**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| IN RE SOUTH AFRICAN APARTHEID LITIGATION | MDL No. 1499 (SAS)<br>ECF Case |
| THIS DOCUMENT RELATES TO: | |
| LUNGISILE NTSEBEZA, *ET AL.*,<br><br>PLAINTIFFS,<br>V.<br><br>DAIMLER AG, *ET AL.*,<br><br>DEFENDANTS. | 02 Civ. 4712 (SAS)<br>02 Civ. 6218 (SAS)<br>03 Civ. 1024 (SAS) |
| SAKWE BALINTULO, *ET AL.*,<br><br>PLAINTIFFS,<br>V.<br><br>DAIMLER AG, *ET AL.*,<br><br>DEFENDANTS. | 03 Civ. 4524 (SAS) |

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN ORDER FINDING CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE**

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## INTRODUCTION

Corporate entities cannot be held liable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for violating international human rights norms, as the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"). The Supreme Court affirmed the Second Circuit's judgment in *Kiobel I* on alternative grounds, specifically stating that it was *not* ruling on the corporate liability question. Under established rules of stare decisis, *Kiobel I* remains the binding law of this Circuit. As the Second Circuit reaffirmed earlier this week, "the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS." *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, __ F.3d __, 2014 WL 503037, at *5 n.6 (2d Cir. 2014) (citations omitted). Judgment should accordingly be entered in favor of defendants Ford Motor Company and International Business Machines Corporation, which are not natural persons but corporate entities.

Plaintiffs' argument that the Supreme Court implicitly overruled *Kiobel I* by affirming it on alternative grounds is directly contrary to the Second Circuit's own precedent, and is based on a misreading of the Supreme Court's opinion. Plaintiffs' arguments about the merits of *Kiobel I* thus are not properly before this Court, and they are wrong in any event. *Kiobel I* correctly holds that corporations may not be held liable under the ATS for violating human rights norms, both as a matter of international law and federal common law.

## BACKGROUND

The ATS "does not provide subject matter jurisdiction over claims against corporations." *Kiobel I*, 621 F.3d at 149. In particular, the *Kiobel I* Court explained that

Supreme Court and Second Circuit precedent "require us to look to international law to determine whether a particular class of defendant, such as corporations, can be liable under the Alien Tort Statute for alleged violations of the law of nations." *Id.* After reviewing the relevant international law materials since Nuremberg, the Court concluded that "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*." *Id.* at 145. Accordingly, the Court held that "insofar as plaintiffs in this action seek to hold only corporations liable … (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction." *Id.* The full Second Circuit denied the *Kiobel* plaintiffs' petition for rehearing en banc, thereby leaving the panel's decision in place. 642 F.3d 379 (2d Cir. 2011).

The Supreme Court granted certiorari in *Kiobel* to consider the Second Circuit's holding that "the law of nations does not recognize corporate liability." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) ("*Kiobel II*"). After oral argument, however, the Court "directed the parties to file supplemental briefs addressing an additional question: 'Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'" *Id.* (alteration in original). The Court ultimately held that the ATS does not support a cause of action "seeking relief for violations of the law of nations occurring outside the United States." *Id.* at 1669. As a result, the Court explicitly declined to reach the corporate liability question, but instead

"affirm[ed] the judgment below, based on [its] answer to the second question." *Id.* at 1663.

Applying *Kiobel II*, the Second Circuit held in this case that the "opinion of the Supreme Court in *Kiobel* plainly bars common-law suits, like this one, alleging violations of customary international law based solely on conduct occurring abroad," and thus "plainly bars the plaintiffs' claims as a matter of law" in this case. *Balintulo v. Daimler AG*, 727 F.3d 174, 182, 188 n.21 (2d Cir. 2013). The Court further explained that the "law of this Circuit" also provides "that corporations are not proper defendants under the ATS in light of prevailing customary international law, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *aff'd on other grounds*, 133 S. Ct. at 1669." *Id.* at 191 n.26. The Court accordingly denied defendants' petition for a writ of mandamus because "the defendants will … be able to obtain relief in the District Court by moving for judgment on the pleadings." *Id.* at 193. The Court noted that defendants had also appealed from this Court's denial of their motion to dismiss under the collateral order doctrine, but held that appeal in abeyance to "enabl[e] the District Court to consider a motion for judgment on the pleadings to dismiss the plaintiffs' remaining claims." *Id.*

Plaintiffs filed a petition for rehearing en banc. At a conference held while that petition was pending, this Court recognized that "the Second Circuit has already held" that there is "no corporate liability." Sept. 24, 2013 Conf. Tr. 13. The Court added that if plaintiffs' petition were denied, then "I don't see very extensive briefings, since the Circuit has already dictated the opinion on extraterritoriality and corporate liability." Tr. 16. Plaintiffs' en banc petition was subsequently denied.

