No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, ET AL.,
PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
RESPONDENTS

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND INTERNATIONAL LAW EXPERTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae (listed in the Appendix) are international human rights organizations or international scholars who have an interest in the proper understanding and assessment of the liability of corporations for the conduct at issue in this case, and specifically the application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to corporations. *Amici* regularly examine the various ways that corporations can be held liable for egregious conduct.

The Second Circuit's majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), rejected the proposition that corporations can be held accountable through a tort action under the ATS for conduct that violates customary international law on the faulty premise that there is no basis in international law for holding corporations liable. In so doing, the majority overlooked a well-recognized source of international law, namely general principles of law, which consists of principles derived from the domestic or municipal laws of legal systems around the world, to determine whether there is a general principle of corporate accountability for the conduct at issue.

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[1] Consents to the filing of *amicus curiae* briefs are on file with the Clerk of the Court pursuant to Rule 37(3) of the Rules of the Supreme Court of the United States. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

Amici join in this brief because an analysis of general principles of law demonstrates that international law provides that corporations can be held accountable for such egregious conduct as that for which the ATS provides a grant of jurisdiction.

SUMMARY OF ARGUMENT

Amici respectfully submit that the majority's flawed analysis of international law produced an erroneous conclusion that corporations cannot be held liable for egregious conduct which rises to the level of a violation of the laws of nations, as set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The majority ignored a well-recognized and often-applied source of international law, namely the "general principles of law recognized by civilized nations." Indeed, the only mention of general principles was in a single footnote, in which the majority incorrectly relegated general principles to a secondary source of international law,[2] and effectively dismissed them as an applicable source of international law. *See Kiobel*, 621 F.3d at 141, n. 43.

Focusing its inquiry on the treatment of corporations instead under a separate source of international law, namely customary international law, the majority rejected the "history of corporate rights and obligations under domestic law," calling it

[2] As discussed below, the majority did not simply misidentify general principles as a *secondary* source of "international law," but it misidentified general principles as a source of "customary international law." *Kiobel*, 621 F.3d at 141, n. 43. Customary international law is itself but a *source* of international law, and does not embody the whole of international law.

"entirely irrelevant." *Kiobel*, 621 F.3d at 118, n. 11. Because it failed to conduct a thorough – or indeed, any basic – examination of corporate liability in other nations, the majority concluded that the ATS – and the remedy it provides for those who suffer egregious conduct in violation of the laws of nations – is "apparently unknown to any other legal system in the world." *Id.* at 115.

Had the majority addressed itself to general principles of law, as this Court and other Courts of Appeal have done on numerous occasions when called to rule upon a question that implicates international law, it would have found that far from being "unknown," the attribution of liability to a corporation for egregious conduct is in fact generally accepted and the provision of some form of redress to victims of serious corporate wrongdoing is commonplace. Notably, the majority concedes that corporations are liable as juridical persons under domestic law, *Kiobel*, 621 F.3d at 117-18, but it fails to recognize the consequence of this conclusion to an international law analysis drawing upon general principles of law.

As set forth below, corporate conduct is regulated under all national legal systems. While the form of accountability for egregious acts which constitute violations of law, including international law, may vary, corporate liability for such conduct is indeed a recognized general principle of law.

Although *amici* agree with Petitioners that courts should look to domestic law to determine whether corporations can be held liable under the ATS, *amici* are satisfied that an analysis of the general concepts

underlying domestic laws, as a source of international law, provides a conclusion at international law that is in conformity with U.S. domestic law: a general principle of law exists that corporations can be held liable for egregious conduct that falls within the scope of the ATS.

The majority's failure to consult general principles of law led to an erroneous conclusion, and as such, warrants reversal.

ARGUMENT

I. 'GENERAL PRINCIPLES OF LAW' IS A WELL-RECOGNIZED PRIMARY SOURCE OF INTERNATIONAL LAW

General principles of law are recognized as one of the authoritative sources of international law, having been codified as a source of international law in the Statute of the International Court of Justice ("ICJ")[3] and other international treaties.[4] General principles of

[3] The sources of international law are set forth in Article 38(1) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993. Article 38(1)(c) of the Statute provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … (c) the general principles of law recognized by civilized nations."

[4] *See, e.g.*, Rome Statute of the International Criminal Court, art. 21(1)(c), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) art. 41(1)(c)(invoking general principles in relation to domestic exhaustion) and art.15(2) (looking to "general principles of law recognized by the community of nations" as the basis for

law have been applied as a source by the ICJ and its predecessor,[5] and other international and regional tribunals,[6] as well as by this Court,[7] among other

identifying acts and omissions as crimes); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 9(1)(e), Mar. 22, 1989, 1673 UNTS 126, 28 I.L.M. 657 (1992). *See also* In'tl Crim. Trib. for the former Yugoslavia, Rules of Procedure and Evidence, Rule 89 (B) ("In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.").

[5] *See, e.g.,* Chorzow Factory Case, Permanent Court of International Justice (PCIJ), Reports 1928 A/17 at 29 (holding that "it is a general conception of law that every violation of an engagement involves an obligation to make reparation"); Corfu Channel Case (Merits), 1949 I.C.J. 4, 27 (Apr. 9) (relying on general principles of law and international custom to find that in times of peace, states have a right to send their warships through straits used for international navigation if the passage is innocent); Military and Paramilitary Activities (Nicar. v. U.S.),1986 I.C.J. 14 (Jun. 27) (ruling that the U.S. had violated "fundamental general principles of humanitarian law" by supporting Contra guerrillas in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors).

