

# 06-4800-cv

06-4876-cv

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS IN  
SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES**

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ESTHER KIOBEL, individually and on behalf of her late husband, DR.  
BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER,  
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LEGBRAA TONY IDIG IMA,SP IU NWI NEE, KPOI BAR TU SIMA,  
individually and on behalf of his late father, CLEMENT TUSIMA,  
*Plaintiffs-Appellants-Cross-Appellees,*

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND  
TRADING COMPANY PLC,  
*Defendants-Appellees-Cross-Appellants,*  
SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA,  
LTD.,  
*Defendant.*

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## **INTEREST OF AMICI**

*Amici* -- listed in the Appendix -- are legal experts in the field of international law and human rights. Their work has been cited by courts at all levels of the federal judiciary for guidance in determining the content and impact of international law in domestic proceedings, including those under the Alien Tort Statute (including for some of the *amici* the panel majority's opinion in this very case). *Amici* respectfully submit that the decision of the panel is both methodologically and substantively flawed and believe that they can offer the Court particular expertise on these issues that may not be available from the parties themselves. *Amici* are concerned that, by creating a law-free zone for corporations, the panel majority has charted an unprecedented and unjustified course that effectively immunizes entities that commit serious human rights violations.<sup>1</sup>

## **SUMMARY OF ARGUMENT**

The panel majority committed clear errors of method and substance that require rehearing by this Circuit *en banc*. It reached its conclusion only by looking for the wrong kinds of evidence of international law, inferring from the absence of cases imposing corporate civil liability for human rights violations that no norm imposed or allowed such liability. That technique

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<sup>1</sup> No party or counsel to any party authored this brief.

betrays a basic misunderstanding of international law and the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). It is also radically inconsistent with this Circuit's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The procedural error of the panel majority has substantive consequences and leads the panel to miss the consistent principles of international law that recognize corporate liability and the obligation of States to provide a meaningful remedy for all violations of human rights, no matter who or what violates them.

## **ARGUMENT**

### **I. EN BANC REHEARING IS APPROPRIATE BECAUSE THE PANEL MAJORITY FUNDAMENTALLY MISUNDERSTOOD THE PROPER METHOD OF PROVING INTERNATIONAL LAW.**

#### **A. The Panel Majority Rigorously Asked the Wrong Question by Seeking Universal Examples of Corporate Civil Liability for Human Rights Violations.**

The panel majority's essential error was its insistence that jurisdiction under the Alien Tort Statute must fail if no corporation has been held civilly or criminally liable for human rights violations. "[B]ecause no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable – much less universally recognized – norm of customary international law that we may apply pursuant to the

ATS.” *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 06-4876-cv, slip op. at 2 (2d Cir. Sept. 17, 2010). International human rights law cannot be parsed in this way for two reasons.

First, certain egregious conduct violates international human rights standards, whether committed by state or non-state actors. Although it is true that international criminal tribunals distinguish between natural and juristic persons *for purposes of criminal liability*, nothing in international law precludes the imposition of civil or tort liability for corporate misconduct. Thus, the proper question is not whether human rights treaties explicitly impose liability on corporations, as concluded by the panel majority, it is whether the treaties distinguish between juristic and natural individuals in a way that exempts the former from all responsibility.

Second, it is wrong to conclude from the alleged absence of human rights cases against corporations that they are exempt from human rights norms: international law never defines the means of its domestic implementation and remediation, leaving States a wide berth in assuring that the law is respected and enforced as each thinks best.<sup>2</sup> It hardly follows that

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<sup>2</sup> The Permanent Court of International Justice – precursor to the modern International Court of Justice – established that international norms could not be inferred from the *absence* of domestic proceedings. In a case where France made the kind of argument the panel majority now finds persuasive, the PCIJ declared: “Even if the rarity of the judicial decisions to be found



States remain free to allow violations so long as a corporation commits the wrong. Equally important, Congress has already exercised its discretion by directing the federal courts to allow civil actions for those violations of international law that take tortious form, without specifying the types of defendants who might be sued. As recognized by the Supreme Court, “[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants....” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

The panel majority apparently felt compelled by *dicta* in a footnote in the Supreme Court’s decision in *Sosa*, 542 U.S. 692, but nothing in *Sosa* requires so distorted a focus. To the contrary, the *Sosa* Court rejected the aggressive corporate immunity positions advanced by business groups appearing *amicus curiae*, reasoning only that “the determination whether a norm is sufficiently definite to support a cause of action” is “related . . . [to] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Id.* at 732 n.20. The Supreme Court

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among the reported cases were sufficient to prove the circumstance alleged by the French government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so.” *The Lotus Case*, [1927] P.C.I.J., Ser. A, No. 10.

thus distinguished between those wrongs that require state action (*e.g.*, torture) from those that do not (*e.g.*, genocide). The text shows that the Court was referring to a single class of non-state actors (natural and juristic individuals), not two separate classes as assumed by the *Kiobel* panel.

