IN THE SUPREME COURT OF THE UNITED STATES

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ESTHER KIOBEL, INDIVIDUALLY AND :

ON BEHALF OF HER LATE HUSBAND, :

DR. BARINEM KIOBEL, ET AL., : No. 10-1491

Petitioners :

v. :

ROYAL DUTCH PETROLEUM CO., ET AL. :

- x

Washington, D.C.

Tuesday, February 28, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

PAUL HOFFMAN, ESQ., Venice, California; for Petitioners.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting Petitioners.

KATHLEEN M. SULLIVAN, ESQ., New York, New York; for Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-1491, Kiobel v. Royal Dutch Petroleum.

Mr. Hoffman.

ORAL ARGUMENT OF PAUL HOFFMAN

ON BEHALF OF THE PETITIONERS

MR. HOFFMAN: Mr. Chief Justice, and may it please the Court:

The principal issue before this Court is the narrow issue of whether a corporation can ever be held liable for violating fundamental human rights norms under the Alien Tort Statute. Under Respondents' view, even if these corporations had jointly operated torture centers with the military dictatorship in Nigeria to detain, torture, and kill all opponents of Shell's operations in Ogoni, the victims would have no claim.

JUSTICE KENNEDY: But, counsel, for me, the case turns in large part on this: Page 17 of the red brief says, "International law does not recognize corporate responsibility for the alleged offenses here"; and the -- one of the -- the amicus brief for Chevron saying "No other nation in the world permits its court to exercise universal civil jurisdiction over alleged

extraterritorial human rights abuses to which the nation has no connection."

And in reading through the briefs, I was trying to find the best authority you have to refute that proposition, or are you going to say that that proposition is irrelevant?

MR. HOFFMAN: Well, there -- there are a couple of questions within that.

JUSTICE KENNEDY: And it's -- it involves your whole argument, of course.

MR. HOFFMAN: It does. Yes.

(Laughter.)

MR. HOFFMAN: And -- and let me start by saying that the international human rights norms that are at the basis of this case for the plaintiffs -- crimes against humanity, torture, prolonged arbitrary detention, extrajudicial executions -- all of those human rights norms are defined by actions. They're not defined by whether the perpetrator is a human being or a corporation or another kind of entity.

And so, I think that the -- the Respondents are wrong when they say that international law does not extend to -- to those kinds of acts. They do -- it does. And the United States agrees with that position.

What they have tried to -- to conflate is

the question about whether international law -- the international law norms apply to a corporation or a person with whether there's a -- an international consensus with respect to how those norms should be enforced, particularly within domestic civil jurisdiction as opposed to criminal jurisdiction.

JUSTICE KENNEDY: But in -- in the area of international criminal law, which is just analogous, I recognize, there is a distinction made between individuals and corporations.

MR. HOFFMAN: Well, there's a distinction made within the jurisdiction of certain modern international criminal tribunals. And Respondents take their position too far in this, because what they've said is that the fact that corporations can't be found liable criminally under the International Criminal Court, for example, means that the norms, the underlying norms -- genocide, crimes against humanity, and war crimes when it comes to the International Criminal Court -- don't apply to corporations.

And that's -- that clearly is wrong because the United Kingdom and Netherlands, for example, the two home countries of -- of these corporations has passed domestic implementing legislation that imposes criminal penalties for violations of those very norms. So,

there's no question that it can be done.

What the most important -- I think one of the most important principles in this case is that international law, from the time of the Founders to today, uses domestic tribunals, domestic courts, and domestic legislation, as the primary engines to enforce international law.

JUSTICE GINSBURG: Mr. Hoffman --

CHIEF JUSTICE ROBERTS: You began by -- by --

JUSTICE GINSBURG: Mr. Hoffman, I -- I thought that Justice Kennedy asked you, is there another nation that has a counterpart to 1350 that imposes civil liability on corporations for violations of customary international law, where the conduct occurred abroad, the harmed person is employed, and the defendant is not a U.S. resident?

MR. HOFFMAN: Well, the -- there are two parts to -- to my answer to that. One is that the Alien Tort Statute is a -- is a unique way of enforcing the law of nations, in terms of the way that the Founders married tort law and violations of the law of nations.

In the international human rights amicus brief, the amicus brief of international human rights organizations, at pages 18 to 22, there's a whole series

of cases where the domestic courts and domestic legislation of various states around the world have addressed those kinds of issues. And so, there isn't an exact analogue to the Alien Tort Statute, but there's no question that domestic legislation and domestic courts have taken on these kinds of issues.

JUSTICE ALITO: Well, there's no particular connection between the events here and the United States. So, I think the question is whether there's any other country in the world where these plaintiffs could have brought these claims against the Respondents.

MR. HOFFMAN: Well, let me address the -- I think this comes under the general rubric of extraterritoriality.

JUSTICE ALITO: Is there a yes or no answer to that question or not?

MR. HOFFMAN: I believe that they -- that the answer to that would be "yes."

JUSTICE ALITO: Where?

MR. HOFFMAN: I think that they could be brought in Holland or the United Kingdom for events in Nigeria. I think that the cases that are discussed as those --

JUSTICE ALITO: Any other country other than the country of the citizenship of the defendants?

MR. HOFFMAN: I don't know if this precise case could be brought. I know that the -- we have a principle of transitory torts, and so, one -- and I believe other countries have that principle as well. So, in terms of the underlying tort action, we have plaintiffs who are U.S. residents and were U.S. residents when they filed this case. They found a tortfeasor within the United States that they believe was responsible for these torts. And from Mostyn v. Fabrigas and before, Mostyn v. Fabrigas being the 1774 case by Lord Mansfield talking about transitory torts, the courts clearly have the jurisdiction to adjudicate those kinds of tort claims.

CHIEF JUSTICE ROBERTS: If -- if there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?

MR. HOFFMAN: Well, that -- that issue has been raised in a number of the briefs. I would say two things: One is that that doesn't really go to the question about whether corporations can be categorically excluded from Alien Tort Statute coverage, which is really the issue that -- that was decided by the court below and which was the question presented here.

Extraterritoriality has to do with a different kind of issue. I would argue that -- I mean, we've obviously argued that that's an issue that ought to be briefed on its own.

But there is no international law principle that I am aware of, and I think it would need to be proved, that says that the United States Congress was disempowered at its founding from providing these kinds of tort remedies. And it was clear from the founding that the Founders at least believed that this statute would be extraterritorial.

CHIEF JUSTICE ROBERTS: But it was motivated, I gather, by assaults on ambassadors here within the United States.

