability: "7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences [crimes against humanity] referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative." Int'l Law Comm'n, Crimes Against Humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading, U.N. Doc. A/CN.4/L.892, art. 6(7) (May 26, 2017). *See also* Int'l Law Comm'n, Report of the International Law Commission, Sixty-eighth session, U.N. Doc. A/71/10 at 262-265 (2016).

The commentary to the incorporation of corporate liability in the draft Convention states in part:

> 42) The [International Law] Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. *In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation. Id.* at 264. (emphasis added)

The commentary also provides a rich source of authorities for the presence of corporate criminal liability in multilateral treaties. *Id.* at 263-264. Thus while the Rome Treaty has been a major impetus in the trend towards corporate criminal liability in national legal systems, so too have the many recent multilateral treaties confirming corporate criminal liability for terrorism, bribery of foreign public officials in international business transactions, protection of the environment, transnational organized crime, corruption, and the unauthorized transboundary movement of hazardous wastes.[32]

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32. For an earlier treatment of the trend line for corporate criminal liability, *see* Joanna Kyriakakis, *Corporate Criminal Liability and the Comparative Law Challenge*, 2009 NETH. INT'L L. REV. at 348 ("In contrast to the ICC Statute, there are a number of international and regional instruments that explicitly require States Parties or member states to provide for the liability of categories of legal persons, including corporations, within their national legal systems.").

CONCLUSION

The decision below, based on the presumption that customary international law shields corporations from civil liability for atrocity crimes, is seriously flawed and should be reversed. The exclusion in an international criminal convention negotiated 19 years ago, which depended on consensus from the 148 States that participated in its negotiation, of criminal liability on juridical persons, is entirely irrelevant to whether customary international law today recognizes corporate civil liability for a "violation of the law of nations or of a treaty of the United States." 28 U.S.C. §1350 (2012) To the extent that international understandings of corporate criminal liability are even relevant to the question whether a corporation can be sued civilly, the appropriate indicia is not a document close to two decades old; rather, it is the increasing tide of recognition of criminal liability for juridical persons in more recent international decisions and more recent national legislation. The finding of the Appeals Panel of the Special Tribunal for Lebanon—that corporate criminal liability is now a general principle accepted in international law—contradicts the lower court's view on the issue, even if one were to accept its misinterpretation of footnote 20 in *Sosa*. The International Law Commission's recent incorporation of corporate criminal liability in the draft Convention on Crimes Against Humanity also demonstrates how obsolete is the view of the lower court.

The lower court, incorporating the mistakes of *Kiobel I,* also erred in fundamentally misinterpreting the Rome Treaty and the negotiations leading to its conclusion in the summer of 1998. The personal jurisdiction of the Rome Treaty is limited to natural persons because no

consensus was reached among delegations as to the criminal liability of juridical persons in national legal systems throughout the world. Such a finding would be critical for the necessary operation of the complementarity principle under the Rome Treaty.

The Rome Treaty focuses strictly on criminal liability and thus has no civil liability within its jurisdiction—even over natural persons. Therefore the omission of corporate liability under the treaty reflected the diverse views of negotiators about criminal liability for corporations under their national legal systems in 1998. No negotiator disputed corporate civil liability as a general principle of law or suggested that corporations should not be held accountable for their commission of torts, including particularly egregious torts that would meet the *Sosa* test for violations of international law under the Alien Tort Statute.

An increasing number of national jurisdictions and international bodies are codifying corporate criminal liability for actions that include the atrocity crimes clearly falling within the *Sosa* standard for liability under the Alien Tort Statute. The trend lines globally point towards more, not less, accountability for both natural persons and corporations in the commission of atrocity crimes. The United States and the federal circuits (including the Second Circuit until its ruling in *Kiobel I*) have long occupied the high ground for corporate civil liability, under the Alien Tort Statute as well, and thus have served as a beacon for the progressive development of corporate liability in foreign jurisdictions and internationally. To abandon that position now would be viewed as a singularly regressive step following decades of modern jurisprudence

under the Alien Tort Statute and of growing corporate accountability (civil and criminal) in the United States, in foreign jurisdictions, in treaties, and in the jurisprudence of international tribunals.

The perspective afforded by this amicus brief, when joined with the other arguments presented in the Petitioners' brief and the amicus briefs that confirm corporate liability under the Alien Tort Statute, should lead the Court to reverse the judgment below.

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Amicus Curiae