## ARGUMENT

### I. THE SECOND CIRCUIT'S HOLDING THAT CORPORATIONS MAY NOT BE HELD LIABLE FOR HUMAN RIGHTS VIOLATIONS UNDER THE ATS BINDS THIS COURT AND RESOLVES THIS CASE

#### A. This Court Remains Bound By *Kiobel I* Unless And Until That Decision Is Directly Overruled By The Supreme Court Or The En Banc Second Circuit

The Second Circuit in *Kiobel I* held that the ATS "does not provide subject matter jurisdiction over claims against corporations." *Kiobel I*, 621 F.3d at 149. The Supreme Court affirmed that judgment on alternative grounds, explicitly declining to consider the corporate liability question. *See Kiobel II*, 133 S. Ct. at 1663. In light of that history—and contrary to plaintiffs' statement that "the *Balintulo* panel did not discuss whether *Kiobel I* remained binding" (Pls. Br. 7 n.4)—the court of appeals concluded *in this case* that the "law of this Circuit already provides … that corporations are not proper defendants under the ATS in light of prevailing customary international law." *Balintulo*, 727 F.3d at 191 n.26 (citing *Kiobel I* and subsequent procedural history). The Second Circuit reaffirmed that conclusion earlier this week, explaining that "the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit … that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS." *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, __ F.3d __, 2014 WL 503037, at *5 n.6. That should be the end of the matter.

Even absent the Second Circuit's controlling decisions in this case and in *Chowdhury*, this Court would be bound to follow *Kiobel I*: "[T]his Court is … bound by the Second Circuit's decisions until such time as they are directly overruled by that court or the Supreme Court," *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008) (Lynch, J.), or "until the Supreme Court or an en banc panel of the Second Circuit

unambiguously rejects [their] rationale," *Tymoshenko v. Firtash*, 2013 WL 4564646, at *3 (S.D.N.Y. 2013) (Wood, J.); *see Unicorn Bulk Traders Ltd. v. Fortune Mar. Enters., Inc.*, 2009 WL 125751, at *2 (S.D.N.Y. 2009); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 436 (S.D.N.Y. 2004). Plaintiffs do not argue that *Kiobel II* "directly overruled" *Kiobel I* or "unambiguously reject[ed]" its rationale. To the contrary, they *admit* that the "*Kiobel II* Court did not reach the corporate liability question on the merits." Pls. Br. 16. *Kiobel I* accordingly remains binding on this Court.

The only court in this District to have addressed the question has come to the same conclusion. In *Tymoshenko*, Judge Wood expressly rejected plaintiffs' argument that "because the Supreme Court did not expressly foreclose corporate liability, their ATS claim against [the corporate defendant] may proceed." 2013 WL 4564646, at *3. Because the "Supreme Court affirmed the Second Circuit decision and did not rule on corporate liability under the ATS," Judge Wood explained, "[t]his Court is bound by the Second Circuit decision unless and until the Supreme Court or an en banc panel of the Second Circuit unambiguously rejects its rationale." *Id.* Thus, Judge Wood held that "because [the defendant] is a corporation," the "Court must consequently dismiss Plaintiffs' ATS claim" for lack of jurisdiction.

Plaintiffs ignore *Tymoshenko* and all the other cases reciting the duty of district courts to follow circuit precedent, and instead erroneously rely (Pls. Br. 6) on the standard defining the *Second Circuit's* authority to abandon *its own* precedent, which it may do when "an intervening Supreme Court decision … casts doubt on [Second Circuit] controlling precedent." *United States v. Plugh*, 648 F.3d 118, 123-24 (2d Cir. 2011)

(quotation omitted).[1] *Kiobel II* does not "cast doubt" on *Kiobel I*. *See infra* Part I.B. But even if it did, that standard has no application to *lower* courts, which have a more rigid duty to adhere to the precedents of higher courts until they are directly overruled or unambiguously rejected by a court with superior authority. As the Supreme Court has explained, when a Circuit or Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to [the higher court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority.").