MR. HOFFMAN: Well, it was motivated by the Marbois incident and a similar incident to -- with regard to a Dutch ambassador in New York at the time of the Constitutional Convention. But if -- if the Court looked to the Bradford incident -- the incident about which Attorney General Bradford expressed his opinion in 1795, which was an opinion that this Court found very important in terms of interpreting the Alien Tort Statute, the Bradford opinion had to do with an assault on the British colony in Sierra Leone. And so, it was not only extraterritorial in the sense of piracy, and I

1 think everybody agrees that -- that this statute was
2 intended to deal with piracy and maritime-related
3 violations of the law of nations.
4 It -- the Bradford opinion there said, even
5 though U.S. criminal jurisdiction was limited, the civil
6 jurisdiction under the Alien Tort Statute provided that
7 the corporation that -- whose property was attacked
8 within the territory of Sierra Leone --
9 JUSTICE ALITO: Have all the judges who have
10 interpreted that opinion interpreted it the way you just
11 did?
12 MR. HOFFMAN: The Bradford opinion?
13 JUSTICE ALITO: Yes.
14 MR. HOFFMAN: I'm not sure in which sense.
15 I mean, the -- yes, the -- I think that the Bradford
16 opinion has been used --
17 JUSTICE ALITO: Well, what did -- how did
18 Judge Kavanaugh interpret that on the D.C. Circuit?
19 MR. HOFFMAN: Well, I think -- I don't
20 recall specifically. I know that there has been some
21 controversy about whether that was an attack in the high
22 seas. I know there's some scholarship about that. What
23 I would suggest to the Court, if the Court went back to
24 the original documents that the -- that were sent to
25 Attorney General Bradford which -- from the British

1 government, I think the Court would find that -- that
2 this attack actually took place in the territory of
3 Sierra Leone.
4 And so, one of the reasons that we've
5 suggested that -- that -- that the extraterritoriality
6 issue deserves full treatment if the Court is troubled
7 by it, in a case where there is full briefing, because
8 in this case it was raised by the -- by -- by the
9 Respondents' amici largely, although the Respondents
10 have raised it, and there -- the historians that have
11 expressed opinions on corporate liability and others
12 that would be interested in this question have not been
13 able to put the other side before the Court.
14 And I think there's a very -- there are
15 very --
16 JUSTICE ALITO: The first sentence in your
17 brief in the statement of the case is really striking:
18 "This case was filed ... by twelve Nigerian plaintiffs
19 who alleged ... that respondents aided and abetted the
20 human rights violations committed against them by the
21 Abacha dictatorship ... in Nigeria between 1992 and
22 1995." What does a case like that -- what business does
23 a case like that have in the courts of the United
24 States?
25 MR. HOFFMAN: Well --

JUSTICE ALITO: There's no connection to the United States whatsoever.

The Alien Tort Statute was enacted, it seems to be -- there seems to be a consensus, to prevent the United States -- to prevent international tension, to -- and -- does this -- this kind of a lawsuit only creates international tension.

MR. HOFFMAN: Well, the Alien -- if I could start with the second part first. The Alien Tort Statute certainly was passed to do that but also as an expression of the Nation's commitment to international law, I think primarily as a -- as a statement of this country's commitment to international law as a new member of the community of nations. And if -- if you look at the incidents like the Marbois incident or --

JUSTICE ALITO: Do you really that think the first Congress wanted victims of the French Revolution to be able to sue in -- in the court -- to sue French defendants in the courts of the United States?

MR. HOFFMAN: I think that what -- I think the question would have been, is there a law of nations violation? For example, in the Marbois incident, say the -- Marbois was -- was attacked by Longchamps outside the United States, but Longchamps came to take refuge in the United States, and the French government said you

have somebody living in your country that has attacked our ambassador in violation of the law of nations.

I think the United States -- I think the same principle -- the United States would have wanted to do something for the French government in response to that because it would have been giving refuge to someone who had violated the law of nations. And -- and the same principle has been applied in the modern era to -- to giving no safe haven to torturers and others.

JUSTICE GINSBURG: That sounds --

JUSTICE KAGAN: Mr. Hoffman, could I --

JUSTICE GINSBURG: That sounds very much like Filartiga. And I thought that -- that Sosa accepted that Filartiga would be a viable action under the Tort Claims Act. So, I thought what we were talking about today, the question was, is it only individual defendants or are corporate defendants also liable?

MR. HOFFMAN: A lot of the extraterritoriality issues would apply to the cases that this Court endorsed in Sosa.

JUSTICE KENNEDY: But I agree that we can assume that Filartiga is a binding and important precedent, for the Second Circuit. But in that case, the only place they could sue was in the United States. He was an individual. He was walking down the streets

of New York, and the victim saw him walking down the streets of New York and brought the suit.

In this case, the corporations have residences and presence in many other countries where they have much more -- many more contacts than here.

MR. HOFFMAN: And those issues, generally speaking, are resolved by other doctrines, rather than an exclusion of corporations categorically from the statute.

JUSTICE BREYER: Are you -- can I go back to -- are you finished with that answer?

MR. HOFFMAN: I was -- the only thing I was going to add to that is that a doctrine like forum non conveniens or personal jurisdiction would deal with the issues about whether this is the most appropriate forum. And those doctrines apply whether it's an Alien Tort Statute case or it's a -- a common law tort case.

These plaintiffs could bring this case in State court. What the Alien Tort Statute does is provide a Federal forum when these torts are in violation of the law of nations. And that's really what it -- what the Founders intended and what -- and what it does.

I'm sorry.

JUSTICE BREYER: I just want some

clarification on the first question that Justice Kennedy asked. Well -- I'll get it in reading about it. You go ahead. You want to reserve your time. I can find the answer --

MR. HOFFMAN: Okay.

JUSTICE BREYER: -- to what I was going to ask.

MR. HOFFMAN: If there aren't any further questions right now, I'd reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Hoffman.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The court of appeals erred in its categorical ruling that a corporation may never be held liable under the Alien Tort Statute regardless of the nature of the norm, the locus of the wrong, or the involvement of the state.

JUSTICE SOTOMAYOR: Mr. Kneedler, could you explain to me the -- the difference between respondeat superior liability and corporate liability? In -- in

1 the briefs, there seems to be an assumption that
2 respondeat superior liability is -- is permissible, and
3 the only issue is whether corporate liability is. Is
4 there a difference between the two doctrines?
5 MR. KNEEDLER: Well, I think the difference
6 is really a matter of degree. I mean, under respondeat
7 superior liability, a corporation is normally
8 responsible, liable for the acts of its agents.
9 Judge Posner, in the Seventh Circuit Flomo
10 decision, suggested that in the nature -- in this
11 category of cases, assuming that the ATS would allow a
12 common law cause of action for conduct in another
13 country, that maybe there should be more limited
14 respondeat superior principles because the action would
15 occur in circumstances were the corporation sought to be
16 held liable may not have much -- much control over it.
17 Where the corporation itself is liable --
18 and this would be true in criminal law and presumably in
19 -- in tort law -- would usually require some action by
20 those responsible for running the corporation or high
21 enough up the chain of command --
22 JUSTICE KAGAN: But, Mr. Kneedler, when
23 you --
24 MR. KNEEDLER: -- that policy --
25 JUSTICE KAGAN: Excuse me.