[6] *See, e.g., Prosecutor v. Kunarac*, et al., Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 439-460 (In'tl Crim. Trib. for the former Yugoslavia Feb. 22, 2001) (identifying the relevant international law that would define rape by reference to the general principles of law as reflected in the basic principles contained in and common to most legal systems); *Gonzalez, et al. v. United States,* Case 1490.05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22, rev.1 ¶ 42 (2007) (stating "that domestic remedies [regarding prosecution of domestic violence], in accordance with generally recognized principles of international law, must be both adequate . . . [and] effective."). *See also* Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, ¶ 2 (finding "respect for fundamental rights forms an integral part of the general principles of law" protected by the court and the protection of those rights is "inspired by the

national courts.[8]

General principles, which are drawn from the rules of the most significant "common points" of law,[9] "constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often

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constitutional traditions common to the Member States").

[7] *See Factor v. Laubenheimer*, 290 U.S. 276, 287-88 (1933) (considering whether a general principle exists such that double criminality in the context of extradition must be considered in the absence of such a requirement in the applicable treaty); *Pearcy v. Stranahan*, 205 U.S. 257, 270 (1907) (looking to general principles of international law as affirmation of its holding). *See also Graham v. Florida,* 130 S. Ct. 2011, 2033-34 (2010) (finding the "global consensus" is against imposing life sentences without parole for juveniles who have not committed homicide); *Roper v. Simmons,* 543 U.S. 551, 575-78 (2005) (finding reference to laws of other countries "instructive" for interpreting the contours of the Eighth Amendment when considering the death penalty for juveniles).

[8] *See, e.g., Kline v. Kaneko*, 141 Misc. 2d 787, 788 (N.Y. Sup. Ct. 1988) (affirming that under general principles of international law, heads of State and immediate members of their families are immune from suit); *In re Klein*, 14 F.Cas. 716, 717 (C.C.D. Mo. 1843) (No. 7865) (holding "the [contractual] restrictions depend on general principles of international law and other parts of the constitution, especially that which prohibits the states from passing any law impairing the obligations of contracts."). *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963) (admiralty).

[9] Antonio Cassese, *International Law*, 151 (2001); *See also* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* 390, 392 (2006) (general principles "belong to no particular system of law, but are common to them all," being the "fundamental principles of every legal system. …[m]unicipal law thus provides evidence of the existence of a particular principle of law").

disparate cogs and wheels of the normative framework of the community."[10] When viewed as intended by the framers of the ICJ Statute, they are "seen as those basic legal principles which underlie, and are common to, every legal system and which, being universally recognized, are known to all nations." Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 U.C.L.A. L. Rev. 1041, 1056 (1963). As such, general principles are commonly derived by employing a comparative law analysis. *See, e.g., Factor*, 290 U.S. at 287-88. *See also United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 (1820) (conducting a survey of "doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law" on the definition of piracy).

The majority in *Kiobel* made two errors in its brief discussion on general principles. *See Kiobel*, 621 F.3d at 141n. 43. First, it states that Article 38(1)(c) of the Statute of the ICJ "identifi[es] 'general principle of law recognized by civilized nations' as a source of *customary* international law." *Id.* (emphasis added). This statement is incorrect. Article 38(1) sets out the four sources of "international law," of which "international custom, as evidence of a general practice accepted as law" (commonly referred to as customary international law) is but one such source. *See* Article 38(1)(b). General principles are a distinct source of international law. *See* Article 38(1)(c). This fundamental error is evidence of the majority's misapprehension of international law and its sources, and its misunderstanding of the various ways in which

[10] Cassese, *supra* note 9 at 151.

corporate accountability can be derived under international law.

Second, it erred in relegating general principles to a secondary source of international law. *Kiobel*, 621 F.3d at 141n. 43. This designation stands in contrast with precedent, including that of the Court of Appeals for the Second Circuit.[11] *See Flores v. Peru Copper Corp.,* 414 F.3d 233, 251 (2d Cir. 2003) (identifying treaties, international custom and general principles as "primary" sources of international law, and identifying judicial decisions and the work of highly qualified publicists as "secondary" sources). Moreover, of the four sources of international law codified in the ICJ Statute, only the last source–judicial decisions and scholarly writings–is identified as a "subsidiary means for the determination of rules of law." ICJ Statute, art. 38(1)(d).

This error is not without consequence. Primary sources, such as general principles of law, establish the rules of international law, whereas secondary sources serve as a means for determining or interpreting such rules. *See* G. J. H. van Hoof *Rethinking the Sources of*

[11] Indeed, the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement (Third)") lists three sources of international law that have been "accepted…by the international community of states" as "[a] rule of international law", namely customary law; international agreement; and "derivation from general principles common to the major legal systems of the world."*See* § 102 (1). The Restatement (Third) is unambiguous that general principles "may be invoked as supplementary rules of international law where appropriate," "even if not incorporated or reflected in customary law or international agreement." *Id.* at § 102 (4).