Only the Supreme Court or the en banc Second Circuit can overrule *Kiobel I*. Neither has. Unless and until that happens, this Court remains bound by the decision, and is therefore compelled to enter judgment in defendants' favor.

### B. Plaintiffs' Theory That *Kiobel II* Casts Doubt On *Kiobel I* Rests On a Profound Misreading of *Kiobel II*

Even under the inapplicable "cast doubt" standard invoked by plaintiffs, *Kiobel I* remains binding on this Court. Nothing in the Supreme Court's decision in *Kiobel II*

[1] Plaintiffs also misleadingly cite *United States v. Fernandez*, 506 F.2d 1200 (2d Cir. 1974), for the proposition that "[p]recedent should 'not rigidly bind' courts, which may 'depart from [their] prior legal pronouncements when the circumstances of the case warrant.'" Pls. Br. 6 (quoting *Fernandez*, 506 F.2d at 1203) (second alteration in original). *Fernandez* in fact had nothing to do with prior appellate precedent, but with the law-of-the-case doctrine, which the Court explained "merely expresses the practice of federal courts generally to refuse to reopen what has been decided, not a limit to their power." 506 F.2d at 1203. No case suggests that a district court may ignore prior Circuit precedent "when the circumstances of the case warrant."

casts doubt on the continuing vitality of *Kiobel I*'s corporate liability holding. Indeed, the Court specifically stated that it was *not* considering the corporate liability issue. 133 S. Ct. at 1663. The Supreme Court's express refusal to *reach* an issue cannot cast doubt on the lower court's ruling on that issue. Just the opposite: the Court's decision to affirm on alternative grounds *leaves the unaddressed holding intact*. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 137 (2d Cir. 2007) (citing as binding precedent prior decision affirmed by Supreme Court on alternative ground); *McHugh v. Rubin*, 220 F.3d 53, 57 (2d Cir. 2000) (same); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1183 (2d Cir. 1996) (same); *Brodsky v. City Univ. of N.Y.*, 56 F.3d 8, 9 (2d Cir. 1995) (same). *Kiobel I* therefore remains the binding law of this Circuit.

Plaintiffs' contrary theory rests on a profound misunderstanding of *Kiobel II*. Plaintiffs' convoluted theory is that whereas *Kiobel I* treated the corporate liability issue as jurisdictional, *Kiobel II* rejected that ruling and found the issue to be non-jurisdictional because the Court resolved the case on extraterritoriality grounds, which plaintiffs contend is also non-jurisdictional, and the Court could not have (according to plaintiffs) reached a non-jurisdictional issue before a jurisdictional issue. Pls. Br. 8-11. The flaw in that theory is its essential premise that extraterritoriality is a non-jurisdictional "merits" issue. As discussed below, in the context of the ATS, extraterritoriality is plainly jurisdictional—as the *Kiobel II* Court itself made clear—and the fact that the *Kiobel II* Court resolved the case on extraterritoriality grounds is thus entirely consistent with *Kiobel I*'s holding that corporate liability is also jurisdictional. *See* Pls. Br. 8 n.5 (acknowledging that court may address non-merits issues in any order). And even if the Court did implicitly determine that corporate liability is not jurisdictional, that holding

would have no effect on *Kiobel I*'s substantive conclusion that only natural persons can be held liable for international law violations asserted under the guise of the ATS.

1. What plaintiffs fail to understand is that the scope of the ATS must be a jurisdictional question because the ATS is a jurisdictional statute. Plaintiffs' flawed argument relies entirely on the Supreme Court's decision in *Morrison v. Nat'l Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), but that case does not even mention the ATS, and certainly does not hold that *all* extraterritoriality questions are non-jurisdictional. *Morrison* instead holds only that the extraterritorial application of Exchange Act § 10(b) is non-jurisdictional. *Id.* at 2877. The difference between Exchange Act § 10(b) and the ATS is obvious—§ 10(b) is not a jurisdictional statute, whereas the ATS is "strictly jurisdictional," *Kiobel II*, 133 S. Ct. at 1664 (quotation omitted). The Second Circuit has accordingly treated all questions concerning the ATS's scope as jurisdictional. *See*, *e.g.*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). The question whether the ATS supports federal common law claims based on extraterritorial actions accordingly implicates the district courts' subject-matter jurisdiction.