MR. KNEEDLER: I'm sorry.

JUSTICE KAGAN: When you say in your brief that we should look at this as a remedial question, as a question of enforcement, do you say that because you're thinking of this as a vicarious liability case? In other words, there's an individual person who clearly has violated a norm of international law, and then the question of whether to hold the corporation liable is an enforcement question. Or would you say that it's also an enforcement question when we're talking about direct corporate liability?

MR. KNEEDLER: I -- I think it's both. Particularly the latter, but I think the former as well. As Mr. Hoffman said, international law norms proscribe certain conduct, but the enforcement of that is left to each nation.

JUSTICE SCALIA: Well, but -- but I find it difficult to understand why we -- we would not hold foreign sovereigns liable under this Act, that they're excluded despite -- despite its language; and yet, we cannot inquire whether persons other than sovereigns are covered. What is -- what is the distinction between the two?

MR. KNEEDLER: Well, with respect to sovereigns, a sovereign could not be held liable for --

at least for conduct outside the United States, because of the Foreign Sovereign Immunities Act. That's -- that's what this Court held in the Amerada Hess case. Within the United States, if the foreign sovereign committed a tort, the Foreign Sovereign Immunities Act, subject to certain limitations, would allow --

JUSTICE KAGAN: But I think, Mr. Kneedler --

JUSTICE SCALIA: This is more specific than the Foreign Sovereign Immunities Act. It deals with a much more narrow category of case. And I do not think that the Foreign Sovereign Immunities Act would be interpreted to eliminate the sovereign's liability, if indeed this statute provided for it.

MR. KNEEDLER: Well, the court in Amerada Hess did hold that, that -- and it made an important --

JUSTICE SCALIA: Yes.

MR. KNEEDLER: It made a point that is important to this case as well. It said that while the Alien Tort Statute identifies who the plaintiff must be -- the plaintiff must be an alien -- it does not identify who the defendant may be, and that if there are limitations on who the defendant may be from other sources of law, and foreign sovereign immunity would be one of them, then the suit could not go forward against the foreign sovereign.

JUSTICE KAGAN: But, Mr. Kneedler, in Sosa, and this is the footnote 20, we said that the question of whether you were a state actor or not a state actor might be relevant to the question of whether there was a substantive norm that applied to you.

And I guess the question here is why that same analysis doesn't apply to the question of whether there is corporate liability? In other words, is there a substantive norm that applied to corporations? Maybe there is; maybe there isn't. But that that's the question, as opposed to what you suggest in your brief, that really we should just think of this as a question of enforcement, which is entirely up to Federal common law. And I guess the question is why think of it as enforcement rather than as a substantive obligation?

MR. KNEEDLER: Well, first looking at footnote 20 in -- in Sosa, it -- what the footnote says, that a related consideration, meaning related to whether the particular norm satisfies the criteria in Sosa, is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued. If the defendant is a private actor such as a corporation or individual --

JUSTICE KAGAN: No, I'm not saying footnote 20 --

MR. KNEEDLER: Right.

JUSTICE KAGAN: It addressed a different question, but it's an analogous question. If the question of whether non-state actors are part of the substantive obligation question, why, too, isn't the question of whether international law extends to corporations?

MR. KNEEDLER: But -- because the state actor aspect of it goes to the question of the conduct. Does the conduct itself violate the norm?

I think it's a -- but beyond that, it's enforcement. I think it's important to bear in mind that the Alien Tort Statute uses the word "tort." And it's --

JUSTICE SCALIA: But it -- I didn't understand the point you just made, that the sovereign immunity part goes to? To the conduct?

MR. KNEEDLER: Well, it goes to whether the defendant can be sued, the sovereign immunity does.

JUSTICE SCALIA: Why doesn't the corporate thing go precisely to the same question?

MR. KNEEDLER: Because there is no independent prohibition in international law or domestic law against suing a corporation the way there is for a foreign sovereign. To the contrary --

CHIEF JUSTICE ROBERTS: But whether -- I'm sorry.

MR. KNEEDLER: I was just going to say, to the contrary, at the time the Alien Tort Statute was adopted, corporations could be held liable. This Court's decision in Chandler recently surveyed the -- the law, and corporations could be held liable in tort.

CHIEF JUSTICE ROBERTS: But under international law, it is critically pertinent who's -- who's undertaking the conduct that is alleged to violate international norms. If an individual private group seizes a ship, it's piracy. If the navy does it, it's not. Governmental torture violates international norms. Private conduct does not.

So, why doesn't the -- why isn't the same pertinence -- your argument seems to be that all you need to do is find an event, torture, piracy, whatever, and then it's up to the domestic law whether or not particular entities can be sued.

MR. KNEEDLER: I -- I think that's correct, and --

CHIEF JUSTICE ROBERTS: As a statement of your position.

MR. KNEEDLER: Yes.

CHIEF JUSTICE ROBERTS: But it doesn't work

when you're talking about state -- whether it's a state conducting the illegal conduct or somebody else. So, why -- that's not up to the domestic --

MR. KNEEDLER: No, because that goes to the definition of the norm. But if we -- if we take -- if we take the Alien Tort Statute, in 1907, the Attorney General concluded that an irrigation company could be sued for violating a treaty. If we take the examples that gave rise to the Alien Tort Statute, if a process serving company -- if one of its agents went into an ambassador's house and tried to serve process, that was a criminal violation at the time.

JUSTICE KENNEDY: But you go much -- you go much further. Suppose an American corporation commits human trafficking with U.S. citizens in the United States. Under your view, the U.S. corporation could be sued in any country in the world, and it would -- and that would have no international consequences. We don't look to the international consequences at all. That's -- that's the view of the Government of the United States, as I understand.

MR. KNEEDLER: No. The question of extraterritorial application is distinct from the question of whether a corporation can be held liable.

JUSTICE BREYER: So -- so, why -- why

then -- you want to answer in your brief and -- this question, I find impossibly difficult, maybe highly fact-dependent. There is no United States Supreme Court of the World. There is no way of getting unified law on the points of whether when we interpret a common law Federal -- a system of Federal common law to decide whether a corporation can be defendant -- a defendant in a certain kind of case. Every other country could do the same. And there's no way of resolving it. All right?

So, I find that a difficult question. I don't know why that's in this case. I would have thought the question in this case is, can a private actor be sued for certain violations of -- of substantive criminal law? The answer is "yes." Okay? Genocide, for example.

And then the question is -- a corporation is a private actor, and is there any reason why, just like any other private actor, a corporation couldn't be sued for genocide? And there the answer is I don't know, but I'll find out when the other side argues. You see?

(Laughter.)