Nor is it relevant that the *Sosa* court would only recognize a cause of action, derived from the common law, for certain violations of international law:

The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

542 U.S. at 724. The ATS requires only that the tort be “*committed*” in violation of a specific, universal, and obligatory norm or international law, *id.*, not that international law itself recognize a right to sue or distinguish for purposes of civil liability between natural and juristic individuals.

**B. *Filartiga* Itself Was Wrongly Decided If the Panel Majority’s Approach Is Correct.**

The mark of the panel majority’s error is that, if its approach were the law of this Circuit, *Filartiga* itself – a globally-respected advance in the development of human rights standards and the fountainhead of ATS jurisprudence for a generation – would have been wrongly decided. The *Kiobel* panel would apparently have required the *Filartiga* plaintiffs to

demonstrate that torturers were universally held civilly liable in the courts of third countries. Of course, no such demonstration could have been made at the time, because state-sponsored torture – though common – had never grounded an award of civil damages from the torturer to the victim in the domestic courts of that State, let alone some other country. Equally telling, every element of proof relied upon in *Filartiga* would be rejected by the *Kiobel* panel: the various treaties cited in *Filartiga* would be irrelevant, because the United States was not a party to any of them and not a single torturer had ever been found civilly liable under any of them. The Universal Declaration of Human Rights, rightly considered by the *Filartiga* court as an authoritative interpretation of States’ human rights obligations under the U.N. Charter, would be rejected as a purely aspirational document – a view that has been inconsistent with international law for decades – and because the Universal Declaration only refers to the role of “every individual and every organ of society” in promoting respect for human rights and does not explicitly refer to “corporations” or their civil liability. The international tribunal decisions cited in *Filartiga* would also be irrelevant, because not one of them involved a private right of action for civil damages against the torturer himself.

*Filartiga* was methodologically sound. The panel majority's approach in *Kiobel* is not.

## **II. EN BANC REHEARING IS APPROPRIATE BECAUSE THE PANEL MAJORITY'S METHODOLOGICAL ERRORS CAUSED IT TO MISCONSTRUE AND UNDERMINE THE CONTENT OF INTERNATIONAL HUMAN RIGHTS LAW.**

### **A. International Law In All Its Forms Allows The Imposition Of Civil Liability On Corporations.**

As a matter of international law, this Circuit was clearly correct when it articulated what has become a dominant principle of ATS jurisprudence:

[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.

*Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). For centuries, it has been recognized that there are acts or omissions for which international law imposes responsibility on individuals and for which punishment may be imposed, either by international tribunals or by national courts. In the modern era, for example, Article IV of the Genocide Convention<sup>3</sup> requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Certain aspects of the war crimes regime of the Geneva Conventions of

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<sup>3</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

1949, especially common Article 3,<sup>4</sup> similarly bind non-state actors when they are parties to an armed conflict. The anti-slavery regime is similar in not requiring state action, and contemporary forms of slavery -- like forced labor and child labor -- are internationally wrongful whether committed by governments or non-state actors. *Crucially, the legal regimes governing these wrongs do not distinguish between natural and juridical individuals,* and international law would not protect a corporation that operated as a front for piracy on the high seas, or engaged in the slave trade, or produced the contemporary equivalent of Zyklon B for the destruction of Jews in concentration camps.

A diverse array of treaties reveals the accepted understanding within the international community that corporations have international obligations and can be held liable for violations of international law. *See, e.g.,* European Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005) (“Each Party shall adopt such measures as may be

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<sup>4</sup> *See, e.g.,* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

necessary, in accordance with its legal principles, to establish the *liability of legal entities* for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.”); Convention against Transnational Organized Crime, Nov. 15, 2000, art. 10(1), 2225 U.N.T.S. 209 (“Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the *liability of legal persons* for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.”); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 2, S. Treaty Doc. No. 105-43 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal persons* for the bribery of a foreign public official.”); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973 art. I(2), 1015 U.N.T.S. 243 (“The States Parties to the present Convention declare criminal those *organizations, institutions, and individuals* committing the crime of apartheid.”); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; Convention on Third Party

Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251 (emphasis added in all cases). There is certainly no rule at international law that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons. As noted by the Special Representative to the U.N. Secretary-General in his summary of international legal principles, the corporate responsibility to respect human rights includes avoiding complicity, which has been most clearly elucidated “in the area of aiding and abetting international crimes, i.e. knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime . . . .” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, paras. 73-74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

Other authoritative actors within the U.N. human rights system have similarly clarified that human rights treaties to which the United States is a party apply to corporations. For example, the Human Rights Committee, which oversees States’ compliance with the International Covenant on Civil and Political Rights, has ruled that States must “redress the harm caused by such acts by private persons *or entities*.” U.N. Human Rights Comm., Gen.