The Supreme Court in *Kiobel II* made this distinction clear in the very discussion of *Morrison* on which plaintiffs erroneously rely. Pls. Br. 10. In considering the application of the presumption against extraterritoriality to the ATS, the Court observed that the presumption is "typically appl[ied] … to discern whether an Act of Congress regulating conduct applies abroad," and cited *Morrison* as holding that "the question of extraterritorial application was a 'merits question,' not a question of jurisdiction." *Kiobel*

*II*, 133 S. Ct. at 1664 (citing and quoting *Morrison*, 130 S. Ct. at 2876-77). But the Court then *distinguished* the ATS, which, "on the other hand, is 'strictly jurisdictional.'" *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)). The Court held that *despite* that crucial distinction, "we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS." *Id.* In other words, the Court concluded that the extraterritoriality principles articulated in *Morrison* apply to the ATS *even though* the ATS is a jurisdictional provision.[2]

The Court's formal judgment in *Kiobel II* confirms that its extraterritoriality ruling was jurisdictional. The Court's judgment "affirmed" the "judgment of the Court of Appeals" without qualification, *id.* at 1669, and that Second Circuit judgment in turn was that the "complaint must be dismissed for lack of subject matter jurisdiction." *Kiobel I*, 621 F.3d at 149. If the extraterritoriality ground on which the *Kiobel II* Court affirmed dismissal had been a merits ground, the Supreme Court would not have affirmed the Second Circuit's dismissal for lack of jurisdiction, but instead would have changed the judgment, which is exactly what it had previously done in *Morrison*. The Court there explained that "[p]etitioners have … failed to state a claim on which relief can be granted," and thus "affirm[ed] the dismissal of petitioners' complaint on this ground," rather than for lack of jurisdiction. 130 S. Ct. at 2888. No such alteration to the

[2] The same distinction applies to the other non-ATS cases plaintiffs cite in footnote 9 of their brief. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012); *Loginovskaya v. Batratchenko*, 936 F. Supp. 2d 357 (S.D.N.Y. 2013); *Starshinova v. Batratchenko*, 931 F. Supp. 2d 478 (S.D.N.Y. 2013); *Liu v. Siemens A.G.*, __ F. Supp. 2d __, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013). Each of those cases concerns a non-jurisdictional statute.

jurisdictional basis of the lower court's dismissal was made in *Kiobel II*.

Finally, Justice Breyer's opinion concurring in the *Kiobel II* judgment expressly viewed the territorial scope of the ATS as a jurisdictional question. *See* 133 S. Ct. at 1671 (Breyer, J., concurring in judgment) ("the parties and relevant conduct lack sufficient ties to the United States for the ATS *to provide jurisdiction*" (emphasis added)). His opinion read the majority opinion—the judgment of which he joined—the same way, *see id.* at 1677 ("I agree with the Court that jurisdiction does not lie."), and nowhere did the majority contest that understanding.

Because *Kiobel II* clearly treated extraterritoriality as a jurisdictional issue, the Supreme Court was free to dispose of the case on that ground without addressing the other jurisdictional issue of corporate liability. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431-32 (2007) ("a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits") (quotation omitted). There is thus no basis for inferring, as plaintiffs do, that *Kiobel II* implicitly held corporate liability to be a non-jurisdictional merits issue, "thus placing it in direct conflict with *Kiobel I*." Pls. Br. 8. There is no conflict at all—*Kiobel II*'s jurisdictional holding on extraterritoriality is completely harmonious with *Kiobel I*'s jurisdictional holding on corporate liability.[3]

2. Even if the Supreme Court had rejected *Kiobel I*'s premise that corporate

[3] Defendants agree with plaintiffs that it is "unlikely"—to say the least—that the *Kiobel II* Court "found corporate liability at the jurisdictional stage—without discussion on this original issue on which it granted certiorari for the case." Pls. Br. 11 n.11. And any such "drive-by jurisdictional ruling[]" would have "no precedential effect" in any event. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *see Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); *Garay v. Slattery*, 23 F.3d 744, 745 n.2 (2d Cir. 1994).