JUSTICE BREYER: So, I -- I think this is unnecessarily complicated. They made a -- a categorical rule. They said never sue a corporation. I seem to

1 think possibly of counterexamples. Pirates,
2 Incorporated.
3 MR. KNEEDLER: Right.
4 JUSTICE BREYER: You know? I mean -- so --
5 so, why isn't that -- why are we going into -- I mean,
6 you have good reason for doing it, and I want to hear
7 why.
8 MR. KNEEDLER: Well, our -- our position is
9 straightforward. Just as you said, the question of
10 whether a corporation can be held liable we think should
11 be based on the fact that the ATS refers to torts. And
12 in applying -- this question we think is not
13 complicated.
14 In -- in fashioning Federal common law to
15 decide whether there should be a common law cause of
16 action, the ATS's reference to tort law, I think,
17 directs the Court to domestic tort law, and the question
18 of whether a corporation can be held liable under
19 domestic tort law. And it clearly can be. It could be
20 at the time this statute was enacted, and it can be
21 today.
22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Kneedler.
24 Ms. Sullivan.
25 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

1 ON BEHALF OF THE RESPONDENTS
2 MS. SULLIVAN: Mr. Chief Justice, and may it
3 please the Court:
4 I'd like to begin with the answer to
5 Justice Kennedy's first question. Justice Kennedy
6 asked, and Justice Breyer renewed the question, is there
7 any source in customary international law throughout the
8 world that holds corporations liable for the human
9 rights offenses alleged here?
10 And the answer is there is none.
11 JUSTICE BREYER: You say there is not a
12 case. That's a different matter.
13 MS. SULLIVAN: Not a case --
14 JUSTICE BREYER: Yes, but that's a different
15 matter because you can have a principle that applies
16 even though there isn't a case. And the principle that
17 here would apply is what I said, Pirates, Incorporated.
18 Do you think in the 18th century if they'd brought
19 Pirates, Incorporated, and we get all their gold, and
20 Blackbeard gets up and he says, oh, it isn't me; it's
21 the corporation -- do you think that they would have
22 then said: Oh, I see, it's a corporation. Good-bye.
23 Go home.
24 (Laughter.)
25 MS. SULLIVAN: Justice Breyer, yes, the

corporation would not be liable.

JUSTICE BREYER: All right. Well, what source have you for --

MS. SULLIVAN: The corporation would not be liable.

JUSTICE BREYER: What source have you for that proposition?

MS. SULLIVAN: The -- look to Justice Story in U.S. v. Smith, cited in the Respondents' brief at footnote 12. It looks to piracy. And piracy is allowed -- in rem actions. You could seize the ship with which the piracy was committed, as you could later slave trading ships. But you could not seize another ship, and you could not seize the assets of the corporation. So, piracy --

JUSTICE BREYER: You couldn't seize another person other than Blackbeard. That's why -- if the ship is owned by a corporation, and they sue the corporation in 18 -- 17 whatever it was -- '96 or something, what reason do we have to think that the corporation would have lost -- I mean, would have won?

MS. SULLIVAN: Your Honor, let's be clear that Sosa referred to specific norms. So, the answer to Pirates, Inc., does not determine the answer in this case, which is about whether corporations can commit

post-Nuremberg human rights offenses.

A given norm must be applicable to a corporation. So, even if I gave you Pirates, Inc., it wouldn't decide this case. But in fact Pirates, Inc., was not suable; it was the ship that could be seized.

But to answer Your Honor's question about the genocide convention, perhaps I could go back. I want to be very clear: We're not arguing there needs to be an international adjudicated case finding a corporation liable in order for Petitioners to win, but they have failed to show anything in the conventions, the non-binding treaties engaged in by multiple nations. They've failed to show anything in custom or practice.

They failed --

JUSTICE KAGAN: But, Ms. Sullivan, I think that that's mostly because all of these are written to prohibit certain acts, and they don't talk about the actors. So, if I could, you know, draw an analogy, it's as if somebody came and said, you know, this -- this norm of international law does not apply to Norwegians. And you -- well, there's no case about Norwegians, and it doesn't specifically say "Norwegians." But, of course, it applies to Norwegians because it prevents everybody from committing a certain kind of act.

MS. SULLIVAN: But, Justice Kagan,

1 international law does speak to who may be liable, which
2 you correctly identified as a substantive question, not
3 a question of enforcement. And international law holds
4 corporations liable for some international law
5 violations. Look to the convention on the suppression
6 of the financing of terrorism, which speaks about legal
7 entities, or the convention on bribery of public
8 officials, which speaks about legal persons.
9 But the human rights offenses here do not
10 arise from conventions like those, which allow corporate
11 liability. To the contrary. The human rights offenses
12 here arise from conventions that speak to individual
13 liability. The liability of individuals.
14 And, Justice Breyer, in precise answer to
15 your question about the convention on genocide, if you
16 look to the Chevron brief on page 20 -- this is the
17 amicus brief of Chevron filed by Professor Goldsmith.
18 On page 20, it quotes in full the relevant passage from
19 the genocide convention, article IV.
20 I'm sorry. There are many briefs, but
21 perhaps if I could read it to Your Honors, I'll read it
22 in full.
23 It says that "persons committing genocide or
24 any of the other acts enumerated in article III shall be
25 punished, whether they are constitutionally responsible

1 rulers, public officials or private individuals."
2 And, Justice Kagan, all the other relevant
3 conventions also speak about natural persons. The
4 convention against torture speaks about "him," not "it."
5 And when Congress -- in the one time it implemented the
6 conventions that are the source of the human rights
7 offenses that are alleged here, Congress, in the Torture
8 Victim Protection Act, said that the suit may be brought
9 against individuals. And it expressly declined to use
10 the term "persons," which could embrace corporations.
11 And we've --
12 CHIEF JUSTICE ROBERTS: You're getting ahead
13 of yourself. We haven't --
14 (Laughter.)
15 CHIEF JUSTICE ROBERTS: We haven't decided
16 that question just yet.
17 (Laughter.)
18 JUSTICE GINSBURG: But this statute doesn't
19 use the word "individual," and it doesn't use the word
20 "person." As far as a corporate entity is concerned, a
21 corporate -- a corporation could sue, could be a
22 plaintiff under the Alien Tort Statute, could it not?
23 There's no --
24 MS. SULLIVAN: Justice Ginsburg, a
25 corporation could sue if it were an alien, and if you

decided "alien" embraced corporations. And, of course, the Attorney General Bradford opinion from 1795, which I agree with the Chief Justice, extended -- and with Justice Alito -- did not extend to conduct in other countries; it extended only to conduct on the high seas.

But Bradford -- the Bradford opinion, if you give it any credit, only establishes that a corporation may be a plaintiff. It does not speak to the question here, which is whether a corporation may be a defendant.

