

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ESTHER KIOBEL, INDIVIDUALLY AND ON:

4 BEHALF OF HER LATE HUSBAND, :

5 DR. BARINEM KIOBEL, ET AL., :

6 Petitioners : No. 10-1491

7 v. :

8 ROYAL DUTCH PETROLEUM CO., ET AL. :

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10 Washington, D.C.

11 Monday, October 1, 2012

12

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

16 APPEARANCES:

17 PAUL L. HOFFMAN, ESQ., Venice, California; on
18 behalf of Petitioners.

19 KATHLEEN M. SULLIVAN, ESQ., New York, New York; on
20 behalf of Respondents.

21 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
22 Department of Justice; Washington, D.C.; for United
23 States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

6 Mr. Hoffman?

7 ORAL ARGUMENT OF PAUL L. HOFFMAN

8 ON BEHALF OF THE PETITIONERS

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

11 The plaintiffs in this case received asylum
12 in the United States because of the human rights
13 violations alleged in the complaint. They sued the
14 defendants for their role in these human rights
15 violations in U.S. courts because the defendants are
16 here and subject to the general personal jurisdiction of
17 our courts.

18 There's nothing unusual about suing a
19 tortfeasor in our --

20 JUSTICE GINSBURG: May -- may I ask you
21 about the statement you just made? Personal
22 jurisdiction was raised as a defense, right?

23 MR. HOFFMAN: Personal jurisdiction was
24 raised as an affirmative defense, but not raised in a
25 motion to dismiss.

1 JUSTICE GINSBURG: And so your position is
2 it was waived?

3 MR. HOFFMAN: Yes.

4 JUSTICE GINSBURG: But it was not
5 adjudicated. Is there --

6 MR. HOFFMAN: It was not adjudicated in this
7 case. Our position, it was waived when it was not
8 raised in a Rule 12 motion.

9 JUSTICE KENNEDY: What effects that
10 commenced in the United States or that are closely
11 related to the United States exist between what happened
12 here and what happened in Nigeria?

13 MR. HOFFMAN: The -- the only connection
14 between the events in Nigeria and the United States is
15 that the plaintiffs are now living in the United States
16 and have asylum because of those events, and the
17 defendants are here. There's no other connection
18 between the events that took place in the -- in Nigeria
19 and the forum. The -- the basis for suing the
20 defendants here was because they are here and because it
21 was possible to get jurisdiction.

22 JUSTICE KENNEDY: And just to make it
23 clear --

24 MR. HOFFMAN: Yes.

25 JUSTICE KENNEDY: -- it's your

1 position -- and I believe it's the position of the
2 United States; I'm not sure -- that if a U.S.
3 corporation commits an international law violation in
4 the United States, that U.S. corporation can be sued in
5 any court in the world?

6 MR. HOFFMAN: Well, it is -- it is possible
7 that other countries would assert jurisdiction. I think
8 that, generally speaking -- and it might well have been
9 the case in this case had the issues been raised -- most
10 of the time, alternative doctrines like the requirement
11 of personal jurisdiction, or the requirement -- or forum
12 non conveniens or other doctrines would -- would have
13 those cases litigated in other places.

14 JUSTICE KENNEDY: But then -- but the way I
15 stated the hypothetical, or the proposition, that is
16 your beginning proposition -- although there might be
17 some defenses. But as a beginning matter, that they can
18 be sued in any country in any court in the world.

19 MR. HOFFMAN: Well, I think it would depend
20 on what the events were and what the claims were and --
21 and what the law in that jurisdiction was.

22 JUSTICE KENNEDY: Well, we assume --

23 MR. HOFFMAN: I think that this -- sorry.

24 JUSTICE KENNEDY: -- we assume a violation
25 of international law --

1 MR. HOFFMAN: Okay.

2 JUSTICE KENNEDY: -- as part of the
3 hypothetical.

4 MR. HOFFMAN: Yeah. Well, I think that
5 if -- if, in fact, the U.S. corporation committed a
6 violation of a universal jurisdiction norm, for example,
7 as we believe these norms are in this case, there are
8 many jurisdictions in which U.S. corporations could be
9 -- could be sued.

10 In fact, in the United Kingdom and -- and
11 the Netherlands, I believe their juris -- their
12 provisions enforcing the international criminal court
13 might --

14 CHIEF JUSTICE ROBERTS: I suppose, if you
15 have -- I suppose, if you have, as I think there
16 probably is in this case, a number of plaintiffs, they
17 can sue in a number of different countries, right? Some
18 will sue in the United States, others in the United
19 Kingdom, others in the Netherlands?

20 MR. HOFFMAN: Well, it -- it is possible
21 that the plaintiffs could have sued in other places.
22 They sued here because this is where they live. This is
23 their adopted homeland because of that.

24 The United States, under international law,
25 clearly has jurisdiction to adjudicate claims between

1 parties properly before them.

2 JUSTICE SCALIA: Is there some -- is there
3 some super body that decides what constitutes a
4 violation of the particular norms of international law?
5 That is to say, these other countries that have
6 jurisdiction, they decide for themselves, don't they,
7 what -- whether there's been a violation of the
8 international norm or not?

9 MR. HOFFMAN: Well, if -- if there are
10 proceedings with respect to those norms or violations,
11 yes, they do.

12 I mean in domestic courts, there are
13 international tribunals that have a limited
14 jurisdiction, and they decide. There are some ad hoc
15 tribunals that decide other cases. And the national --
16 national courts have always been engines of decision
17 making on -- on international law.

18 In fact, that's the foundation of this -- of
19 this statute comes from the founders' desire to have
20 Federal courts decide what law of nations claims --

21 JUSTICE SCALIA: Sure, national courts have
22 been the deciders when -- when the violation occurs
23 within the nation. But to give national courts
24 elsewhere the power to determine whether a United States
25 corporation in the United States has violated a norm of

1 international law is something else, it seems to me.

2 MR. HOFFMAN: Well, it's -- it's unlikely
3 that -- that that would come up, because the suit could
4 be brought in the United States. It's also unlikely,
5 because, based on most forum non conveniens doctrines,
6 the suit would be heard here, because --

7 JUSTICE GINSBURG: You didn't mention
8 exhaustion of administrative remedies.

9 MR. HOFFMAN: Well, there is the possibility
10 of exhaustion of local remedies. I know the European
11 Union brief suggests that that's part of the
12 international law package that one has to accept. And
13 this Court in Sosa did say that it would consider an
14 exhaustion of local remedies doctrine if that was the
15 case.

16 And, of course, exhaustion of local remedies
17 would be an additional safeguard against the issue that
18 Justice Kennedy and Justice --

19 JUSTICE ALITO: Suppose a case like this is
20 brought in the United States and the State Department
21 tells the district court that allowing this case to go
22 forward will have a very deleterious effect on U.S.
23 foreign policy and on the welfare of U.S. -- U.S.
24 citizens abroad.

25 MR. HOFFMAN: Well, I think there --

1 JUSTICE ALITO: The district court says:

2 "Well, there's nothing I can do about it. This case is
3 just going to forward." That's your position?

4 MR. HOFFMAN: Well, no, not at all. I mean,
5 I think --

6 JUSTICE ALITO: Well, what would happen in
7 that situation?

8 MR. HOFFMAN: Well, I think the political
9 question doctrine would clearly apply, and -- and -- and
10 a court would decide whether to go forward. If the
11 United States believed that -- that the case should be
12 dismissed, as I understand the U.S. position in past
13 cases like Doe v. Exxon, is that -- that there should be
14 interlocutory appeal from -- from a denial of a
15 political question doctrine decision to go forward in
16 light of that.