liability is a jurisdictional matter, it would have had no effect on the Second Circuit decision's *substantive* determination that only natural persons can be held liable under the ATS for violating human rights norms. That holding did not turn in any way on the jurisdictional nature of that inquiry. Rather, the Second Circuit limited ATS liability to natural persons because "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*." 621 F.3d at 145. That principle does not turn on whether the corporate ATS liability is a jurisdictional or merits question. *See Morrison*, 130 S. Ct. at 2877 (after correcting erroneous treatment of § 10(b) extraterritoriality as jurisdictional, refusing plaintiffs' request to remand because "nothing in the analysis of the courts below turned on the mistake," and "remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion"). Accordingly, even if plaintiffs were right that ATS extraterritoriality is a merits question rather than a jurisdictional one, it does not follow that *Kiobel I*'s substantive holding on corporate liability is undermined in any way by *Kiobel II*. It is not.[4]

[4] Plaintiffs also cite the *Kiobel II* Court's statement that because "[c]orporations are often present in many countries," "mere corporate presence" does not suffice to overcome the presumption of extraterritoriality. 133 S. Ct. at 1669; *see* Pls. Br. 13-14. Plaintiffs wisely do not contend that this statement is enough to render *Kiobel I* non-binding; they only argue that the statement favors a finding of corporate liability assuming the question were an open one. Pls. Br. 13-14. But even that is wrong: the Court expressly declined to consider the corporate liability question, as plaintiffs themselves admit, and the "mere corporate presence" passage plaintiffs cite was made only in response to an argument the *Kiobel* plaintiffs made about why the presumption against extraterritoriality was overcome. 133 S. Ct. at 1669. And in any event, the statement that "mere corporate presence" *does not* suffice to support an ATS claim is at least as consistent with a no-corporate-liability rule as it is with the opposite rule.

### C. *Licci* Does Not Make Corporate Liability An Open Question For This Court

Plaintiffs assert that in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), the Second Circuit "[r]ecognized that *Kiobel II* undercut the rationale of *Kiobel I*." Pls. Br. 1. That assertion mischaracterizes *Licci*, and is contradicted by Second Circuit precedent both before and after *Licci* affirming that *Kiobel I* remains binding law.

*Licci* involved numerous claims brought by American, Canadian, and Israeli citizens against two corporations. One ATS claim was involved. *Id.* at 166. The Second Circuit's opinion focused not on that claim, but on whether the Court could exercise personal jurisdiction over one of the defendants. *Id.* at 167-74. At the end of the decision, the Court added a brief note on the ATS claim, beginning with its statement in a previous iteration of the case that if the Supreme Court were to affirm the Second Circuit's holding in *Kiobel I*, "'we will likely be required to affirm the dismissal of the ATS claims' based on our conclusion in *Kiobel* that the ATS does not provide subject matter jurisdiction over corporate defendants for violations of customary international law." *Id.* at 174 (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 73 (2d Cir. 2012)). The Court then observed that the "Supreme Court has indeed affirmed, but on different grounds from those upon which we decided the appeal." *Id.* And "[b]ecause the question of subject matter jurisdiction was not briefed on appeal, because the Supreme Court's opinion did not directly address the question of corporate liability under the ATS, and in light of the other claims brought by the plaintiffs," the Court thought "it best for the district court to address this issue in the first instance." *Id.*

*Licci* thus does not—and as a panel opinion, could not—overrule *Kiobel I*. As set

forth above, only the Supreme Court or the Second Circuit sitting en banc can do so. While the *Licci* Court arguably asked the district court to consider whether *Kiobel I* remains binding, it expressly did not answer that question, but instead left it to the "district court to address this issue in the first instance." *Id.* And it invited consideration of this issue only because the issue had not been briefed on appeal, and because dismissing the ATS claim would not have disposed of the case in any event, since other non-ATS claims would remain. *Id.* That exercise of appellate prudence cannot be read as a statement one way or the other about *Kiobel I*'s ongoing viability. And plaintiffs' contrary reading of *Licci* flatly conflicts with the view of Second Circuit panels both before and after *Licci*, which have squarely held that *Kiobel I* remains controlling Circuit precedent. *See Chowdhury*, 2014 WL 503037, at *5 n.6; *Balintulo*, 727 F.3d at 191 n.26. This Court should follow *Kiobel I* and enter judgment for defendants.