JUSTICE KAGAN: Ms. Sullivan, take an example that has all the extraterritoriality aspects of this case removed from it. Let's assume that the French ambassador is assaulted or attacked in some way in the United States and that that attack is by a corporate agent. Would we say that the corporation there cannot be sued under the Alien Tort Statute?

MS. SULLIVAN: Yes, Your Honor. You would say that because there is no assaulting ambassador norm that applies to corporations.

I just want to go back and --

JUSTICE KAGAN: Well, could you explain that to me? We would have to sue the person individually.

MS. SULLIVAN: Exactly. Exactly.

JUSTICE KAGAN: And what -- so, this goes back to Justice Breyer's question. Where do you find

that in international law? Where -- where does it say, when the French ambassador is sued in the United States by a corporate agent, we can't sue the corporation?

MS. SULLIVAN: The burden rests on the Petitioners to show that the norm is established by international law, not on us to show that corporate liability is anchored --

JUSTICE SCALIA: Congress could -- could pass a statute to that effect.

MS. SULLIVAN: Could absolutely.

JUSTICE SCALIA: Yes.

MS. SULLIVAN: Congress tomorrow, Justice Scalia --

JUSTICE SCALIA: The issue is whether this did it or not.

MS. SULLIVAN: This did not. And what international law has not established -- not just through cases, Justice Breyer, but through any source, convention or custom. If you look to the jurisdictional statutes of the ICC, the Rome Statute --

JUSTICE KAGAN: You don't -- of course, one could bring an ATS suit against the individual. Is that right?

MS. SULLIVAN: Yes, Your Honor.

JUSTICE KAGAN: Now, all the United States'

1 law and mostly other countries' law would hold the
2 corporation liable for the individual's act. Isn't that
3 right? That's a general principle of law.
4 MS. SULLIVAN: Justice Kagan, let's be clear
5 to separate two very different causes of action. There
6 is no country -- and to answer Justice Ginsburg's first
7 question, there is no country in the world that provides
8 a civil cause of action against a corporation under
9 their domestic law for a violation of the law of
10 nations. In Mr. Hoffman's hypothetical, if there were a
11 suit in England or in the Netherlands, it would be for
12 assault and battery, wrongful death, or --
13 JUSTICE KAGAN: Ms. Sullivan that would be
14 true against an individual as well. The ATS is just a
15 unique statute. It's unique against individuals, and
16 it's unique against corporations. That doesn't answer
17 the question that you're here to address, which is
18 whether corporations are meaningfully different from
19 individuals.
20 MS. SULLIVAN: They are meaningfully
21 different from individuals under international law,
22 which is the crucial choice of law question you need to
23 answer here. The crucial question that's at the
24 threshold is which law determines whether corporations
25 are liable?

JUSTICE BREYER: I think you're right on that point. What about slavery? Genocide -- I see your point in the Goldsmith brief. But what about slavery? That seems like contrary to international law norms, basic law norms, it could be committed by an individual. And why, if it could be committed by an individual, could it not also be committed by a corporation in violation of an international norm?

MS. SULLIVAN: Let me be clear. The question is not "could" --

JUSTICE BREYER: No, no. I know, but the way --

MS. SULLIVAN: -- international law apply.

JUSTICE BREYER: I've read the reason why, as you point out in your briefs, the corporations are different in many countries as if they're not moral persons. And I have in my mind filled in the blanks on that, and I think I know what it refers to. All right. That's the rationale that kept them out of some of these treaties.

And now the question would be, all right, are they always kept out no matter what? And I'm bringing up the two counterexamples I think were fairly strong, was Pirates, Inc., but that's a joke example, and the other -- although it's a point. And the other

is slavery. What about -- what about that one?

MS. SULLIVAN: Corporate liability, even for norms on which the international community agrees -- torture, genocide, piracy, slavery -- corporate liability is a substantive norm that is established by international law. And the nations of the world, for various reasons, have treated individuals and corporations differently.

And, Justice Kennedy, over and over and over again, as not just the Respondents' brief at page 17 but the U.K./Netherlands brief -- two of our most important allies filed a brief in support of Respondents, saying, at pages 11 through 15, there is no international norm applicable to corporations for violations of the human rights offenses here.

Now, the international community has many reasons for this. In 1998, when the Rome statute established the ICC, the signatories actually discussed whether to have criminal liability for corporations; and as the Scheffer amicus brief in support of Petitioners points out, at page 18, they actually also discussed civil liability for corporations, and the nations of the world who created the ICC, one of the most important modern instruments for bringing about human rights prosecutions, declined to embrace --

JUSTICE KENNEDY: Can you tell me why --

MS. SULLIVAN: -- jurisdiction over corporations.

JUSTICE KENNEDY: Can you tell me why you think they did that? I mean, for us, the -- respondeat superior is so simple. Why is it a big deal in international law?

MS. SULLIVAN: Well, Justice Kennedy, there's many reasons. For one, a corporation involves many innocent stakeholders beyond the perpetrators. And the regime established at Nuremberg, if it established nothing else, established that it is individuals who are liable for human rights offenses. It pierced the notion of hiding behind a state abstract entity, and it held individuals, including individual businessmen, from Alfred Krupp to 28 officials indicted from the I.G. Farben firm. But Nuremberg was about individual liability.

JUSTICE GINSBURG: What happened to I.G. Farben? I thought that it was dissolved and its assets taken.

MS. SULLIVAN: Yes, Justice Ginsburg. I.G. Farben was dissolved by the Control Council Law Number 9 in 1945. It was a political act. It preceded any of the tribunals, either international or national. It was

1 not until later that year that the international
2 military tribunal began. It prosecuted no corporations.
3 When the Allies prosecuted perpetrators of
4 the Nazi horrors in later cases, they prosecuted, again,
5 only individual officers, not any corporations.
6 There are two amicus briefs on the Nuremberg
7 history, one in support of Petitioners filed by Jennifer
8 Green and one in support of neither party filed by
9 Jonathan Massey. Both of them agree on one proposition,
10 and that is that no corporation was prosecuted by either
11 the international military tribunal in 1945 and '46 nor
12 in any of the subsequent U.S. tribunals. In fact, in
13 U.S. v. --
14 JUSTICE GINSBURG: But there's no -- there
15 was no civil liability adjudicated in Nuremberg. It was
16 about criminal.
17 MS. SULLIVAN: That's correct, Your Honor.
18 And to answer your question, when I.G. Farben was
19 dissolved, it was part of denazification,
20 decartelization, and the destruction of the Nazi war
21 machine of which I.G. Farben was an integral part. It
22 was practically viewed as an enemy state in and of
23 itself.
24 That is a -- so, the precedent of Nuremberg,
25 like the precedent of the ICTY, the ICTR, the ICC, all

exclude liability for corporations, even for the most heinous offenses of the modern era. They focus liability, rather, on corporate officers.