17 JUSTICE ALITO: What if a district court
18 won't certify a question for interlocutory appeal?

19 MR. HOFFMAN: Well, but I think what the
20 U.S. position is, and I think -- I think it would -- I
21 assume it would be accepted -- is that if the United
22 States says going forward at all raises those questions,
23 that it would be able to go up on a Cohen v. --

24 JUSTICE KENNEDY: Well, you know, Justice
25 Alito can protect his own hypothetical, but it seems to

1 me you're walking away from it. The question as I
2 understood it assumed that there is a violation of
3 international law.

4 MR. HOFFMAN: Right.

5 JUSTICE KENNEDY: But that proceeding with
6 this particular case will, because of some other
7 reasons --

8 MR. HOFFMAN: Right --

9 JUSTICE KENNEDY: -- involve the United
10 States or its citizens living abroad in serious
11 complications with a foreign Government. That's not a
12 political question.

13 MR. HOFFMAN: Well, it could be.

14 JUSTICE KENNEDY: There's political
15 consequences, but that's the whole point.

16 MR. HOFFMAN: Well --

17 JUSTICE KENNEDY: There's -- there's -- you
18 can't cite a case -- but maybe you can, please do if you
19 can -- that this is part of the political question
20 doctrine.

21 MR. HOFFMAN: Well, I think that in
22 Corrie v. Caterpillar, for example, there were alleged
23 human rights violations, and the United States said that
24 because U.S. aid was involved in providing the
25 bulldozers that were involved in that alleged human

1 rights violation, that the court should dismiss on
2 political question grounds, and the courts did dismiss
3 on political question grounds.

4 JUSTICE BREYER: Couldn't you just say if --
5 would we have the power to say, looking at Sosa and the
6 principles that narrow considerably the subject matter
7 of this statute, to add a requirement that if the State
8 Department says that it interferes with foreign
9 relations it doesn't fall within the statute, can't
10 bring it?

11 MR. HOFFMAN: Well --

12 JUSTICE BREYER: That would get rid of this
13 problem, wouldn't it?

14 MR. HOFFMAN: Well, that would get rid of
15 the problem. I think that in truth, the -- the way the
16 political question doctrine would work would probably
17 end up being the same when it's that kind of rule.

18 JUSTICE BREYER: It would be the same thing.
19 By the way, did we sign the torture treaty?

20 MR. HOFFMAN: Yes. We've ratified --

21 JUSTICE BREYER: We've signed the torture
22 treaty.

23 MR. HOFFMAN: We've ratified --

24 JUSTICE BREYER: The torture treaty does
25 provide for -- for what is it called, universal

1 jurisdiction?

2 MR. HOFFMAN: Yes.

3 JUSTICE BREYER: All right. So, if in fact
4 a corporation in the United States, in cahoots with the
5 Government or something, should do the unusual thing of
6 violating the torture treaty, Tasmania or any country in
7 the world that signed the torture treaty would have
8 jurisdiction under that treaty to proceed, is that
9 right?

10 MR. HOFFMAN: Right.

11 JUSTICE BREYER: So the situation that we're
12 talking about already is in existence.

13 MR. HOFFMAN: That's right. I mean, there's
14 nothing that the Court would do in this case that would
15 change --

16 JUSTICE ALITO: Well, if it was the
17 corporation, it wouldn't fall under the torture --

18 JUSTICE BREYER: Well, that's -- no, the
19 torture treaty says nothing about corporations.

20 MR. HOFFMAN: Right. I mean, that's
21 different from the ICC.

22 But the -- the -- yes, Justice.

23 JUSTICE SOTOMAYOR: Counsel, there is the
24 amicus brief from the European Commission.

25 MR. HOFFMAN: Yes.

1 JUSTICE SOTOMAYOR: And it provides for a
2 very simple rule. Please explain to me what's wrong
3 with it. It basically says you have to borrow both the
4 substantive and procedural international law norms; that
5 those norms do permit these foreign-cubed cases only so
6 long as either, it appears to me, the defendant is a
7 citizen of the country, the acts occurred within that
8 country, or the alien has exhausted both domestic and
9 international avenues for relief, a sort of forum by
10 necessity, which apparently most countries have,
11 including the ones who have submitted amici arguing --

12 MR. HOFFMAN: Right.

13 JUSTICE SOTOMAYOR: -- different points,
14 like England and The Netherlands.

15 MR. HOFFMAN: Right.

16 JUSTICE SOTOMAYOR: It seems to me like a
17 fairly simple set of rules clearly defined and limiting
18 the application of this statute in a way that sort of
19 makes sense.

20 MR. HOFFMAN: Well, I think --

21 JUSTICE SOTOMAYOR: What's wrong with the
22 rule?

23 MR. HOFFMAN: I don't think there is a lot
24 wrong with the rule, actually. In a foreign-cubed kind
25 of case, it seems to me the EU position is, number one,

1 that there is universal jurisdiction, no matter whether
2 you consider the Federal Commonwealth cause of action
3 prescriptive or not. And so, the countries of the world
4 have agreed that all states have an interest in
5 enforcing these fundamental norms and that's part of
6 international law. And that -- that what goes with that
7 are limits of exhaustion of remedies under international
8 law, which guard -- safeguards the interests of third
9 states before the United States can --

10 JUSTICE SOTOMAYOR: So answer me why is this
11 not the case where on the facts there has been a failure
12 to exhaust.

13 MR. HOFFMAN: Well, I think that we would --
14 we would -- there's no record, obviously, about that.
15 And one of the arguments we would make about exhaustion,
16 I believe, is that it would have been futile to exhaust
17 under international law -- under international law
18 standards.

19 JUSTICE GINSBURG: Might be -- Nigeria is
20 one question, but other potential forums are the U.K.
21 and the Netherlands.

22 MR. HOFFMAN: Right. And I think that we --
23 you know, we have -- if there was an exhaustion of local
24 remedies requirement, then we would have to see if we
25 could satisfy that.

1 JUSTICE GINSBURG: I think -- haven't both
2 of those nations said they would not entertain this
3 case?

4 MR. HOFFMAN: It's not clear. I mean, in
5 fact, the -- you know, there is a recent Dutch decision
6 that goes perhaps farther than the Alien Tort Statute,
7 the Al Brujaj case.

8 JUSTICE KAGAN: But you would agree, Mr.
9 Hoffman, that if there were an exhaustion requirement,
10 it would not apply only to Nigeria, but also to the
11 Netherlands and to the U.K.?

12 MR. HOFFMAN: Well, I mean, it depends on
13 how the Court frames it. I mean, there's the exhaustion
14 requirement under the Torture Victim Protection Act,
15 there are other arguments about what that looks like
16 under international law. I mean, I think that -- to
17 follow up on Justice Sotomayor's point, I think that if
18 that's deemed by the Court to be a requirement of
19 international law, then international law rules on
20 exhaustion should apply, and we would either be able to
21 satisfy them or not or take whatever position we would
22 take with respect to that.

23 JUSTICE ALITO: Well, the U.K. -- the U.K.
24 and the Netherlands, I -- well, I'll ask you. Do you
25 disagree that those are fair judicial systems where a

1 plaintiff can get a fair shake?

2 MR. HOFFMAN: Yeah. No, I don't think that
3 anybody disputes that -- that the legal systems in the
4 Netherlands or the United Kingdom are fair. I mean,
5 they obviously are.

6 JUSTICE ALITO: Well, if that's so, then
7 what does this case -- why does this case belong in the
8 courts of the United States --

9 MR. HOFFMAN: Well --

10 JUSTICE ALITO: -- when it has nothing to do
11 with the United States other than the fact that a
12 subsidiary of the defendant has a big operation here?