International Law (1983) 170.[12] This error also reveals a profound misunderstanding of international law more broadly.

The three distinct, but interrelated, primary sources of international law serve to ensure that appropriate and sufficient guidance exists for determining the content of international law across a continuum of formation and practice. Each source, by definition, manifests a form of international consensus. Both customary international law and general principles look to municipal or national systems in defining their content. Indeed, the relationship between customary international law and general principles can be a close one, but each concept remains distinct: the former can be said to be concerned with usage and practice, while the latter turns on the recognition of an underlying principle.

Treaties and customary international law do not, and were not intended to, address every question regarding the content of international law, as evinced by the inclusion of general principles in the Statute of the ICJ.[13] To the extent that these two sources leave

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[12] *See* Cheng, *supra* note 9 at 390 (general principles hold an "important position … in the international juridical order" and "lie at the very foundation of the legal system and are indispensable to its operation," being applied "directly to the facts of the case wherever there is no formulated rule governing the matter" which is significant for "a system like international law, where precisely formulated rules are few."

[13] *See* Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* viii (2d ed. 1970) ("The adoption ... of 'general principles of law recognized by civilized States' as a binding ... source of decision in the judicial settlement of disputes signifies that practice, hitherto unsupported by universal and authoritative

gaps in the law or questions unaddressed, general principles of law are intended to fill any "gaps that are bound to exist in the normative network of any community."[14]

The indispensable role of general principles has long been recognized by judicial bodies. It is reflected, for example, in the US-British Claims Tribunal case, *Eastern Extension, Australasia and China Telegraph Co. (Gr. Brit.) v. U.S.*,[15] which held that in the absence of a treaty and a specific rule of international law,

> [I]t cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical sciences – the solution of the problem. … it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between

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international enactment, and regarded by many as derogating from the strictly judicial character of international arbitration, has now received formal approval on the part of practically the whole international community.")

[14] Cassese, *supra* note 9.

[15] 6 R.I.A.A. 112, Nov. 9, 1923 (American and British Cl. Arb. Under the Special Agreement of Aug. 18, 1910, 1923).

States as between private individuals.[16]

This Court came to a similar conclusion in S*ouffront v La Compagnie Des Sucreries De Porto Rico,* where, in the absence of a treaty providing special rules regarding enforcement of contracts, it turned to general principles of law to identify the principle of reciprocity. 217 U.S 475, 483 n. 9 (1910). This is in accord with the practice of the International Court of Justice. *See, e.g., Temple of Preah Vihear (Cambodia v Thailand),* Merits 1962 ICJ 6 (Judgment of 15 June) Separate Opinion of Vice-President Alfaro at 42-43 ("While refraining from discussing the question whether the principle of the binding effect of a State's own acts with regard to rights in dispute with another State is or is not part of customary international law, I have no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations' applicable and in fact frequently applied by the International Court of Justice in conformity with Art 38, para. I (c) of its Statute").

In the context of the Alien Tort Statute, the role of general principles as a source of international law has been recognized and affirmed, most recently in the case *Doe v. Exxon Mobile Corp.*, 654 F.3d 11 (D.C. Cir. 2011). *See also Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) (looking to general principles to decide exhaustion of domestic remedies requirements); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (same, in the context of the Torture Victim Protection Act). In *Doe v. Exxon*, the court admonished

[16] *Id.* at 114-15.

the majority in *Kiobel* for overlooking general principles of international law as a source of the content of international law. *See* 654 F.3d at 53-54. Notably, the court in *Exxon* distinguished a customary international law analysis, which looks to common practice or usage, from a general principle which "becomes international law by its widespread application domestically by civilized nations." *Id.* at 54 (citations omitted).

Significantly, the court in *Exxon* conducted a general principles analysis on the very question at issue in this case, namely whether a corporation can be held liable under the ATS, and answered the question unambiguously in the affirmative. The court in *Exxon* explained why resort to general principles is appropriate: domestic law "being in general more developed than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing [because] a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system." 654 F.3d at 54 *(quoting* J.L. Brierly, *The Law of Nations* 62-63 (6th ed. 1963)).

Such a general principles analysis does not look for "one law" for the entire world, but should be understood as "crystallizing a core of legal principles." Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 Am. J. Int'l L. 734, 741 (1957). Notably, "outside of that common core the detailed legal rules followed by the various nations necessarily differ, and perhaps

should differ." *Id.* It is not required that a legal principle exists in the legal systems of all nations in order for it to be considered a "general principle of law recognized by civilized nations." *See,* Charles S. Rhyne, *International Law: The Substance, Processes, Procedures and Institutions for World Peace with Justice* 62 (1971). Moreover, resort to general principles does not mean the application of domestic law, but rather the analysis of domestic law should lead to a general principle recognized by civilized nations. *Id.* at 62-63; *see also* International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (dissenting opinion of Judge McNair) (identifying a general principle "is not by means of importing private law institutions 'lock, stock and barrel,' ready-made and fully equipped with a set of rules…the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles").