And, Justice Kagan, we don't dispute that corporate officers can be held to account for these offenses, assuming, Justice Alito, that we don't have concerns about extraterritoriality --

JUSTICE KAGAN: Well, if that's --

MS. SULLIVAN: -- even as to individuals.

JUSTICE KAGAN: If that is true -- let me just take you back to this question of separating out direct corporate liability from vicarious corporate liability, because it's clear -- one question is, is there a substantive international law obligation?

But there's another question which would not be an international law question, which is a remedial question. Remedies are addressed by common law rather than -- American common law rather than by international law.

So, why shouldn't we look at the vicarious liability question as essentially a question about the scope of the appropriate remedy once an international law violation has been found?

MS. SULLIVAN: Justice Kagan, you should look at questions of corporate liability. Like

1 questions of aiding and abetting liability. Like
2 questions of individual private liability as opposed to
3 state actor liability. You should look at all of those
4 questions as substantive questions answered by
5 international law. And that's because footnote 20 of
6 Sosa says you look to whether international law extends
7 liability to the perpetrator being sued.
8 You can't just find an act out there and fan
9 out to anyone in the entire world, including consumers
10 pumping gas in Ohio, and say there's been an act of --
11 an international law violation.
12 JUSTICE KAGAN: But the question of who can
13 sued --
14 MS. SULLIVAN: It's a question of who.
15 JUSTICE KAGAN: -- is a remedial question.
16 MS. SULLIVAN: It's not.
17 JUSTICE KAGAN: The question of who has an
18 obligation is a substantive question.
19 MS. SULLIVAN: Respectfully, Justice Kagan,
20 we disagree. The question of who may be sued is
21 fundamentally part of the question of whether there has
22 been a tort committed in violation of the law of
23 nations. It would read the verb "committed" out of the
24 statute, if you just said find a violation of the law of
25 nations anywhere and then apply it to whoever you want.

JUSTICE KAGAN: But in my example, the tort in violation of the law nations has been committed. It has been committed by the corporate agent. And the question then is, can one hold the corporation responsible for that tort? And that seems to be a question of enforcement, of remedy; not of substantive international law.

MS. SULLIVAN: Justice Kagan, we respectfully disagree. That is a question of substantive law. Think about a domestic analogy. Look to the Restatement of Conflicts. You would ask whether -- you would not look to foreign law to determine a question of respondeat superior or contribution or indemnity. You would not look to foreign law to determine whether, in the words of the Restatement, one person is liable for the tort of the other.

You would look to the law of the place of misconduct or the place of where the corporation is headquartered. We -- foreign law determines in this case whether you had can have civil remedies rather than criminal. We concede that the ATS allows a civil remedy where the world would impose only criminal liability.

That's because civil liability versus criminal liability -- that's a matter of remedy. So

1 would be the amount of damages. So would be the choice
2 of compensatory or punitive damages.
3 JUSTICE GINSBURG: If you look --
4 MS. SULLIVAN: Those are matters of remedy
5 for domestic law to decide.
6 JUSTICE GINSBURG: If you look to the law of
7 the place where the corporation is headquartered, well,
8 suppose that has a typical respondeat superior liability
9 that says corporations are liable for the acts of their
10 agents. So -- and most -- correct me if I'm wrong, I
11 think most countries in the world have such a notion,
12 that corporate -- corporations are responsible for the
13 acts of their agents. So, how does a -- looking to the
14 law where the corporation is headquartered, where does
15 that get you when that country has the very same law
16 that we do, that, yes, corporations are liable for the
17 acts of their agents?
18 MS. SULLIVAN: Justice Ginsberg,
19 respectfully, we don't think the world is all of one
20 when it comes to issues of corporate responsibility for
21 the acts of its agents. If you look at the ICJ --
22 sorry. If you look at the Rome statute, the Rome
23 statute itself has very particular sections about when
24 an -- a corporate superior is liable for the actions of
25 a corporate inferior. It looks to a knowledge and

1 deliberate indifference standard.

2 Not every nation of the world agrees on what

3 standard must -- there must be for even attributing the

4 agent's act at the bottom of the corporate hierarchy to

5 a senior officer, much less to the corporation as an

6 entity.

7 In answer to your question about -- earlier

8 about respondeat superior, Justice Kagan, the only way a

9 corporation can do anything is through the acts of human

10 beings; thus, there's always the question, when it comes

11 to corporate liability, to ask how to attribute the

12 action of the human beings who work for the corporation

13 to the corporation. And we respectfully submit that

14 Sosa footnote 20 commits that question, as does the ATS

15 itself, to international law.

16 JUSTICE KENNEDY: Well --

17 MS. SULLIVAN: Yes?

18 JUSTICE KENNEDY: -- I wonder if you don't

19 concede away too much when you say, well, there's a

20 difference in substance and -- and remedy and questions

21 of jury trial, damages, and so forth. That's domestic.

22 Those were the concerns that the U.K. and

23 the Netherlands addressed in their brief as saying why

24 corporations shouldn't be liable for acts committed on

25 foreign -- foreign territories. Those -- that was the

1 whole reasoning of -- of the U.K. brief.

2 MS. SULLIVAN: Justice Kennedy, I agree

3 completely, and let me be very clear on one thing. I've

4 addressed only step one of Sosa, which is, does

5 international law provide for a specific universal and

6 obligatory norm of corporate liability? It does not.

7 In fact, it refutes it. The Rome statute rejected

8 liability for corporations. The jurisdictional statutes

9 of the ICTY and the ICTR apply jurisdiction only to

10 natural persons. The international community at step

11 one has rejected it.

12 But, Justice Kennedy, it's very important

13 that Sosa puts a second screen into your inquiry. You

14 must ask, at the second step, even if international law

15 had provided any source of corporate liability, which it

16 does not, you would still have to ask -- footnote 30 of

17 Sosa says it's a higher bar -- should Federal common

18 law, should Federal common law now embrace these kinds

19 of actions? And the answer is "no."

20 Even if you found this were a question of

21 domestic remedy, we think you cannot. This is a

22 question of substance. But even if this were a question

23 of -- domestic remedy, you should not find liability for

24 corporations for the same reasons you rejected corporate

25 liability in Malesko.

JUSTICE GINSBURG: Ms. Sullivan, I'm -- in Sosa, as I understand it, it's all about what is the conduct that falls under this law of nations. It is not about who is the actor subject to that law. Sosa is dealing with what kinds of conduct come within the Alien Tort Statute. It -- it doesn't consider the question of what actor; that wasn't before the Court. What was before the Court is what kind of activity violates, is contrary to, the law of nations.

MS. SULLIVAN: Justice Ginsburg, respectfully we disagree and so do all the courts of appeals who have addressed the question of aiding and abetting liability. Every court of appeals, save one, including the Ninth Circuit and the D.C. Circuit, which disagreed with us on the outcome, said that the question of whether international law permits liability for aiding and abetting is to be determined by international law. The second --

JUSTICE BREYER: You could -- you could -- first, maybe you addressed this case. There was a case called Skinner v. East India Company.