13 MR. HOFFMAN: Well, it -- it -- from our
14 standpoint it's here, the way I started the argument,
15 really, which is that our clients are here, they're
16 here. Their -- personal jurisdiction has not been
17 contested and no one made a forum non conveniens motion
18 in this particular case. Now, there was a forum non
19 conveniens motion in a companion case. So -- but I
20 think that that's a problem that goes more toward --

21 JUSTICE GINSBURG: And what happened to
22 that?

23 MR. HOFFMAN: It -- the Second Circuit
24 overturned the district court on forum non conveniens.

25 JUSTICE GINSBURG: Overturned it which way?

1 MR. HOFFMAN: It said that the case -- that
2 the Wiwa case could proceed and --

3 JUSTICE GINSBURG: So it rejected the forum
4 non conveniens.

5 MR. HOFFMAN: Rejected forum non conveniens
6 in that case. And I know that the United States brief
7 believes that that was wrongly decided. But from our
8 standpoint, the -- if we're talking about the way that
9 the ATS should be structured, our belief is that forum
10 non conveniens, generally speaking, is going to deal
11 with the problem -- the problems that the Court has
12 raised. If -- if the Court believes that the Wiwa
13 decision was wrong or that that doctrine's wrong, that
14 doctrine should be changed.

15 JUSTICE GINSBURG: May I ask you a question
16 about your reliance on the Alien Tort Statute, but if
17 your theory is that this is a violation of a universal
18 norm, and that Federal common law makes it a claim
19 available in the United States, now there is 1331
20 general Federal question jurisdiction.

21 Couldn't you have said, never mind the Alien
22 Tort Statute, I'm suing under 1331 Federal question
23 jurisdiction, and I have got the -- the claim for relief
24 is the U.S. common law implementing the international
25 law?

1 MR. HOFFMAN: Well, I think this Court in
2 Sosa said that its analysis did not necessarily apply to
3 1331, and I think that's because of the history of 1350.

4 The history of 1350, as the historians'
5 brief lays out, is that the Founders believed that
6 certain law of nations norms could be implemented by
7 common law tort actions. And this Court in Sosa found
8 that without further congressional action, the courts of
9 the United States would be available to enforce norms
10 that were similar to those norms.

11 And in fact, the norms that the Founders
12 were familiar with were very similar in kind to the
13 universal jurisdiction norms that Justice Sotomayor --

14 JUSTICE SCALIA: Yes, but -- but general --
15 general common law was not considered to be Federal law,
16 neither Federal law nor state law. If that were so,
17 every tort action, which in those days were decided
18 under -- under a general law that was up there in the
19 sky, would have been a Federal -- a Federal claim.

20 MR. HOFFMAN: But there were -- there was
21 certain -- there were certain norms that were believed
22 to be part of the law of nations, including piracy and
23 attacks on ambassadors, and they were governed by
24 universal standards.

25 JUSTICE SCALIA: Common law. It's general

1 common law.

2 MR. HOFFMAN: Well, but I think this Court
3 found in Sosa that that -- that that part of common law
4 at the time has become customary international law, and
5 that -- that the courts of this country have not lost
6 their ability to enforce the same kinds of law of
7 nations norms as the Founders wanted to be -- to enforce
8 in the Alien Tort Statute in the context of universal
9 human rights norms.

10 JUSTICE SCALIA: Well, that isn't the issue.
11 The issue is whether when they do so they are enforcing
12 Federal law or not.

13 MR. HOFFMAN: I think this Court said that
14 it's the Federal common law within one of the exceptions
15 to Erie and -- and I think this Court, right after Erie,
16 found that there were enclaves of Federal law, one of
17 them being the area of foreign relations, where Federal
18 common law should be viewed as Federal --

19 JUSTICE KENNEDY: Well, that answer would
20 apply if you were answering Justice Ginsburg's question
21 in the affirmative by saying that there is 1331
22 jurisdiction, but you need not go so far, given Sosa.

23 MR. HOFFMAN: We don't. We don't, and I
24 think the distinction is that in Sosa and in the Alien
25 Tort Statute the statute itself speaks about torts.

1 This Court found, based on the history and
2 intent of the Congress, that there was no reason to wait
3 for any congressional authorization to go forward on
4 those claims, and -- and therefore it was available to
5 bring claims. So --

6 JUSTICE GINSBURG: Well, maybe they had --

7 MR. HOFFMAN: -- we're not taking the
8 position that 1331 --

9 JUSTICE GINSBURG: -- maybe they had to
10 provide that in 1789 because there was no -- there was
11 no general Federal question jurisdiction existing at the
12 time.

13 MR. HOFFMAN: Well, it could be, but what
14 seems more obvious about the reason for the Alien Tort
15 Statute was to make sure that there -- there was a
16 Federal court available to litigate law of nations
17 claims that could have been litigated in state court,
18 just as these claims could be litigated in State court.

19 And -- and in fact, one of the -- and, also,
20 in answer to the Respondents' claims about
21 extraterritoriality, if one imagines -- under the
22 Respondents' theory, you could -- a French ambassador
23 could be attacked by a Frenchman in Pennsylvania and
24 have Alien Tort Statute jurisdiction and a claim for
25 relief. If a U.S. citizen attacked the French

1 ambassador on foreign soil, he wouldn't have an Alien
2 Tort Statute claim; he would be sent to the state courts
3 if he could -- the state courts were open, which is
4 exactly the opposite of the purpose of the Alien Tort
5 Statute, the fundamental known purpose of the Alien Tort
6 Statute.

7 JUSTICE GINSBURG: You point out, I think,
8 an anomaly. If the victim is a United States citizen --
9 you say the only ties here are that the victims got
10 asylum in the United States, so they are here. But
11 someone who is here all the time, someone who is a
12 citizen of the United States, but is abroad and is a
13 victim of one of these atrocities, there would be no
14 suit for such a person.

15 MR. HOFFMAN: Well, the -- the Congress
16 provided for some jurisdiction in the Torture Victim
17 Protection Act.

18 JUSTICE GINSBURG: Yes, but under the Alien
19 Tort Statute.

20 MR. HOFFMAN: Well, the Alien Tort Statute
21 is limited to alien plaintiffs. I mean, and that was
22 the congressional design, and it was -- that arises out
23 of the history, to make sure that aliens with law of
24 nations claims had access to Federal courts and Federal
25 remedies to -- to vindicate those positions. The -- the

1 United States could still take action to protect the
2 U.S. citizen.

3 Can I reserve the balance of my time then?

4 CHIEF JUSTICE ROBERTS: You can.

5 Ms. Sullivan?

6 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

7 ON BEHALF OF THE RESPONDENTS

8 MS. SULLIVAN: Mr. Chief Justice and may it
9 please the Court:

10 This case has nothing to do with the United
11 States. It's Nigerian plaintiffs suing an English and
12 Dutch company for activity alleged to have aided and
13 abetted the Nigerian Government for conduct taking place
14 entirely within Nigeria.

15 And, Justice Ginsburg, to the personal
16 jurisdiction question, Shell did not waive personal
17 jurisdiction objections to the suit. The court in the
18 companion Wiwa case determined -- rejected the personal
19 jurisdiction affirmative defense, and the Second Circuit
20 affirmed.

21 So if you look at Joint Appendix pages 111
22 to 112, you'll see that we absolutely preserved the
23 personal jurisdiction defense.

24 Missing from the discussion you've just had
25 with Mr. Hoffman about possible ways to minimize the

1 dangers of applying the ATS in foreign countries is any
2 mention of Congress. And I'd like to return us to the
3 question presented on this round of the argument, which
4 is: Should the ATS and, Justice Ginsburg, Federal
5 common law be applied to conduct taking place entirely
6 within the borders of a foreign country? And our answer
7 is it should not, under the --

8 JUSTICE GINSBURG: Does that mean,
9 Ms. Sullivan, that you -- and do I understand your
10 argument on brief correctly, that you would say from --
11 the revival of 1350 from Filartiga was wrong because
12 nothing happened -- nothing happened in the United
13 States there? Marcos was wrong because nothing -- the
14 wrong occurred abroad?