The majority in *Kiobel* fundamentally misunderstands the relationship between domestic law and international law. It recognizes the relationship between the two only to the extent that *custom* can be derived by national laws and practice; it demonstrates its disregard of general principles in stating that "the fact that a legal norm is found in most or even all 'civilized nations' does not make that norm a part of customary international law." *Kiobel*, 621 F.3d at 118. *See also id.* ("[o]ur recognition of a norm of liability as a matter of *domestic law,* therefore, cannot create a norm of customary international law") (emphasis in

original).[17]

The *Kiobel* majority's insistence that corporate liability must be established as a rule under customary international law in order to hold corporations liable under the ATS is a requirement that is inaccurately attributed to the discussion in *Filártiga v. Peña-Irala* related to a different question - the requirements for a *norm* under international law. *Kiobel*, 621 F.3d at 118, *quoting Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) ("It is only where the nations of the world have demonstrated that *the wrong* is of mutual, and not merely several, concern, by means of express international accords, that a *wrong* generally recognized becomes an international law violation within the meaning of the [ATS]") (emphasis added). There is nothing, however, in *Filártiga's* discussion of norm recognition that requires a court to look to customary international law, while prohibiting it from looking to general principles of law – and domestic law as its source – for the issue of corporate liability.

Indeed, a 'general principles' analysis has aided the development of a number of areas of law related to corporate operations with international dimensions, including contract, anti-trust and trademark law.[18] *See*

[17] To the extent that the majority examines practice of other nations, or discusses general principles, it focuses solely on the recognition of corporate criminal liability in national systems— a curious focus in the context of assessing tort liability. *See Kiobel*, 621 F.3d at 141, n. 43.

[18] Indeed, legal "responsibility" has been recognized as a general principle: "[i]t is a logical consequence flowing from the very conception of law and is an integral part of every legal order." Cheng, *supra* note 9, at 389. Responsibility and liability for breaches of law must be an integral part of the legal order

Wolfgang Friedman, *The Uses of 'General Principles' in the Development of International Law*, 57 Am. J. Int'l L. 279 (1963). *See also* Lord McNair, Q.C., *The General Principles of Law Recognized by Civilized Nations*, 33 Brit. Y.B. Int'l L. 1 (1957) (discussing use of general principles in contract law in the context of international development or natural resource concessions involving multinational corporations); Freeman Jalet, *supra* at 1043 (submitting that use of general principles has occurred primarily in the area of private international law to "enlighten the international business world").[19] There is no reason why such an analysis should not be applied in the content of the Alien Tort Statute.

A comparative study of legal principles to ascertain a general principle is likely to "show that different systems apply substantially the same principles, though in very different forms." Friedman, *supra*, at 284. Such a comparative study, in relation to transnational corporations engaging in conduct that qualifies as a violation of international law, unequivocally demonstrates that while the form of

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applicable to corporations to provide sufficient legal certainty allowing parties to enter into contracts and otherwise engage in business with corporations, including those corporations that conduct business across borders. Such responsibility is also a necessary corollary to granting rights to corporations. *See, e.g., Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

[19] Accordingly, it is inaccurate to describe the legal principles for regulating corporate actions as solely matters of "several" concern between States, as the *Kiobel* majority suggests; particularly in the era of transnational corporate activity, it must be seen a matter of mutual concern. *See generally Flores,* 414 F.3d at 249-50 (discussing wrongs that are of "mutual, and not merely several, concern").

liability may vary between States, all States apply the principle that a transnational corporation can and should be held legally liable for its egregious conduct.

II. CORPORATE LIABILITY FOR EGREGIOUS CONDUCT IS A GENERAL PRINCIPLE OF LAW.

All legal systems recognize the liability of corporations.[20] *See First National City Bank (FNCB) v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (1983); *see also Exxon*, 654 F.3d at 53 (finding that "[l]egal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood"); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 U.S. App. LEXIS 21515 at *15-18 (9th Cir. Oct. 25, 2011) (en banc) (adopting Judge Leval's position in *Kiobel* that no principle of domestic or international law supports a finding that the norms enforceable through the ATS apply only to natural persons and not corporations).

Such recognition of corporate liability for wrongful conduct, as a universal feature of the world's legal systems, qualifies as a general principle of law. The form in which corporations are made to account for their violations of law may vary—including civil, criminal and administrative penalties—and the

[20] Corporate personhood is recognized in all legal systems. *See* The Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 38-39 (Feb. 5) (finding a "wealth of practice already accumulated on the subject" of corporate personhood and "lifting the corporate veil" in municipal law).

conduct at issue may be defined as a tort, a crime or, in some cases, as a violation of international law.

There can be no doubt, however, that domestic legal systems recognize that corporations engaging in the specific conduct at issue in ATS cases can similarly be held liable for their actions. *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes*, Vol. 2, p. 58, Vol. 3, pp. 49-51, *available at* http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22851. *See generally id*., Vols. 1-3. As indicated above, general principles can be derived by employing a comparative law approach. Comparative studies relating to liability for multinational corporations for egregious conduct carried out over the last decade demonstrate that a general principle of law exists allowing for corporations to be held legally responsible for egregious conduct, including conduct constituting a specific breach of a universal and obligatory norm under international law.[21] An examination of liability in both the criminal

[21] *See, e.g.,* International Commission of Jurists, *Report of Legal Expert Panel on Corporate Complicity in International Crimes*, Vols. 1-3 (2008); International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, 2010, *available at* http://www.fidh.org/Corporate-Accountability-for-Human-Rights-Abuses; Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries*, FAFO, 2006, *available at* http://www.fafo.no/pub/rapp/536/536.pdf (seeking to achieve some geographic diversity and represent different legal systems, examining corporate liability in Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, Norway, the Netherlands, Spain, South Africa, Ukraine, the United Kingdom,

and civil contexts demonstrates the existence of the principle of corporate liability for serious transgressions of fundamental norms.[22]