Cmt. No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (emphasis added). Similarly, the Convention on the Elimination of All Forms of Racial Discrimination obliges States to remedy “any acts of racial discrimination,” and the Race Committee established under the Convention has consistently ruled that this provision includes the acts of corporations. Concluding Observations for the United States, 2008, CERD/C/USA/CO/6, at ¶30.

Even if treaties and customary international law did not speak to the question, the uniform recognition of corporate liability in legal systems around the world demonstrates that legal responsibility accompanies legal personality – a proposition that qualifies as a general principle of law. *See* Statute of the International Court of Justice, art. 38(1)(c). In essence, general principles encompass maxims that are “accepted by all nations *in foro domestico*”<sup>2</sup> and are discerned by reference to the common domestic legal doctrines in representative jurisdictions worldwide.<sup>3</sup> Section 102(1)(c) of the

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<sup>2</sup> Permanent Ct. of Int’l Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee* (“*Procès Verbaux*”), July 16th – July 24th, 1920, with Annexes (The Hague 1920), at 335 (quoting Lord Phillimore, the proponent of the general principles clause).

<sup>3</sup> *See* Bin Cheng, *General Principles of Law as Applied by International Courts* 390 (1953) (noting that general principles encompass “the fundamental principles of every legal system” and that they “belong to no particular system of law but are common to them all”).



Restatement (Third) of U.S. Foreign Relations Law similarly provides that “[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.” This Court has recognized that “general principles of law recognized by civilized nations” form part of international law. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Thus, courts may consult the general principles of law common to legal systems around the world in order to give content to the law of nations for purposes of the ATS. International law is routinely established through this exercise in comparative law and would have been especially familiar to the founding generation and the drafters of the ATS.<sup>5</sup>

Because corporate liability for serious harms is a universal feature of the world’s legal systems, it qualifies as a general principle of law. In most legal systems, this takes the form of actual criminal or quasi-criminal liability in addition to civil liability, and we are aware of no domestic jurisdiction that exempts legal persons from all liability. To the contrary,

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<sup>5</sup> *Jus gentium* was the precursor to what the 18th-century lawyers called “the law of nations,” and it consisted essentially of general principles among civilized nations that the Roman praetors would consider in resolving “transnational” cases. It was by no means limited to state responsibility norms, because it would apply whenever the case involved two aliens (i.e., non-Roman citizens) in what we would today characterize as a torts or contracts case.

every legal system around the world encompasses some form of tort law (or delicts), and none exempts a corporation from the obligation to compensate those it injures. All legal systems also recognize corporate personhood.<sup>6</sup> The law of civil remedies does not necessarily use the terminology of human rights law of course, but in every jurisdiction it protects interests such as life, liberty, dignity, physical and mental integrity, and it includes remedial mechanisms that mirror the reparations required by international law for the suffering inflicted by abuse. *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), <http://www.business-humanrights.org/Updates/Archive/ICJPanelonComplicity>. Indeed, from that perspective, as shown below, the panel majority's conclusion is inconsistent with the obligation of States to assure a remedy for human rights violations.

**B. The Failure To Punish Corporate Violations Of International Human Rights Law Violates The Obligation To Provide A Meaningful Remedy For Such Abuses.**

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<sup>6</sup> The Supreme Court has recognized the international principles governing corporate personhood, holding under international law that “the legal status of *private* corporations . . . is not to be regarded as legally separate from its owners in all circumstances.” *First Nat’l City Bank (FNCB) v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (citing the decision of the International Court of Justice in *Barcelona Traction (Belgium v. Spain)*, [1970 I.C.J. at 38-39.]

The panel majority's conclusions allow governments to privatize their way around their obligations under international human rights law. The simple expedient of creating a corporation to run prisons or maintain civil order or fight wars would effectively block the imposition of liability on the entity that is directly responsible for the violation. The panel majority's approach thus conflicts with the obligation of States to provide a meaningful remedy for such abuses. *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.") This conclusion has already been articulated by the Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations, who noted in 2009:

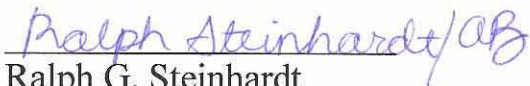
As part of their duty to protect, States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction – in short, to provide access to remedy.

*Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009). Similarly, the Human Rights Committee, *supra*, has stated that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by *private persons or entities*.” *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant* [ICCPR], U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 8. In these circumstances, it falls to the Circuit Court, acting *en banc*, to bring the law back into conformity with international standards.

## CONCLUSION

For these reasons, *amici* respectfully request that the Petition for Rehearing *En Banc* be granted.

Respectfully submitted,

  
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## APPENDIX

### LIST OF AMICI

N.B. Institutional affiliations are for identification purposes only.

**Philip Alston** is John Norton Pomeroy Professor of Law and Director of the Center for Human Rights and Global Justice, at New York University Law School. Since 2004, he has served as Special Rapporteur of the United Nations Commission on Human Rights, on Extrajudicial, Summary, or Arbitrary Executions. He chaired the UN Committee on Economic, Social and Cultural Rights from 1991 to 1998 and was Editor-in-Chief of the *European Journal of International Law* from 1996-2007.

**Jose Alvarez** is Herbert and Rose Rubin Professor of International Law at the New York University School of Law. From 1999-2008, he taught at Columbia Law School, where in 2005 he became Hamilton Fish Professor of International Law & Diplomacy and Director of the Center on Global Legal Problems. He is a former president of the American Society of International Law, and serves on the Editorial Boards of the *American Journal of International Law* and the *Journal of International Criminal Justice*. He is also member of the Council on Foreign Relations and the American Law Institute.

**Lori Fisler Damrosch** is Hamilton Fish Professor of International Law and Diplomacy and Henry L. Moses Professor of Law and International Organization at Columbia University. She is a former vice president of the American Society of International Law, an associate member of the Institut de Droit International, and co-Editor in Chief of the *American Journal of International Law*.

**John Dugard** is a member of the Institut de Droit International and the UN International Law Commission. From 2002 to 2008, he served as Judge *ad hoc* in the International Court of Justice. He has also served as Special Rapporteur to the UN Commission on Human Rights on violation of Human Rights and International Humanitarian Law in the Occupied Palestinian Territory. He has held the Chair in Public International Law at the University of Leiden since 1998. He is also a Professor of Law in the Centre for Human Rights of the University of Pretoria, South Africa. He has held visiting positions in the United States (Princeton, Duke, Berkeley and

Pennsylvania), Australia (New South Wales) and England (Cambridge). From 1995-1997 he was Director of the Lauterpacht Research Center for International Law, Cambridge.

**Richard Goldstone** served as the first chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and for Rwanda. He was then appointed to the Constitutional Court of South Africa, to which he had been nominated by President Nelson Mandela. He has taught at a variety of U.S. and foreign law schools, including Michigan and Harvard. He chaired the Independent International Commission on Kosovo and was a member of the Volcker Committee, appointed by UN Secretary General Kofi Annan, to investigate the Iraq Oil for Food program. In 2009, Goldstone led an independent fact-finding mission created by the UN Human Rights Council to investigate international human rights and humanitarian law violations related to the Gaza War. He has received the International Human Rights Award of the American Bar Association, the Thomas J. Dodd Prize in International Justice and Human Rights, and the MacArthur Award for International Justice.

**David Scheffer** is Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, and a former U.S. Ambassador at Large for War Crimes Issues (1997-2001). In the latter capacity, he represented the United States at the Rome Conference where the Statute of the International Criminal Court was negotiated.

## CERTIFICATE OF COMPLIANCE

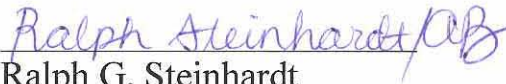
This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 2,885 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office in Times New Roman 14-point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Respectfully submitted,

October 14, 2010

  
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**CERTIFICATE OF SERVICE**

I, Ralph G. Steinhardt, the undersigned, hereby certify that I am a Professor of Law and International Affairs at the George Washington University Law School, 2000 H St. N.W., Washington, D.C. 20052; I am over the age of eighteen; and I am not a party to this action.

I further declare under penalty of perjury that on this day I caused the foregoing Brief of *Amici Curiae* International Law Scholars in Support of the Plaintiffs-Appellants-Cross-Appellees' Petition for Rehearing and Rehearing en Banc to be served on all parties of record by sending electronic PDF copies to the following recipients by electronic mail, and, except for those indicated as having waived paper service, by placing two true copies in envelopes addressed as follows and dispatched to a third-party commercial carrier for delivery on October 15, 2010:

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that the foregoing is true and correct.

Executed on October 14, 2010, at Washington, the District of Columbia.

Respectfully submitted,

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