MS. SULLIVAN: Yes, Your Honor. That was under English tort law, 1666.

JUSTICE BREYER: Okay. All right. So, it's -- now, what -- what I'm thinking of is if you go

through the rationale is you find some instances where individuals could, in fact, violate an international law norm, and then you find a lack of a reason why a corporation couldn't do the same. Now, in that kind of category, could the Court say we're interpreting Federal common law here to determine who can be sued under this statute? That's the remedial part.

MS. SULLIVAN: You may --

JUSTICE BREYER: And we're -- and so, what we're saying is that there is a -- in certain circumstances, there could be a suit against your corporation. You'd have to be careful because you recognize that by creating a -- a suit against your corporation, you're saying every country in the world can do the same. And -- and, therefore -- but maybe there are instances of like, universal jurisdiction recognized under international law where you could be pretty certain no harm would be done by that.

And so, what I'm thinking of is -- is a way of enforcing it.

MS. SULLIVAN: Justice Breyer, first we disagree that the question of who may be sued is a question of enforcement. We think that bridge --

JUSTICE BREYER: No, I see. Yes.

MS. SULLIVAN: -- was crossed in Sosa. And

as I was saying to Justice Ginsburg, in all the cases that hold, all the courts of appeals agree that who may be liable, just primary actors or also aiders and abetters, is determined by international law is a question of substance. So, we disagree with the premise. But to answer Your Honor's question, the Federal common law still should not fly in the face of Congress, and I think the important question in your hypothetical is who is the "you"?

As Justice Scalia just pointed out, Congress could amend the ATS tomorrow to provide for a Federal common -- a Federal statutory cause of action against corporations. But the one time Congress spoke to the very question at issue here, it held the diametric opposite. Congress in the TVPA rejected corporate liability by choosing the term "individuals" rather than "persons."

And I realize, Mr. Chief Justice, that's the next case, but we think there's -- really the answer that the TVPA excludes corporations is compelled, and the U.S. agrees.

So, Your Honor, the question is not what should Federal courts do in the abstract; it's what should Federal courts do when there is exact statutory decisionmaking by the political branches that has gone

1 the other way. In maritime law, in Miles v. Apex, you
2 didn't -- you didn't decide to go contrary to the
3 Congress in the Jones Act; you said if there's a Jones
4 Act statutory statement about wrongful death, we should
5 follow it in Federal common law.
6 Similarly here, even if the international
7 community thought there was anything to corporate
8 liability -- which it doesn't. It disagrees. Our two
9 allies the U.K. and Netherlands disagree, and Germany
10 has filed a brief saying it also disagrees with the ATS
11 as it has been applied. Even if there was international
12 consensus, you would still have to ask, should the
13 Federal courts, through free-form Federal common law
14 making, do the opposite of what Congress is saying?
15 JUSTICE BREYER: Well, we know the way to do
16 it. I mean, in Skinner, even if it was English common
17 law, the court reasons -- it says the taking of the ship
18 on the high seas was "odious and punishable by all laws
19 of God and man." So, we -- could you not say, where an
20 action is forbidden by the international law, and it is
21 punishable or -- by all laws of God and man, in such a
22 circumstance there being no reason to deny corporate
23 liability here, even under the moral person rule, it --
24 we interpret the Federal common law to permit that
25 remedy?

MS. SULLIVAN: Well, Your Honor, the ATS has language that says the tort must be committed in violation of the law of nations. And so, although, Justice Ginsburg, it doesn't specify who may be the defendants, it does point us to the law of nations to figure out what the law of nations thinks about who may be the defendants. And the law of nations is uniform. It rejects corporate liability. It rejects corporate liability.

So, to find a Federal common law cause of action here is to fly in the face of both the international community, with all the foreign policy consequences Justice Kennedy referred to earlier, if as Mr. -- as the Chief Justice said earlier, the point of the ATS was to stop war, by making sure there was a forum for the Marbois incident so that France wouldn't think it had to go to war on us to stop the offense to its sovereignty. But it will it provoke war to go out ahead of the international community, foiling the purpose of the ATS.

But also -- and this is --

JUSTICE KAGAN: Ms. Sullivan, could I take you back to --

JUSTICE GINSBURG: I assume the United States has taken that into account. I mean, for you

1 just representing the corporations to say what is in the
2 interests of the United States, when the United States
3 representative told us they think that individuals and
4 corporations are both subject to suit.
5 MS. SULLIVAN: Well, Your Honor,
6 respectfully, we -- we accept that the United States
7 here before you today doesn't speak to the foreign --
8 foreign policy consequences of this kind of ATS
9 liability, and we haven't even gotten to the alternative
10 ground Justice Alito and the Chief Justice referred to
11 earlier, which is Charming Betsy canon says don't
12 lightly construe your law to offend international law.
13 But just back to the -- the United States, I
14 respectfully suggest you should look to the TVPA, rather
15 than simply to what the United States says here today.
16 And the TVPA, which is Congress interpreting --
17 JUSTICE KAGAN: Well, the TVPA is one
18 limited statute dealing with one particular category of
19 offense, and it was specifically meant to supplement,
20 not to supplant, the ATS. So, between those two things,
21 the fact that it's limited to torture and that there was
22 no design to supplant the ATS, I guess I think that if
23 your best shot is the TVPA, that's a -- that's a weak
24 one.
25 MS. SULLIVAN: Well, far -- it's -- it's one

1 of many sources, Your Honor.

2 Just to go back to the key point about

3 international community, the international community --

4 Justice Breyer says don't just look for adjudicated

5 opinions, but every convention for every international

6 tribunal excludes corporations.

7 Look to the U.N. process. The Petitioners

8 make a great deal out of a U.N. process that's taken

9 place since 2007. We cite the U.N. special

10 representative, saying I have looked at the

11 international human rights instruments that are out

12 there, and I find no basis --

13 JUSTICE KAGAN: Ms. Sullivan, if I asked

14 you --

15 MS. SULLIVAN: -- for corporate liability.

16 JUSTICE KAGAN: If I asked you --

17 MS. SULLIVAN: That's the U.N., not

18 Congress.

19 JUSTICE KAGAN: You said the international

20 community draws this line. And as far as I can see, the

21 international sources are simply silent as to this

22 question. So, if I said to you, Ms. Sullivan, I want to

23 go back and read the best thing you have saying that the

24 international law sources draw this line, what do I

25 read?

MS. SULLIVAN: Read, first of all, the Rome statute, 1998, and the legislative history, the reports --

JUSTICE KAGAN: Well, the Rome statute is different because the Rome statute is about criminal liability. And we know that the Rome statute was meant to complement many -- many international states' laws which in fact do not hold corporations criminally liable domestically.