Civil liability against multinational corporations for egregious conduct is both commonplace and regularly exercised, including for conduct that occurs outside the home jurisdiction of a corporation. For example, in the United Kingdom, domestic tort law has been used as a vehicle for seeking accountability against business entities for human rights violations committed outside

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and the United States). *See also* European Center for Constitutional and Human Rights (ECCHR), *Business and Human Rights: European Cases Database*, *available at* http://www.ecchr.eu/index.php/eonference_en.html; International Commission of Jurists, Business and Human Rights - Access to Justice: Country Reports *available at* http://www.icj.org/default.asp?nodeID=350&langage=1&myPage=Publications (containing detailed discussion of corporate accountability in Brazil, China, Colombia, Ecuador, India, The Netherlands, Poland, South Africa, and the Philippines). *See also* Allens Arthur Robinson, *'Corporate Culture' As A Basis For The Criminal Liability Of Corporations* (Feb. 2008), available at http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

[22] Certain civil law countries do not draw a clear distinction between criminal and civil proceedings, and instead allow for victims of a violation to seek damages from a defendant in a criminal case – a practice highlighted by Justice Breyer in his discussion of international comity in *Sosa v. Alvarez-Machain*. 542 U.S. 692, 762-63 (2004). *See also* Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 886 (2009) (noting that Argentina, Belgium, France, Japan, the Netherlands and Spain employ the mixed civil/criminal mechanism of *action civile* that allows a crime victim or his representative to seek tort damages against a defendant in a criminal case).

the State borders. *See, e.g., Lubbe v. Cape Plc,* [2000] 1 WLR 1545 (H.L.) (appeal taken from Eng.) (claims for damages of over 3,000 miners who claimed to have suffered as a result of exposure to asbestos and its related products in the English defendant corporation Cape's South African mines); *Flores v. BP Exploration Co. (Colombia),* [Pending] Claim No. HQ08X00328 [Filed Dec. 1, 2008] EWHC (QB) (complaint against BP in Colombia for serious environmental harm with devastating impact on the local population); *Guerrero & Ors v. Monterrico Metals Plc & Rio Blanco Copper SA*, [2009] EWHC 2475, [2010] EWHC 3228 (QB) (case on behalf of Peruvians detained and tortured while protesting at copper mine).

Indeed, as these examples demonstrate, many cases involving transnational activity brought under domestic law look quite similar to the fact-patterns that arise in ATS cases. *See Prosecutor v TotalFinaElf et al.*, [Court of Cassation] March 28, 2007 PAS. No. P.07.0031.F (2007) (Belg.) (brought by Myanmar residents in Belgium against the French oil company, Total, arising out of the same pipeline construction project at issue in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002)); *Dagi v. BHP*, (1997) 1 VR 428 (Austl.) (suit in the Supreme Court of Victoria, Australia by 30,000 natives of Papua, New Guinea, against a mining company for damages to their lands); *Union Carbide Corporation v. Union of India* (1991) 4 S.C.C. 584; A.I.R. 1992 S.C. 248 (India) (case filed by residents of Bhopal, India, against the Union Carbide Company for extensive injuries and loss of life arising from the release of toxic gases from a chemical plant); *Hiribo Mohammed Fukisha v. Redland Roses Limited* [2006] eKLR Civil Suit 564 of 2000 (Kenya) (case filed

in Kenya in which tort law provided the remedy for serious bodily harm caused by exposure to hazardous chemicals when spraying herbicides and pesticides); *Caal v. Hudbay Minerals Inc.*, [2011] O.J. No. 3417 (Can. Ont. Sup. Ct.) (QL) (suit by eleven Guatemalan women against HudBay and its subsidiary HMI Nickel Inc for claim of negligence resulting in *inter alia* assaults and gang rapes).[23] *See also* Thompson, Ramasastry & Taylor, *supra* note 22, at 887. One recent case against the multinational corporation domiciled in the Netherlands, Trafigura, addressed the dumping of toxic waste off the coast of the Ivory Coast leading to the death of an estimated twelve people and the sickening of thousands of people; this precipitated civil and criminal litigation in various jurisdictions, including the Ivory Coast, the Netherlands, and the United Kingdom. *See, e.g., Yao Essaie Motto & Ors v. Trafigura Ltd & Anor,* [2011] EWCA (Civ) 1150 (Eng.). *See also* Nicola M.C.P. Jägers and Marie van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands*, 33 Brook. J. Int'l L. 833 (2008); *Trafigura Found Guilty of Exporting Toxic Waste*, BBC, July 23, 2010, http://www.bbc.co.uk/news/world-africa-10735255.