15 Does your -- the argument you're making now
16 that this is not applicable to things that happened
17 offshore exclude Filartiga and Marcos?

18 MS. SULLIVAN: We do not believe that you
19 need to address Filartiga because Filartiga is taken
20 care of entirely by the proper body, which is Congress.
21 Congress, in enacting the TVPA, the Torture Victim
22 Protection Act, covered a situation like Filartiga,
23 where a Paraguayan plaintiff sues a Paraguayan
24 individual defendant for conduct in Paraguay.

25 JUSTICE GINSBURG: But then you're at least

1 saying --

2 JUSTICE KENNEDY: Well, maybe it's just
3 history and background, but I would really like you to
4 answer Justice Ginsburg's question. Suppose we had
5 granted cert in Filartiga before Congress acted?
6 What -- under your position, what should have been the
7 result? I think that was the purport of her question,
8 and I would appreciate an answer to it.

9 MS. SULLIVAN: Yes, Justice Kennedy. We
10 think the current correct result is that the ATS and
11 Federal common law, which is substantive and remedial
12 law of the United States -- and here, we agree with the
13 United States on page 2 of its brief -- ATS plus Federal
14 common law is the substantive and remedial law of the
15 United States. And we think, under the well-established
16 canon against extraterritorial application of U.S. law,
17 absent congressional clear indication, there should not
18 be such an extension. So, therefore --

19 JUSTICE SCALIA: Ms. Sullivan, can I ask you
20 about your position on extraterritorial application. I
21 believe strongly in the presumption against
22 extraterritorial application, but do you know of any
23 other area where extraterritorial application only means
24 application on the territory of a foreign country and
25 not application on the high seas?

1 MS. SULLIVAN: Well --

2 JUSTICE SCALIA: I find that -- you know,
3 extraterritorial means extraterritorial, but -- but you
4 contend that this -- as I think you must -- that this
5 statute applies on the high seas.

6 MS. SULLIVAN: We -- we don't concede that
7 the statute applies on the high seas.

8 JUSTICE SCALIA: Oh, you don't? Okay. I
9 thought that was common ground. I'm glad to know it
10 isn't.

11 MS. SULLIVAN: Sosa said, looking to the
12 three Blackstone paradigms, assaults on ambassadors,
13 interference with safe conducts, and piracy, that
14 certainly the antecedents to the ATS, the Marbois
15 incident of an attack in Philadelphia, and the New York
16 constable entering the home in New York City of the
17 Dutch ambassador, those were incidents on U.S. soil.
18 And Sosa says perhaps also the third paradigm, piracy,
19 might also be covered.

20 CHIEF JUSTICE ROBERTS: Well, I thought that
21 was the most clear violation of an international norm.
22 The one thing that the civilized countries would agree
23 on is that you --

24 MS. SULLIVAN: At the time.

25 CHIEF JUSTICE ROBERTS: -- capture pirates.

1 MS. SULLIVAN: Our clear -- our position on
2 piracy is this. Even if you think the ATS and Federal
3 common law can extend to conduct on the high seas, which
4 are stateless, a place where no foreign sovereign rules,
5 that does not mean that the ATS and Federal common law
6 can apply to conduct within a foreign sovereign's
7 borders --

8 JUSTICE BREYER: Well, it doesn't mean that.
9 It doesn't mean that, but if the -- what is the question
10 we're asking. If, when the statute was passed, it
11 applied to pirates, the question to me is who are
12 today's pirates. And if Hitler isn't a pirate, who is?
13 And if, in fact, an equivalent torturer or dictator who
14 wants to destroy an entire race in his own country is
15 not the equivalent of today's pirate, who is?

16 And we have treaties that say there is
17 universal jurisdiction. Other countries take it.

18 MS. SULLIVAN: Justice Breyer --

19 JUSTICE BREYER: We took it in *Filartiga*.
20 We took it in the cases that Justice Ginsburg mentioned.
21 So I absolutely grant you could make the distinction,
22 but, given the purpose and an objective of the statute,
23 why should we make it?

24 MS. SULLIVAN: Justice Breyer, with respect,
25 the United States has not acceded to the principle of

1 universal civil jurisdiction. And with respect --

2 JUSTICE BREYER: Well, we did explicitly in
3 the torture treaty in respect to that particular
4 incident.

5 MS. SULLIVAN: Justice Breyer, in our brief
6 at 48, note 11, you'll see that that's not quite the
7 case. I'm sorry -- I'm sorry.

8 We object -- the United States objected to
9 the universal civil jurisdiction aspect of the
10 convention against torture. We have never acceded to
11 that. And the reason is that we fear exactly the
12 consequences Justice Kennedy began the argument with.
13 We fear that if we say that a United States court can be
14 open to try any accused law of nations violator for
15 anywhere in the world regardless of the place of the
16 conduct, the other nations of the world might seek to do
17 the same to us.

18 JUSTICE BREYER: They do that, don't they,
19 with torture? I mean, isn't that -- it's criminal, not
20 civil, quite right. Does that make it better?

21 MS. SULLIVAN: Criminal is very different
22 from civil. And what we -- the precise argument we are
23 making here is that the presumption against application
24 of U.S. law to conduct within foreign sovereigns -- and
25 remember, the purpose of the presumption,

1 Justice Scalia, is to avoid conflict with foreign
2 sovereigns. There is no foreign sovereign over the high
3 seas.

4 The conflict arises, and the presumption
5 protects against this conflict, when we go into a
6 foreign nation, we project our law.

7 JUSTICE SCALIA: I understand that. That's
8 the worst. But I really don't -- you appeal to the
9 general principle of territoriality of our laws. And,
10 as I say, I don't know any other case where -- where
11 that principle allows our securities laws to be applied
12 on the high seas, for example --

13 MS. SULLIVAN: Well --

14 JUSTICE SCALIA: -- even though they can
15 apply in Australia.

16 MS. SULLIVAN: -- Your Honor, if you wish to
17 say no extraterritorial application, we think Sosa does
18 not foreclose that, because Sosa simply said piracy
19 might be one of the -- the actions covered.

20 But I want to get back to the key point,
21 which is --

22 JUSTICE ALITO: Can I ask this about piracy?
23 In 1789, do you think that Congress was contemplating
24 tort actions against pirates in courts of the United
25 States?

1 MS. SULLIVAN: No, we do not, Your Honor,
2 because we think that in rem actions were the typical
3 things contemplated. And as soon as
4 United States v. Palmer comes along, this Court applied
5 the presumption against extraterritorial application of
6 U.S. law to -- the application of the then-extant piracy
7 statute to a foreign-flagged vessel on the high seas.

8 The thought was, don't apply it to the
9 foreign-flagged vessel because that's like a mini-
10 foreign country on the high seas. So we would argue
11 that the presumption against extraterritoriality
12 actually applied in the founding era even to piracy.

13 But even if you were to say, well, piracy is
14 covered now, it doesn't follow that the norms that are
15 invoked here under the law of nations can be subject to
16 a U.S. civil cause of action.

17 And I want to stress that our point is that
18 the U.S. is projecting here -- and I don't believe
19 through the statute, the ATS, but through the causes of
20 action under Federal common law -- our law onto foreign
21 countries.

22 JUSTICE KAGAN: Well, Ms. Sullivan, your
23 argument is very broad, and I want to ask you a
24 question. Your case might properly be dismissed. But
25 take a different case, and it's a -- just a variation on

1 the Marbois incident, where instead of being attacked in
2 Philadelphia, the French ambassador to Britain is
3 attacked in London, but is attacked by a United States
4 citizen, who then comes home to the United States, seeks
5 refuge in the United States. And the French
6 ambassador -- the French ambassador wants to bring an
7 action.