## II. ON THE MERITS OF THE ISSUE, ATS LIABILITY IS LIMITED TO THE NATURAL PERSONS RESPONSIBLE FOR THE ALLEGED INTERNATIONAL HUMAN RIGHTS VIOLATIONS

The merits of the corporate liability question are not properly before this Court to resolve. If the Court nevertheless were to reach that question, however, it should hold that liability under the ATS for conduct violating international human rights norms is limited to the natural persons responsible for the conduct.

### A. *Kiobel I* Correctly Concluded That The Question Of Corporate ATS Liability Is Determined With Reference To International Human Rights Law, Which Does Not Recognize Corporate Liability

Most of plaintiffs' merits arguments are answered by *Kiobel I*. *Kiobel I* explains at length why courts must "look[] to customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued." 621 F.3d at 128; *see id.* at 127-31; *Sosa*,

542 U.S. at 732 n.20. As *Kiobel I* further explains, customary international law does not treat corporate entities (as opposed to the natural persons through whom the entity acts) as having the capacity to violate human rights norms. 631 F.3d at 131-45.

*Kiobel I*'s analysis need not be fully repeated here, but certain key points can be briefly summarized. Most critically, every international criminal tribunal beginning with Nuremberg has extended liability only to natural persons. *See id.* at 132-37. While these international tribunals address crimes rather than torts (Pls. Br. 24 n.23), their judgments are crucial to the corporate ATS liability question because their jurisdiction has always reflected customary international law, which is why Second Circuit caselaw "has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS]." *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 270 n.5 (2d Cir. 2007) (Katzmann, J., concurring).[5] In fact, *all* international human rights norms that are civilly enforceable under the ATS—including the norms at issue in this case—are based on international criminal law prohibitions. There is no basis for *accepting* those sources to establish a binding international law norm while at the same time *rejecting* those same sources on the question whether the norm extends liability to corporations.

Moreover, international tribunals reject corporate liability for an important reason that applies fully to civil proceedings under the ATS: there is no international consensus that a corporation as an entity can form its own mens rea, as required for criminal

[5] *See id.* at 271 (The London Charter and Nuremberg "were viewed as reflecting and crystallizing preexisting customary international law"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 n.7 (2d Cir. 2009) ("[C]ustomary international law norms prohibiting … war crimes[] and crimes against humanity have 'been developed largely in the context of criminal prosecutions rather than civil proceedings'" (quoting *John Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002))).

culpability. Because the same mens rea is required to establish a violation of the human rights norms enforceable under the ATS, there is no basis in international law for enforcing those norms against corporate entities.

Plaintiffs' principal response is that various common and civil law systems recognize corporate tort liability under their *domestic* law. Pls. Br. 20-22. Customary international law, however, consists solely of norms of "mutual concern," not those of "several concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248-49 (2d Cir. 2003) (quoting *Filartiga*, 630 F.2d at 888). All civilized nations prohibit (for example) murder and theft, but those prohibitions do not reflect customary international law because they concern matters of "several" rather than "mutual" concern. The domestic laws on which plaintiffs rely fall into the same category. *See Filartiga*, 630 F.2d at 888. Further, the question whether a particular type of defendant can be held liable under the ATS must be answered "on a norm-specific basis," *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1096 (D.C. Cir. 2011); *see Sosa*, 542 U.S. at 732 n.20, so it is irrelevant that nations generally recognize corporate tort liability. What matters is that there is no consensus among nations that corporate entities are capable of violating international human rights norms like those asserted by plaintiffs here.[6]

### B. Even If Corporate ATS Liability Is Determined By Federal Common Law, There Is No Basis For Corporate ATS Liability In Federal Common Law

Plaintiffs' chief objection to *Kiobel I* is that it errs in focusing on the lack of corporate liability in international law, because according to plaintiffs, corporate liability

[6] Plaintiffs err in relying (Pls. Br. 20) on *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). That case did not involve a suit seeking to enforce a customary international human rights law norm against a corporation, and thus has no bearing on the existence of corporate liability in ATS cases.

for ATS claims arises not from international law, but from the federal common law of the United States. The objection gets them nowhere, however, because federal common law also does not permit corporate liability for ATS claims.