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[23] *See* also *Arias v Dyncorp,* 517 F. Supp. 2d 221 (D.D.C. 2007) (claims of residents of Ecuador against U.S. contractor to recover under ATS, common law, international agreements and conventions for physical harm and property damage from herbicide spraying in Colombia survived motion for summary judgment), *Aguinda v. ChevronTexaco Corp.,* Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed May 7, 2003) (Ecuador) (the court awarded nearly $9 billion in damages against Chevron for engaging in improper byproduct disposal techniques which contaminated nearby water sources and contaminated the Oriente region with carcinogenic toxins)

There is also growing acceptance for holding corporations liable under domestic criminal law.[24] *See, e.g.,* Thompson, Ramasastry & Taylor, *supra* note 22, at 870 (identifying that half of countries surveyed – representing both civil and common law countries – "make it a general practice to recognize no distinction between natural and legal persons"); Robinson, *supra* note 21. *See also Flomo v. Firestone Natural Rubber Co.,* 643 F.3d 1013, 1019 (7th Cir. 2011). Even those countries that do not provide for criminal liability over legal persons in the same manner as natural persons allow for criminal liability in certain areas, including anti-terrorism law. *See* Thompson, Ramasastry & Taylor, *supra* note 22, at 872 (discussing Argentina

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[24] *See, e.g*. Code pénal [C. Pén.] art. 121-2 (Fr.);Wetbok van Strafrecht (Criminal Code) art. 5 (Neth.); Criminal Code, R.S.C., ch C-46, § 2 (1985) (Can.); Code Pénal Suisse [CP] [Criminal Code] Dec.21, 1937, SR 757 (1938) art. 102a; Verbandsverantwortlichkeitsgesetz [VbVG] [Law on the Responsibility of Associations] Bundesgesetzblatt I [BGBl I] No. 151/2005 §§ 1- 2 (Austria); Code Pénal [C.Pén] art. 5 (Belg.); The Indian Penal Code Act, No. 45 of 1860 Pen. Code §§ 2, 11; Penal Code. ch. 3, § 48 (Nor.); Penal Code, No. 19, ch. 2, art. 19 (b-c) (Ice.); Criminal Procedure Act 51 of 1977, §332 (S. Afr.); Crimes Act 1961, §2.1 (N.Z.); Criminal Code Act 1995 (Cth) s 12.1 (Austl.); Penal Code, art. 11 (Myan.); Revised Penal Code, ch. 9 (Fin.); Borgerlig straffelov [Danish criminal code], § 306; China Criminal Code Art. 30 (corporate liability for "unit crimes"); Revised Penal Code, Act No. 3815,(Phil.) (corporate liability if specified by individual penal statute); Criminal Code of the Republic of Lithuania art. 20 (Lith.); Criminal Code of the Republic of Moldova, art. 21(3) (Mold.); Law on the Criminal Liability of Legal Entities (9754/2007) (Alb.); Criminal Code, art. 45(1) (Rom.); Penal Code, ch.224, s. 11 (Sing.); Código Penal (Criminal Code) art. 31(Sp.). In Japan, two thirds of laws which provide punishment apply against corporations. *See* FAFO, *A Survey of Sixteen Countries*, *supra* note 21, at 6-7.

and Indonesia). And while some countries do not allow for criminal liability of legal persons, these countries (including Germany, Greece, Mexico and Sweden) have adopted national laws to impose fines or other equivalent sanctions on corporations for certain violations – a punishment that mirrors that imposed by countries that allow for criminal liability.

Municipal laws that have as a "common core" the assignment of corporate liability for the egregious acts that fall under the ATS are increasingly being harmonized – a process unnecessary to demonstrate a general principle. And likewise, statutes and regulations that provide jurisdiction to adjudicate claims against corporations are becoming more widespread. For example in Europe, it has been codified that corporations domiciled in any member State of the European Union can be sued for torts that occur outside the jurisdiction of the home-State pursuant to the European Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Articles 2 and 60.[25] Council Regulation 44/2001, arts. 2, 60, 2001 O.J. (L 12) 3, 13. *See generally* International Federation for Human Rights supra note 21*, at* 204-214. *See also* Jan Wouters and Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 Geo. Wash. Int'l L. Rev.

[25] Art. 2 provides: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Pursuant to Article 60(1) of the Brussels Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.

939, 941 (2009) (national courts in the European Union have jurisdiction over any defendant corporation that is "domiciled" in the EU, irrespective of where the harm occurred or the nationality of the plaintiffs); *Oguru et al. v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd.,* Court of The Hague, Dec. 30, 2009, Case No. 330891/Docket No. HA ZA 09-0579 (Neth.) (English translation of decision of Dec. 30, 2009 finding jurisdiction under Dutch law in conjunction with Article 60(1) of EC Regulation No. 44/2001 over claims brought by Nigerians against Shell for torts, arising out of oil spill in Nigeria, *available at* http://milieudefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma).