8 Wouldn't the ATS have contemplated exactly
9 that sort of action? I mean, why would it make any
10 difference whether the attack on the French ambassador
11 by a United States citizen occurred in Philadelphia or
12 occurred in London?

13 MS. SULLIVAN: The difference it makes is
14 that in your hypothetical, the reverse Marbois case, the
15 proper remedy would have been to seek -- for France to
16 seek extradition of the U.S. assailant and --

17 JUSTICE KAGAN: Well, I think I'm advised by
18 the Solicitor General's office that there were very few
19 extradition treaties at that time. And even if
20 extradition was a possible remedy, I mean why shouldn't
21 we understand the ATS to provide supplemental remedies
22 as well, civil as well as criminal, civil as well as
23 extradition?

24 MS. SULLIVAN: Because Congress hasn't
25 clearly said so. And the point of the presumption is to

1 avoid all of the judge-made possible qualifications that
2 were discussed earlier: exhaustion, political question,
3 the possible limitations suggested by the European
4 Union.

5 Congress doesn't get to say anything if it's
6 the courts deciding, through their own prudence,
7 together with the advice from the Department of State.

8 And, Justice Alito, in answer to your
9 question whether --

10 JUSTICE SCALIA: Excuse me. Excuse me. Do
11 you mean that the courts -- in those areas where you
12 acknowledge the statute applies, that the courts will
13 not apply doctrines of exhaustion, of, you know, comity,
14 of -- the appropriateness of bringing the action here?
15 Of course they will, won't they?

16 MS. SULLIVAN: They're not always applied,
17 Justice Scalia. And if so, it sometimes takes many
18 years before they happen. And the State Department is
19 not always listened to.

20 In the South African apartheid case, not
21 only did the State Department seek to protest the
22 action, but the Government of South Africa filed a
23 letter, and the district court ignored both.

24 JUSTICE KAGAN: Well, we should fix that
25 then. But that's not the question here, right? The

1 question here is -- is the different one of whether you
2 ever get to the exhaustion question.

3 MS. SULLIVAN: Correct.

4 JUSTICE KAGAN: And if you go back to the
5 reverse Marbois, you said Congress didn't speak, but I
6 think what we said in Sosa is that Congress did speak,
7 that Congress was referring to exactly that kind of tort
8 when it passed the Alien Tort Statute.

9 And you are saying it would have made a
10 difference to Congress that the incident occurred in a
11 different place even though the attacker was a United
12 States citizen seeking refuge in the United States and
13 leaving the French with no remedy.

14 MS. SULLIVAN: With respect, Your Honor, the
15 French had several remedies. The French victim could
16 have sued in tort in the United States. And under the
17 transitory tort doctrine that was adopted at the time,
18 which is not a precedent for the ATS, would have allowed
19 a suit under French law. French law would have been
20 imported to try that claim. So it could have been tried
21 in State court as an assault.

22 Second, there could have been extradition.

23 Third, the point of the Marbois in
24 stimulating the ATS was that if -- if a U.S. citizen
25 attacks the French ambassador on U.S. soil, and we then

1 harbored him, that could have led to an incident of war.
2 But there is no incident of war or conflict posed in
3 your hypothetical because extradition was possible, and
4 State court tort violations -- State law tort -- State
5 court jurisdiction over a transitory tort should
6 have obtained.

7 JUSTICE SOTOMAYOR: Do you think it matters
8 that the harboring is after the fact or not? Meaning if
9 the -- if the mercenary fled France and was hiding from
10 the French here, why is there any less chance of a war?

11 MS. SULLIVAN: Well --

12 JUSTICE SOTOMAYOR: I don't understand. The
13 apples and apples don't -- seem to not match in my mind.

14 MS. SULLIVAN: Justice Sotomayor, I -- there
15 is theoretically the possibility that if State law
16 transitory tort didn't work, and if extradition didn't
17 work, and if the French didn't just seek to punish the
18 assailant in their own country, maybe there would have
19 been international conflict, but there is no evidence
20 Congress was thinking about that at the time.

21 JUSTICE SOTOMAYOR: Pirates could have been
22 sued in State court, too, and yet the ATS -- I know that
23 you quarrel about whether an act of piracy qualifies as
24 an international norm, but assuming that I accept it is,
25 pirates could have been -- under your theory, pirates

1 could have been sued in State court, too, yet Congress
2 found it important to pass the ATS.

3 MS. SULLIVAN: It did. But, Your Honor,
4 there is not a single founding era precedent, not a
5 single one, that involves the reverse hypothetical.
6 Every single founding era precedent that stimulated the
7 ATS or came soon in its aftermath involved international
8 law violations alleged to have occurred on U.S. soil or
9 in U.S. waters.

10 The two cases most soon after the ATS were
11 Moxon v. The Fanny and Bolchos v. Darrell, which
12 involved supposed law of nations violations on U.S.
13 waters and on U.S. soil.

14 JUSTICE ALITO: What should happen when the
15 injury occurs within the territory of a foreign country,
16 but it is alleged that the injury was directed by
17 someone in the United States?

18 MS. SULLIVAN: Justice Alito, we would
19 respectfully urge that direction is -- is not enough.
20 If the place of the injury and the place of the last
21 conduct was on foreign soil. We think ordinary
22 restatement of conflict principles would suggest that
23 you look to the law of the place of injury, not to the
24 forum law.

25 And the most important point about the ATS

1 and Federal common law, even if it were under section
2 1331, Justice Ginsburg, is that it's an application of
3 U.S. substantive and remedial law to another country.
4 And the offense is we're telling the other country that
5 they have to entertain private civil litigation. And
6 there is a difference, Justice Breyer, between criminal
7 and civil --

8 JUSTICE BREYER: Okay. You're right about
9 that. What about the Bradford? Isn't there -- all this
10 stuff about -- you know what I'm talking about.

11 MS. SULLIVAN: Bradford is the best thing
12 the Petitioners have in the founding era, and it's not
13 enough to overcome the presumption --

14 JUSTICE BREYER: Because?

15 MS. SULLIVAN: -- because he could have been
16 speaking about the high seas.

17 JUSTICE BREYER: He could have, but if you
18 read it, it looks as if there was -- what he's upset
19 about -- or what Britain was upset about was an
20 American.

21 MS. SULLIVAN: And he --

22 JUSTICE BREYER: Yes. Go ahead.

23 MS. SULLIVAN: It was Americans, but
24 we -- we think, if properly read, the hostilities of
25 which he spoke was the high seas part of the conduct.

1 It was an American who piloted the French fleet 60 miles
2 from the Iles de Los to the Sierra Leone River. And
3 that was -- if you read grammatically, we think that is
4 what Attorney General Bradford was referring to.

5 JUSTICE KAGAN: But --

6 JUSTICE GINSBURG: Ms. Sullivan, before your
7 time runs out, I mean, you have said, candidly, that if
8 Filartiga were to come up today, if Marcos were to come
9 up to this forum, there would be no basis under the
10 Alien Tort Statute.

11 But assume for the moment that those two
12 cases -- that we accept them -- Sosa seemed to accept
13 them. Is there anything different about your case?

14 MS. SULLIVAN: Yes, Your Honor. There are
15 many -- many differences between us and Filartiga. For
16 one, this is a case in which there is a -- a class
17 action against a corporation. And if you don't agree
18 with us on the lack of extraterritorial application, we
19 still maintain that the ATS does not apply to
20 corporations.

21 Second, there is -- there was a -- there's
22 an allegation here of aiding and abetting a foreign
23 Government. It was unclear in Filartiga whether the
24 Paraguayan was acting within or without the state's
25 authority, but -- and he was later deported, so we don't

1 know the answer.