MS. SULLIVAN: Read -- but the Rome statute also rejected civil liability. That's in the Scheffer brief. The Scheffer amicus brief. He was our representative there, and he said civil liability was considered but rejected.

So, the Rome statute rejected either corporate or criminal liability for corporations under the new ICC. The ICC -- the ICTY, the convention against torture itself, and --

JUSTICE GINSBURG: I thought they rejected civil liability for everyone. It wasn't limited to corporations.

MS. SULLIVAN: Well, Justice Ginsburg, we don't -- we agree that there's no civil liability for human rights offenses. The answer to Justice Alito's question at the beginning -- is there any other nation

in the world that provides for civil liability for human rights violations? The answer is, no, there is no other nation in the world that provides an ATS.

JUSTICE KAGAN: Yes, but that's for individuals as well as for corporations.

MS. SULLIVAN: That's correct, but for --

JUSTICE ALITO: Could I ask you --

MS. SULLIVAN: -- human rights violations.

JUSTICE ALITO: Yes. Is there an Article III source of jurisdiction for a lawsuit like this?

MS. SULLIVAN: None other than the ATS, Your Honor. If -- there --

JUSTICE ALITO: Well, what's the constitutional basis for a lawsuit like this, where an alien is suing an alien?

MS. SULLIVAN: The -- well, there's no alien diversity jurisdiction. So -- because an alien is suing an alien. And there's a good argument you could dispose of this case, but not all the other ATS cases, by simply holding there's no alien diversity jurisdiction here, and the ATS can't have been viewed as displacing Congress's intent to limit jurisdiction at the time. That would dispose of this case and other cases involving foreign corporations sued by foreign plaintiffs, cases likes Talisman and Nestle and Rio

Tinto.

But we respectfully urge you to reach a broader ruling, which is that corporate liability is foreclosed both by the uniform practice, the uniform practice, not just adjudications, of the nations of the world --

JUSTICE BREYER: Okay. You're -- now you're beginning one additional thing, that the corporate rule that you're about to cite shows that many people believe there shouldn't be a remedy against a corporation because they're not moral persons. Why does it show that the corporation couldn't violate the substantive rule?

Please.

MS. SULLIVAN: Your Honor, we do not urge a rule of corporate impunity here. Corporate officers are liable for human rights violations and for those they direct among their employees. There can also be suits under State law or the domestic laws of nations, but there may not be ATS Federal common law causes of action against corporations.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hoffman, you have 5 minutes remaining.

MR. HOFFMAN: Thank you.

REBUTTAL ARGUMENT OF PAUL HOFFMAN

ON BEHALF OF THE PETITIONERS

MR. HOFFMAN: Let me just make a few quick --

JUSTICE SOTOMAYOR: For all the reasons Justice Kagan mentioned, that the TVPA is not a limiting source and can be viewed as a supplemental source, but there does appear to be a little bit of incongruity, that aliens can sue corporations for acts against other aliens, but American citizens under the TVPA might not be able to sue corporations.

How do we deal with that incongruity?

MR. HOFFMAN: Well, there are a number of -- of differences between the TVPA and -- and the Alien Tort Statute apart from that. I mean, for example, the Alien Tort Statute applies to a much broader range of international human rights violations. Congress decided to legislate in those areas for the reasons that it decided to do that.

The one thing that's clear, as Justice Kagan said, is that the Torture Victim Protection Act was designed to establish or to make even stronger the Filartiga precedent and shield it from analyses that challenged its bases, and was -- was not intended to restrict the Alien Tort Statute in any way.

1 Obviously, the next case will discuss in
2 greater detail whether the TVPA applies to corporations
3 or not. If -- I don't know.
4 If I could just make a couple of additional
5 points.
6 If -- if it was true that international law
7 barred corporate liability, then our friends the United
8 Kingdom and the Netherlands have violated international
9 law by passing legislation that imposes criminal
10 liability on corporations for violating genocide, crimes
11 against humanity, and war crimes.
12 And I think that brief makes it pretty clear
13 that whatever they're saying, if -- if the Alien Tort
14 Statute is a domestic enforcement of international law,
15 then their views don't apply.
16 And -- and this is a tort statute. That's
17 what -- there was a meaning to torts. Skinner's case,
18 for example, was a tort not only under English common
19 law; it was -- it was a tort in violation of the law of
20 nations. It was robbery on the sea. The law of nations
21 was incorporated in English common law, just as it was
22 in the founding in our country and, under the Paquete
23 Habana, is still part of our land -- the law of our
24 land.
25 "Tort" meant to the founders "tort

1 remedies." It meant -- it meant that the means of
2 enforcement would be done by the common law. That's all
3 that was available then. It's all that's available now.
4 And -- and international law places no
5 restriction on the way domestic jurisdictions enforce
6 international law. There is a general principle law of
7 corporate civil liability for all of the things that we
8 allege in this case.
9 In every legal system in the world, one can
10 get redress for this kind of thing. Countries don't
11 necessarily call it a violation of the law of nations.
12 They didn't fashion the statute the way our Founders did
13 for the reasons that they did --
14 CHIEF JUSTICE ROBERTS: I'm sorry. In every
15 nation in the world, you can get redress for this sort
16 of thing, but I thought you told us earlier that there
17 was no place where this suit could be brought --
18 MR. HOFFMAN: No, no. If --
19 CHIEF JUSTICE ROBERTS: In other words, a
20 suit by an alien against another alien for conduct that
21 takes place overseas.
22 MR. HOFFMAN: Well, what I'm suggesting -- I
23 don't know whether in every domestic jurisdiction, the
24 extraterritoriality issue is taken in the same way.
25 What I'm suggesting is that, for these kinds

of acts, you can get redress against a corporation within every legal system. Now, not every legal system -- I don't know every legal system with respect to the extraterritoriality issue.

CHIEF JUSTICE ROBERTS: Well, that just gets back to your basic submission, which is you define the international norm based on the act rather than the entire issue that's going to be litigated, which includes both remedy and actor.

MR. HOFFMAN: Well, what -- what -- what we would suggest is that international law does not distinguish with respect to actor, at least in -- with respect to these four norms, if we're going by a norm-by-norm basis. These -- these norms are defined in ways that human beings and corporations can violate.

JUSTICE SCALIA: What's your position --

MR. HOFFMAN: Could -- could it --

JUSTICE SCALIA: What's your position on aiding and abetting? Is that -- is that a matter of our domestic law or would we track international law on that?

MR. HOFFMAN: The lower courts have treated it in different ways. I think that most of the courts now have found that aiding and abetting is --

JUSTICE SCALIA: I don't care about the

courts. I care about you. What's your position on aiding and abetting?

MR. HOFFMAN: I think that -- I think that aiding and abetting could be viewed as a conduct regulating norm, that it actually applies to the things that can be done to violate the norm. And, therefore, international law would apply to that.

I think my -- my time is up.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

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