The majority, erroneously, looked only to whether other countries had an exact replica of the Alien Tort Statute and when it failed to find an ATS clone in each country, it drew the incorrect conclusion that the liability allowed for by the ATS against corporations was an anomaly.[26] *See generally* Beth Stephens,

[26] One system does have a legal structure very similar to the United States is Canada's, albeit without an equivalent of the Alien Tort Statute. In Canada, the common law can be used to assert tort claims against multinational corporations. Similar to the United States, the Supreme Court of Canada has ruled that customary international law is a part of Canadian domestic law. *See R v. Hape*, 2007 SCC 26, 2 SCR 292, para. 39 (Can.) ("the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada"). In Quebec, which has a civil law system distinct from the common law system in the rest of Canada, the Superior Court

Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations, 27 Yale J. Int'l L. 1, 3 (2002) (looking for a replica of the ATS in other systems "reflects a misconception of the interrelationship between international law and varied domestic legal systems. Exact duplicates of *Filártiga* human right litigation are unlikely in most legal systems because of differences in legal procedure and legal culture"). *See also Id.* (explaining that each State translates its international law obligations into proceedings that are appropriate to its domestic civil and legal system); Menno T. Kamminga, *The Next Frontier: Prosecution of Extraterritorial Misconduct before Non-US Courts*,174 *in Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference* 172, 174 (Willem J.M. van Genugten, Michael P. Scharf, and Sasha E. Radin, eds., 2009) ("In most European countries civil lawsuits against multinational enterprises for unlawful actions committed abroad would not require the Alien Tort Claims Act" because of EU Regulation 44/2001, which codified that

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has found that allegations of war crimes, namely violations of international law such as the Geneva Conventions, would be recognizable as a civil fault (i.e. tort) under the Quebec Civil Code if committed by a corporation. *See Bil'in (Village Council) v. Green Park International Ltd.*, 2009 QCCS 4151, para 190 ("if the Plaintiffs' allegations are true, a trial judge could find that the Corporations are at fault for knowingly participating in Israel's alleged illegal Policy"). *See also Association Canadienne contre l'Impunité v. Anvil Mining Limited* (2011), 201 A.C.W.S. (3d) 626 (Can. Que. Sup. Ct.) (Superior Court of Quebec has found that it has jurisdiction over a company incorporated in Canada but also with ties to Australia and the Democratic Republic of Congo that is accused of involvement in a massacre in the Democratic Republic of Congo).

corporations domiciled in the European Union can be sued for torts outside the home-State). *C.f.* Human Rights and Business, Report: Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, Doc. 12361, Sept. 27, 2010, para. 101 (finding the "Brussels I Regulation is an important piece of legislation [that] could potentially pave the way for litigants from across the globe to bring cases against European Union-based companies for alleged human rights violations by way of civil law").

As demonstrated above, both through the laws and practice of other nations, the majority had sufficient evidence that a principle of corporate liability is found to be generally accepted by 'civilized' legal systems. Indeed, acceptance of this principle is evident not only in national laws but is also increasingly reflected in the practice of authoritative sources within the U.N. human rights system. *See, e.g.,* U.N. Human Rights Comm., Gen. Cmt. No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (States must "redress the harm caused by such acts by private persons *or entities*"); Concluding Observations for the United States, 2008, CERD/C/USA/CO/6, at ¶30. *See also Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007) (common law systems generally have corporate criminal liability and more civil law countries "are evolving independently towards greater recognition of corporate criminal liability for violations of domestic law"). Additionally, the general principle of corporate legal liability is reflected in the various "international treaties that explicitly state that juridical entities

should be liable for violations of the law of nations." *See, e.g., Doe v. Exxon*, 654 F.3d 11, 49 nn. 35-36 (treaty names and citations omitted).

As the majority in *Exxon* recently held, "[g]iven that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts**,** it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of universally recognized principles of international law.'" 654 F.3d at 57.

Accordingly, as a matter of international law derived from the general principles of law of civilized nations, corporations can be held liable under the ATS.

CONCLUSION

The majority erred in holding that corporations cannot be held liable for egregious conduct under international law. Corporate liability is a general principle of law recognized by civilized nations. As such, it is part of international law. To the extent that the ATS may require a finding of corporate liability under international law, one exists.

Amici curiae respectfully submit that this Court should reverse the judgment below and remand for further proceedings.

Dated: December 21, 2011

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APPENDIX

APPENDIX A – LIST OF *AMICI CURIAE*

International Human Rights Organizations:

Amnesty International is a worldwide human rights movement of more than 2.8 million members and supporters in more than 150 countries and territories. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. Amnesty International has previously appeared as amicus curiae in other cases involving the scope and application of the Alien Tort Statute, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), as well as in cases before the United States Supreme Court.

The **Canadian Centre for International Justice** (CCIJ) is a non-governmental organization in Canada dedicated to supporting survivors of genocide, torture and other atrocities in their pursuit of justice and seeking accountability for those who commit such acts. The CCIJ advocates for the criminal and civil prosecutions of those responsible for serious human rights violations, including corporations. The CCIJ is involved in civil litigation in Canadian courts and other efforts to hold Canadian companies accountable when they are alleged to be complicit in human rights abuses.

The **Center for Constitutional Rights** (CCR) is a nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Since its founding in 1966 out of the civil rights movement, CCR has litigated many international human rights cases under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, or served as amicus in ATS cases, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Statute grants federal courts jurisdiction to hear cases seeking compensation and other relief for violations of international law, *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000) and *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

The **European Center for Constitutional and Human Rights** (ECCHR) is an independent, non-profit legal organization dedicated to protecting civil and human rights. ECCHR also works to ensure that transnational companies are held to account for their operations in third countries where their operations lead to or are complicit in gross human rights violations. ECCHR not only builds and files strategic litigation cases for human rights violations but also offers trainings for human rights organizations, lawyers and communities in countries of the global South, negatively affected by transnational corporations.