1. While it is true that corporations often are subject to tort liability under positive law and state common law, they are not subject to liability in the federal common law context most analogous to implied ATS actions: implied actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), to enforce constitutional guarantees against federal agents. *See Sosa*, 542 U.S. at 742-43 (Scalia, J., concurring in judgment). In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court exercised its federal common-lawmaking authority and refused to extend *Bivens* liability to corporations, even when they act under color of law. *Id.* at 63. The Court so held because it deemed corporate liability unnecessary to further *Bivens*'s core purpose to deter individual federal officers from violating the Constitution, *id.* at 70, and because the "caution toward extending *Bivens* remedies into any new context … forecloses such an extension here," *id.* at 74. *Malesko* thus demonstrates that corporate liability under federal common law should not be assumed, especially in fraught areas—like the ATS—requiring "great caution" before creating new federal common law. *Sosa*, 542 U.S. at 728.

2. In addition to the Supreme Court's guidance regarding the circumstances under which federal common law allows for corporate liability, Congress itself established an equally—if not more—significant guidepost when it enacted the TVPA to provide an express cause of action under the ATS for torture and extrajudicial killing,

while providing *only* for liability against natural persons. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

The "general practice" in fashioning federal common law under the ATS, as in any other context, "has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. In particular, when Congress has provided policy guidance in the form of positive law addressing the same subject matter, those positive-law enactments both guide and restrict the court's authority to establish the federal common law rules. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990). In *Miles*, the Court looked to federal maritime statutes to determine the rule to apply in an analogous issue arising under admiralty law. As with actions under the ATS, actions in admiralty sound in federal common law, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90 (2008), but the *Miles* Court explained that "legislation has always served as an important source of both common law and admiralty principles." 498 U.S. at 24 (quotation omitted). Indeed, "an admiralty court should look *primarily* to … legislative enactments for policy guidance." *Id.* at 27. A court must keep federal common law rules "strictly within the limits imposed by Congress," the Court explained, *id.* at 27, because positive law does not merely reflect "general policies," but also the "limits" of those policies, which a court making federal common law "is not free to go beyond," *id.* at 24.

Adhering to the approach required by *Miles*, Congress's policy judgment concerning corporate liability in the TVPA controls the formulation of federal common law under the ATS. The cause of action made available in the TVPA for torture and extrajudicial killing, 28 U.S.C. § 1350 note, § 2, is directly analogous to the implied action federal courts are authorized to recognize under the ATS for violation of

international human rights norms, except that the TVPA applies to both aliens *and* U.S. citizens. When the TVPA was enacted in 1992, it was still unclear whether any ATS action would be available at all. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (1984) (Edwards, J., concurring) (ATS creates a cause of action), *with id.* at 799 (Bork, J., concurring) (ATS is purely jurisdictional and requires further congressional action). The TVPA's legislative history makes clear that the statute was specifically intended to provide the express cause of action Judge Bork believed the ATS required. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 3-4 (1991).

In enacting the TVPA, Congress established the clear policy that only natural persons may be sued for violating international law norms like torture and extrajudicial killing. That congressional policy determination answers the question presented in this case. In the words of *Miles*, the "decisional law" to be made under the ATS (498 U.S. at 24) must "keep strictly within the limits imposed by Congress" (*id.* at 27). Accordingly, this Court should keep federal common law liability under the ATS limited to natural persons, just as Congress limited liability under the TVPA.

If corporate liability for ATS claims outside the TVPA context *were* recognized, an intolerable anomaly would arise. *See Miles*, 498 U.S. at 33 (construing federal common law to avoid "anomaly" and "unwarranted inconsistency" in legal treatment of similar situations). The TVPA provides a cause of action to both aliens and U.S. citizens, while ATS actions are limited to aliens. Accordingly, if ATS suits against corporations for human rights norms were allowed while TVPA suits were not, then aliens would be allowed to sue U.S. corporations for alleged acts of torture under the ATS, while U.S. citizens could not sue foreign or U.S. corporations under either statute for the exact same

conduct. That inexplicable and indefensible policy result is reason enough to construe federal common law concerning corporate liability under the ATS consistent with the policy judgment reflected in the TVPA.[7]

**CONCLUSION**

For the foregoing reasons, the Court should enter judgment for defendants.

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Respectfully submitted,

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[7] Plaintiffs rely on precedent from other circuits holding that corporations may be held liable under the ATS. Pls. Br. 12-14. The precedent of *this* Circuit is, of course, to the contrary. Further, most of the out-of-circuit cases plaintiffs cite were decided before the Supreme Court unanimously held in *Mohamad* that Congress rejected corporate liability for TVPA actions.