2 But here the offense is magnified because
3 the allegation is that an English and a Dutch company
4 aided and abetted the Nigerian Government. That is
5 where the offense to the principle against international
6 friction is at its highest. And so if you weren't to
7 adopt our position in full, at a minimum we think you
8 should hold that the presumption applies to
9 foreign-cubed cases involving aiding and abetting a
10 foreign government, where everything is foreign.

11 But we don't think you should do that in the
12 first instance. We respectfully submit the better
13 approach is to apply the presumption as a categorical
14 matter.

15 JUSTICE KENNEDY: But in Filartiga, why
16 wasn't there an aiding and abetting? I think it was
17 pretty clear. He probably was working for the
18 government, which is even worse.

19 MS. SULLIVAN: Well --

20 JUSTICE KENNEDY: But -- and I am interested
21 in Justice Ginsburg's question.

22 MS. SULLIVAN: Yes.

23 JUSTICE KENNEDY: Just assume we think the
24 Second Circuit was right, pre-congressional action under
25 the Alien Tort Statute. Is -- is there any way in which

1 we can use the principle of extraterritoriality to rule
2 in your favor?

3 MS. SULLIVAN: We think there is,
4 Justice Kennedy. And we think the principle of
5 extraterritoriality is -- is essentially a
6 democracy-forcing device to send these questions back to
7 Congress. And if we send it back to Congress --

8 CHIEF JUSTICE ROBERTS: Well, have we
9 crossed that -- we've crossed that bridge already,
10 didn't we, in Sosa?

11 MS. SULLIVAN: You have --

12 CHIEF JUSTICE ROBERTS: The presumption
13 applies to interpreting acts of Congress. We are over
14 that. We're -- we're making this law up ourselves,
15 right?

16 MS. SULLIVAN: Chief -- Mr. Chief Justice,
17 you are making it up themselves, and that's why there's
18 all the more reason to apply the presumption against
19 application to foreign countries.

20 It's far worse to have judges --

21 JUSTICE SOTOMAYOR: But you're asking us to
22 overturn our precedents.

23 MS. SULLIVAN: We --

24 JUSTICE SOTOMAYOR: You're -- you're
25 basically saying Filartiga and Marcos, Sosa, they were

1 all wrong.

2 MS. SULLIVAN: We are not, Your Honor. Sosa
3 did not address the question we have before the Court
4 today.

5 JUSTICE SOTOMAYOR: Counsel, how can you say
6 that? Maybe the facts didn't, but certainly the
7 reasoning of the case addressed that issue very directly
8 and -- and basically said it does. And then it talked
9 about how you limit it. That's what Sosa did.

10 MS. SULLIVAN: To answer the Chief Justice's
11 question, you don't need to overrule, so to speak,
12 Filartiga on Justice Kennedy's question. You can simply
13 say that in the intervening period, Congress did, as is
14 appropriate in the area of applying law to foreign
15 conduct, pass a specific statute, the TVPA, that applies
16 exactly to the conduct in Filartiga. That should inform
17 your decision today, that you don't need judge-made law
18 to address the situation in Filartiga.

19 And you don't need to overrule Sosa, with
20 respect, Justice Sotomayor, because Sosa did not
21 address, for better or for worse, the
22 extraterritoriality argument we make today. It went off
23 at the first step. No international norms, specifically
24 universal and specific -- sufficiently specific and
25 universal. So it didn't get to the concerns about

1 friction with foreign countries.

2 JUSTICE KAGAN: But, Ms. Sullivan, I'm going
3 to read you something from Sosa, which -- it talks all
4 about the rule that it adopts and then it says: "This
5 is generally consistent with the reasoning of many of
6 the courts and judges who faced the issue before it
7 reached this Court. See *Filartiga*." And then it quotes
8 *Filartiga*: "For purposes of civil liability, the
9 torturer has become like the pirate and slave trader
10 before him, an enemy of all mankind."

11 So we gave a stamp of approval to *Filartiga*
12 and *Filartiga*'s understanding that there were certain
13 categories of offenders who were today's pirates.

14 MS. SULLIVAN: If -- the fact that the
15 nations of the world agree on norms does not mean the
16 nations of the world agree on remedies. And what the
17 ATS and Federal common law, as interpreted in *Sosa*, do
18 is project a U.S. civil cause of action with U.S. rules,
19 punitive damages, no attorney fee shifting, contingent
20 fee and punitive damages. That should not be done
21 except by Congress. They did it in the TVPA, but you
22 should not permit it to be done here.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Ms. Sullivan.

1 General Verrilli.

2 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING THE RESPONDENTS

5 GENERAL VERRILLI: Mr. Chief Justice, and
6 may it please the Court:

7 The Alien Tort Statute should not afford a
8 cause of action to address the extraterritorial conduct
9 of a foreign corporation when the allegation is that the
10 defendant aided and abetted a foreign sovereign. In
11 this category of cases, there just isn't any meaningful
12 connection to the United States.

13 JUSTICE SOTOMAYOR: Is that the same -- is
14 that your simple rule? Is that how you want us to
15 rule --

16 GENERAL VERRILLI: Yes.

17 JUSTICE SOTOMAYOR: -- that there could
18 never be aiding and abetting on behalf of a corporation?
19 Is that your simple answer to this case, or what's the
20 general --

21 GENERAL VERRILLI: It's -- it's a narrower
22 statement than that, Justice Sotomayor. It's that there
23 shouldn't be a cause of action to address the
24 extraterritorial conduct of a foreign corporation that
25 is alleged to have aided and abetted the acts of a

1 foreign sovereign.

2 JUSTICE GINSBURG: What about in your -- you
3 do say in your brief that you think that Filartiga is
4 within the Alien Tort Statute.

5 GENERAL VERRILLI: Yes, we do,
6 Justice Ginsburg.

7 JUSTICE GINSBURG: You don't -- don't adopt
8 a theory that many of the -- briefs do, that there has
9 to be some connection, some nexus to the United States.
10 You just tell us that Filartiga is okay. And how about
11 Marcos, is that okay?

12 GENERAL VERRILLI: Well, we think in
13 Filartiga, Justice Ginsburg, that the -- the -- that
14 there is a nexus to the United States. The actual
15 perpetrator was -- A, it was a case against the actual
16 perpetrator.

17 JUSTICE GINSBURG: Yes, but you -- you don't
18 --

19 GENERAL VERRILLI: And B --

20 JUSTICE GINSBURG: -- you don't offer us a
21 nexus. You don't offer us that reason why Filartiga was
22 okay.

23 GENERAL VERRILLI: Yes, I think our reasons
24 for why Filartiga was okay is that -- that it was the
25 actual perpetrator, not an aider and abettor, and the

1 actual perpetrator was resident in the United States.

2 And I do think when Congress enacted the
3 TVPA, that is what Congress looked to as the salient
4 features of the Filartiga situation that justified --

5 JUSTICE GINSBURG: What else? What else?
6 You -- you say Filartiga. You don't mention Marcos. Is
7 Marcos in your view a proper exercise?

8 GENERAL VERRILLI: I -- I think Filartiga is
9 the paradigm, and cases like Filartiga are the paradigm
10 that -- where we think ATS -- ATS causes of action
11 should be recognized.

12 JUSTICE SCALIA: General Verrilli, the --
13 that's -- that is a new position for the -- for the
14 State Department, isn't it?

15 GENERAL VERRILLI: It's a new --

16 JUSTICE SCALIA: And for -- and for the
17 United States Government? Why should -- why should we
18 listen to you rather than the solicitors general who
19 took the opposite position and the position taken by
20 Respondents here in other cases, not only in several
21 courts of appeals, but even up here?

22 GENERAL VERRILLI: Well, Justice Scalia, in
23 a case like this one, in cases under the Alien Tort
24 Statute, the United States has multiple interests. We
25 certainly have foreign relations interests in avoiding

1 friction with foreign governments; we have interests in
2 avoiding subjecting United States companies to liability
3 abroad. We also have interests in ensuring that our
4 Nation's foreign relations commitments to the rule of
5 law and human rights are not eroded.

6 JUSTICE SCALIA: I understand that, but --

7 GENERAL VERRILLI: It's my responsibility to
8 balance those sometimes competing interests and make a
9 judgment about what the position of the United States
10 should be, consistent with existing law.

11 JUSTICE SCALIA: It -- it was --

12 GENERAL VERRILLI: And we have done so.

13 JUSTICE SCALIA: -- it was the
14 responsibility of your predecessors as well, and they
15 took a different position. So, you know, why -- why
16 should we defer to the views of -- of the current
17 administration?

18 GENERAL VERRILLI: Well, because we think
19 they are persuasive, Your Honor.

20 JUSTICE SCALIA: Oh, okay.

21 CHIEF JUSTICE ROBERTS: Your successors may
22 adopt a different view. And I think -- I don't want to
23 put words in his mouth, but Justice Scalia's point means
24 whatever deference you are entitled to is compromised by
25 the fact that your predecessors took a different

1 position.

2 GENERAL VERRILLI: So, Mr. Chief Justice,
3 let me be clear: In this case our position is that the
4 Court ought not recognize a cause of action.

5 JUSTICE ALITO: Suppose that the defendant
6 in this case were a U.S. corporation, but the case were
7 otherwise identical. What result then?

8 GENERAL VERRILLI: In that case the possible
9 risk of foreign relations friction would be comparable.
10 The risk of reciprocal exposure to American companies
11 would also exist. The difference between that case and
12 this case, Your Honor, is that there'd be a much more
13 substantial connection to the United States because it's
14 an American company. The question in the case would be
15 whether the -- that substantial connection provided a
16 sufficient justification for subjecting the United
17 States company to these international law norms to avoid
18 undermining the credibility of our Nation's commitment
19 to those norms. We haven't taken a position on that
20 question in this case because we think that the Court
21 ought to proceed incrementally here. The case before
22 the Court involves a foreign corporation in which there
23 just isn't any connection to the United States at all,
24 and it's our judgment that the Court should decide that
25 case --

1 JUSTICE SOTOMAYOR: You are disavowing --
2 you are disavowing any forum of necessity view of the
3 ATS? You are disavowing what other countries do or say
4 with respect to citizens -- to aliens who are attacked?

5 GENERAL VERRILLI: Our view about that,
6 Justice Sotomayor, is that the key determinant here, and
7 the reason why there ought not be a cause of action
8 here, is the absence of any meaningful connection to the
9 United States. And the question is --

10 JUSTICE SOTOMAYOR: I asked you a question
11 directly. Are you foregoing -- are you foregoing any
12 forum necessity exception to the rule you've just
13 announced?

14 GENERAL VERRILLI: We don't think that the
15 question of the availability of a forum or
16 nonavailability of a forum is sufficient to override the
17 absence of any connection to the United States.

18 Now, I will say --

19 JUSTICE ALITO: If I could follow up on the
20 question I asked before. I'm not asking you to say
21 definitively which way you would come out in this
22 hypothetical case, but from your brief I really don't
23 understand how you would decide. Would it depend --
24 what would it depend on?

25 GENERAL VERRILLI: Well, I think it would

1 depend on a weighing of the strength of the interests of
2 the United States, the foreign relations interests of
3 the United States, in applying this narrow category of
4 Sosa norms in order to avoid undermining the
5 credibility --

6 JUSTICE BREYER: Suppose everything is the
7 same except for --

8 JUSTICE SCALIA: But we don't -- we are not
9 very good at figuring out the foreign policy interests
10 of the United States. And, you know, in the past we
11 have tried to get out from under our prior case law in
12 the sovereign immunity area of asking the State
13 Department. And the State Department would come in
14 here: This is good; this is bad. We abandoned all that
15 in the sovereign immunity field. Why should we walk
16 back into it here? Or do you intend to have us make
17 these foreign policy decisions?

18 GENERAL VERRILLI: Congress can always act
19 in this area, Justice Scalia.

20 JUSTICE SCALIA: No, but assuming Congress
21 doesn't act. Why should -- you know, you want us to
22 listen to the State Department case by case. Is that --

23 GENERAL VERRILLI: Well, actually what we
24 are advocating here, Your Honor, is that the Court can
25 make categorical judgments, not pure case by case

1 factual judgments. We just think there is more than one
2 category. There are salient differences between a
3 situation like this one, in which there is no connection
4 to the United States at all, or a situation like the one
5 Justice Alito raised about an American corporation. And
6 there are also cases in which the suit is against a
7 direct perpetrator.

8 JUSTICE SCALIA: But we listen to the State
9 Department as to what those categories ought to be.

10 GENERAL VERRILLI: Well, I think the
11 categories are evident from the kinds of cases that have
12 been brought. But -- but certainly, the views of the
13 State Department do deserve deference.

14 JUSTICE SOTOMAYOR: Are you talking about a
15 nexus test? That's what it sounds like to me. Has to
16 have either an actor nexus or a act nexus, effect nexus?
17 What are you talking?

18 GENERAL VERRILLI: I think what we're --
19 we're not -- we're talking about something different,
20 Justice Sotomayor. The question is whether to recognize
21 a Federal common law cause of action. I think that
22 depends on --

23 JUSTICE SOTOMAYOR: Either it exists or it
24 doesn't.

25 GENERAL VERRILLI: It depends on a weighing

1 of interests, I believe, Your Honor, and that there are
2 interests that cut against recognizing causes of acts in
3 this area, and that's what Sosa said.

4 JUSTICE SOTOMAYOR: Is -- that -- I'm having
5 trouble with this. We -- without question, piracy,
6 attacks on ambassadors, we know that those were
7 international norms in 1789. If one of those acts
8 happened, you seem to be suggesting that, answering
9 Justice Kagan's hypothetical, that if a Frenchman
10 attacks an English ambassador in Switzerland, that case
11 would never be heard in the United States because there
12 is no nexus to the United States; is that correct?

13 GENERAL VERRILLI: Well, if no one ever came
14 to the United States.

15 JUSTICE SOTOMAYOR: Well, assuming someone
16 came. So how is that different from here?

17 GENERAL VERRILLI: No. It's just -- it's
18 not -- the connection is not an on/off switch. But our
19 position is you need a connection in order to assess
20 whether there is even an interest in having cause of
21 action --

22 JUSTICE SOTOMAYOR: So why isn't presence
23 alone in the United States a connection?

24 GENERAL VERRILLI: Well, if it's an
25 individual perpetrator like Filartiga we think that it

1 is because it's the direct perpetrator.

2 JUSTICE BREYER: If in the -- in fact in
3 Filartiga it was done through a corporation -- the
4 torture -- now?

5 GENERAL VERRILLI: If the -- if the -- it
6 was -- I think torture has to be --

7 JUSTICE BREYER: Torture is done by hiring
8 Torture, Inc. Okay? Is there or isn't there?

9 GENERAL VERRILLI: If it's a norm that has
10 to be violated by --

11 JUSTICE BREYER: You heard the question. I
12 need an answer to that specific -- that specific
13 hypothetical. Everything is the same except the torture
14 is carried out by Torture, Inc. Because my actual
15 question is about aiding and abetting. I mean, the
16 first part is they do it directly. Can they bring
17 Filartiga or not -- in your view?

18 GENERAL VERRILLI: If they do it directly.
19 If they are the direct violator of a norm that they can
20 violate directly, then yes they can.

21 JUSTICE BREYER: Okay. But if it's aiding
22 and abetting?

23 GENERAL VERRILLI: Then if it's a foreign
24 corporation and it occurred entirely in a foreign
25 country.

1 JUSTICE BREYER: Yes. So it turns on that.
2 And what I really want to know is what is the difference
3 between that? Is it like the criminal law difference of
4 accessory versus principle or what?

5 GENERAL VERRILLI: May I answer,
6 Mr. Chief Justice?

7 CHIEF JUSTICE ROBERTS: Briefly, yes.

8 GENERAL VERRILLI: The difference is that
9 while you would have a comparable -- you would have a
10 risk of friction in subjecting a foreign sovereign's
11 acts to scrutiny in the United States, you have the
12 reciprocity risk I mentioned. You would have to make a
13 judgment about whether those concerns are overcome by
14 the countervailing concern of applying the -- finding an
15 ATS cause of action to apply U.S. norms. If it's an
16 entirely foreign corporation with no connection to the
17 United States, our position is the answer to that is no.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Hoffman you have eight minutes
20 remaining.

21 REBUTTAL ARGUMENT OF PAUL L. HOFFMAN

22 ON BEHALF OF THE PETITIONERS

23 MR. HOFFMAN: Thank you, Mr. Chief Justice.
24 I would like to make three points.

25 First, on the Bradford opinion. I think if

1 you read the diplomatic materials that we placed before
2 the Court, it's absolutely clear that what the British
3 were concerned about was pillaging and plundering on
4 land in the Sierra Leone colony. They were seeking
5 redress for those things, for destroying libraries, for
6 destroying Freetown, not just about things that happened
7 on the high seas and not just about things that happened
8 in territorial waters. It's absolutely clear that
9 that's true, but obviously you have those materials and
10 you can read it. And Attorney General Bradford said
11 there was no doubt that there was an ATS action.

12 JUSTICE GINSBURG: There was also a U.S.
13 perpetrator.

14 MR. HOFFMAN: Well, that's true, but with
15 respect to the presumption against extraterritoriality,
16 it wouldn't matter if it is a U.S. perpetrator or not.
17 And it shows exactly why the presumption can't apply
18 because it would undermine the very purposes of the
19 statute in the best available evidence that we have
20 about what it meant in the era.

21 I would like to give a hypothetical that I
22 think reveals why the U.S. Government position should
23 not be accepted.

24 Suppose there is -- there is an Iranian
25 corporation that secretly supplies poison gas to the

1 current Syrian regime in order to kill tens of thousands
2 of Kurdish citizens. And suppose after the Assad regime
3 is overthrown, those -- the documents revealing that
4 poison gas transfer to the Syrian regime was made public
5 and that Iranian corporation does business in the United
6 States, asylum seekers who were driven out by the poison
7 gas attacks are in the United States, maybe living in
8 the same communities as the plaintiffs in our case,
9 having gotten asylum in this case. Would it be the case
10 that the Alien Tort Statute should not apply to a claim
11 of aiding and abetting the Assad regime and murdering
12 tens of thousands of its people? It is the modern day
13 example of I.G. Farben. Is it the case that a modern
14 day I.G. Farben would be exempt from the Alien Tort
15 Statute? There is a clear, well-established doctrine of
16 aiding and abetting in international law. It has been
17 accepted by the lower courts. The lower courts have
18 uniformly rejected the arguments that have been made by
19 Respondents in this case. And I would say that the Sosa
20 framework is -- should be given a chance to work. This
21 Court dealt with these issues eight years ago. It set
22 up a historical paradigm test based on many of the
23 concerns that have been expressed here, and there are
24 alternative doctrines that can be applied to deal with
25 these concerns. Political question, active state,

1 international comity, forum non conveniens, personal
2 jurisdiction, those have not really been litigated.
3 Whether they have been waived or not is something that
4 the lower courts can deal with. Whether they apply the
5 lower court --

6 JUSTICE GINSBURG: Given the court's recent
7 decisions on personal jurisdiction, and I have in mind
8 particularly the Goodyear Tire case, is there personal
9 jurisdiction in this case or in the case of your
10 hypothetical?

11 MR. HOFFMAN: One of the problems that --
12 that we would have, Justice Ginsburg, in answering that
13 question is that there is no record about the contacts
14 between these defendants and -- and the jurisdiction in
15 2002. The Wiwa case, for example, where it was
16 litigated was dealt on a factual record that went back
17 to 1996 and 1997. So there is no record here about
18 personal jurisdiction because it hasn't been asserted.

19 Now if the defendants have not in fact
20 waived personal jurisdiction, then presumably the lower
21 courts would apply the tests that this Court has -- has
22 established or in the 2011 decisions. And the same
23 would be true of forum non conveniens or any of the
24 other defenses. They have raised other defenses in this
25 case that have not been fully litigated. So -- so my

1 basic position is that the Sosa framework actually is --
2 works. It has actually weeded out cases. These
3 alternative doctrines have weeded out cases, but the
4 Court should not accept the categorical positions
5 asserted by either of the Respondents, which are the
6 broadest categorical positions even rejected by the
7 Government, or the Government's modified categorical
8 position. Those kinds of issues can be dealt with
9 within well-established doctrines where lower courts
10 have a body of jurisprudence that they can use to do
11 this.

12 The Alien Tort Statute as was applied to
13 human rights cases from *Filartiga* on is part of a trend
14 in the world today. The trend in the world today is
15 towards universal justice for people that -- and
16 corporations that violate these kinds of norms. That's
17 the trend. In fact, the United States has been the
18 leader in that. Our Government has proclaimed our
19 leadership position to U.N. bodies and around the world.

20 CHIEF JUSTICE ROBERTS: Well, the United
21 Kingdom and Netherlands don't think so.

22 MR. HOFFMAN: Well, the United Kingdom and
23 Netherlands have obviously asserted this position. But
24 the Netherlands have asserted that position while at the
25 same time 21 days after the -- the argument in

1 February a Dutch court gave damages to a Palestinian
2 doctor for wrongful imprisonment and torture that
3 occurred in Libya against two Libyan defendants that
4 were not even present in the courtroom.

5 JUSTICE SCALIA: It may have been wrong.

6 MR. HOFFMAN: Well, it may have been but
7 actually it seems perfectly consistent with Dutch law,
8 it is consistent with the exercise of universal
9 jurisdiction in many pieces of legislation --

10 JUSTICE SCALIA: I would rather listen to
11 the Dutch Government than one, one Dutch judge, frankly.

12 MR. HOFFMAN: Well, the Dutch Government,
13 though, and one of the significant pieces in this case
14 is that the Nigerian Government doesn't have a position
15 on this case any longer. The United States Government
16 has never asked for this case to be dismissed on foreign
17 policy grounds. The United Kingdom and the Dutch
18 Government have never asked for this case to be -- to be
19 invalidated on foreign policy grounds. They have stated
20 their position about what they think the Alien Tort
21 Statute should mean. And if you look at the European
22 Union brief, of which the United Kingdom and Dutch are
23 members, the European Union says there is no issue about
24 universal jurisdiction, there is no issue about civil
25 jurisdiction that falls within universal jurisdiction.

1 Their only argument is that if you accept that, you
2 should accept international opposition and exhaustion of
3 local remedies.

4 JUSTICE KAGAN: And isn't that really the
5 way to reconcile the Dutch positions? The Dutch are
6 objecting because they think they have a fair forum, but
7 when the judges were faced with a case arising from
8 Libya, they thought that there was no fair forum there.
9 And that's the difference, that in one case there was
10 exhaustion and in the other there wasn't.

11 MR. HOFFMAN: I think that that's probably
12 what the basis of the Dutch position. Our position,
13 though, is that this -- the framework that this Court
14 established in *Sosa* to -- to take the pirates of the
15 18th century and deal with the Alien Tort Statute with
16 the torturers and those who commit genocide in the 21st
17 century was correct, and that doesn't need a radical
18 re-evaluation as suggested by the Respondents and the
19 United States.

20 If there are no further questions, I'd --

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
22 The case is submitted.

23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)

25

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