Global Witness is a non-governmental organisation established in 1993. Global Witness runs pioneering campaigns against natural resource-related conflict and corruption and associated environmental and

human rights abuses and was jointly nominated for the Nobel Peace Prize for its work on conflict diamonds in 2003. Global Witness' international campaigns operate at the nexus of development, the environment and trade. Global Witness seeks to end the impunity enjoyed by individuals and companies that profit from the illicit exploitation of natural resources and is constantly looking for ways to hold perpetrators of natural resource-related harm to account, including through litigation and advocating for legal reform where necessary.

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For over 30 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments and private actors to protect the human rights of all persons. Human Rights Watch investigates allegations of human rights violations in the United States and over 80 countries throughout the world by interviewing victims and witnesses, gathering information from governmental and other sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights before government bodies, political leaders, tribunals, and in the court of public opinion.

The **International Association of Democratic Lawyers** (IADL) is a non-governmental Organization (NGO) with consultative status to ECOSOC and UNESCO. With members and member associations in 90 countries IADL lawyers work to promote human and peoples' rights. Since IADL's founding in 1946 in

Paris, IADL members have worked to promote human rights of groups and individuals and oppose threats to international peace and security. IADL lawyers have sought the development of international law, and international humanitarian law, and have opposed impunity for crimes and violations of the laws of nations. IADL lawyers supported litigation against the corporations which manufactured Agent Orange which was used in the Vietnam War.

The **International Commission of Jurists** (ICJ) is an international non-governmental organization dedicated to the promotion and observance of the rule of law and human rights. The ICJ was created in 1952 and is integrated by 60 well-known jurists representing different legal systems. It has its headquarters in Geneva, Switzerland, has three regional offices, and approximately 90 national sections and affiliated organizations throughout the globe. It enjoys consultative status before the United Nations Economic and Social Council, UNESCO, the Council of Europe and the Organizations of the African Union. It maintains cooperation ties with the Organization of American States. The ICJ also provides legal expertise in international law in the context of national and international litigation.

The **International Commission for Labor Rights** (ICLR) is a non-profit, non-governmental organization based in New York City, which coordinates the pro bono work of a global network of lawyers and jurists who specialize in labor and human rights law. ICLR's legal network also responds to urgent appeals for independent reporting on alleged labor rights violations, including violations by corporations. ICLR

has addressed this issue in various reports and amicus briefs. ICLR is therefore interested in ensuring that there is a proper assessment and understanding of liability of corporations for violations of the laws of nations.

The **International Federation for Human Rights** (FIDH) is a federation of 164 Human Rights Organizations in more than 100 countries. Founded in 1922, FIDH co-ordinates and supports its member-leagues activities at the local, regional and international level. FIDH aims at obtaining effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy and litigation, FIDH has developed strict and impartial procedures which are implemented by world-renowned independent human rights experts. For more than a decade, FIDH has been focusing on the effects of globalization on the full recognition of human rights, and particularly the impact of business activities on economic, social and cultural rights.

RAID is a research and advocacy not-for-profit organisation based in the United Kingdom. Since its foundation in 1997, RAID has conducted research into corporate accountability, human rights and extractive industries in developing countries. A particular focus of RAID's research is the Democratic Republic of Congo. RAID is a member of the Canadian Association against Impunity, an organisation that has filed a class action in Quebec against the Canadian company Anvil Mining Limited. It is alleged that the company, by providing logistical assistance, played a role in human rights

abuses, including the massacre by the Congolese military of more than 70 people in the Democratic Republic of Congo in 2004. RAID has made numerous submissions on corporate accountability issues to different parliamentary committees, the United Nations, the Organisation of Economic Cooperation and Development and other expert bodies.

Individuals:

Olivier De Schutter is Full Professor at the Catholic University of Louvain and the College of Europe (Natolin), and a visiting professor at Columbia University. Professor De Schutter has been specializing *inter alia* on the protection of social rights and on the impact of globalization on the enjoyment of human rights and has published widely on the subject, including *Transnational Corporations as Instruments of Human Development*, in Philip Alston & Mary Robinson (eds.), HUMAN RIGHTS AND DEVELOPMENT : TOWARDS MUTUAL REINFORCEMENT, Oxford Univ. Press, 2005, pp. 403-444; *The Accountability of Multinationals for Human Rights Violations in European Law*, in Philip Alston (ed.), NON-STATE ACTORS AND HUMAN RIGHTS, Collected Courses of the Academy of European Law, Oxford Univ. Press, 2005, pp. 227-314; *The liability of multinationals for human rights violations in European law*, in E. Brems & P. Vanden Heede (eds.), BEDRIJVEN EN MENSENRECHTEN. VERANTWOORDELIJKHEID EN AANSPRAKELIJKHEID, Antwerpen-Apeldoorn, Maklu, 2003, pp. 45-106.

Florian Jessberger is a Full Professor of criminal law and holds a chair in criminal law, international criminal law and modern legal history at the Faculty of Law of the University of Hamburg. He is a Managing Editor of the *Journal of International Criminal Law* (Oxford University Press) and a co-author and co-editor of leading handbooks in the field of international criminal law, including PRINCIPLES OF INTERNATIONAL CRIMINAL LAW, with Gerhard Werle, which translated into German, Spanish, Italian, Russian and Chinese, and the OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE.