

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ESTHER KIOBEL, INDIVIDUALLY AND       :

4   ON BEHALF OF HER LATE HUSBAND,       :

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

6                   Petitioners               :

7                   v.                       :

8   ROYAL DUTCH PETROLEUM CO., ET AL.   :

9   - - - - - x

10                                   Washington, D.C.

11                                   Tuesday, February 28, 2012

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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 HOFFMAN, ESQ., Venice, California; for

18       Petitioners.

19   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

20       Department of Justice, Washington, D.C.; for the

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22       Petitioners.

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

24       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 morning in Case 10-1491, Kiobel v. Royal  
5 Dutch Petroleum.

6 Mr. Hoffman.

7 ORAL ARGUMENT OF PAUL HOFFMAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

11                   MR. HOFFMAN: It does. Yes.

12                   (Laughter.)

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

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

25                   What they have tried to -- to conflate is

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

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

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

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

1     there's no question that it can be done.

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

8                     JUSTICE GINSBURG:   Mr. Hoffman --

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

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

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

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

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

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

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

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

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

19 JUSTICE ALITO: Where?

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

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

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

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

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



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

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

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

15 MR. HOFFMAN: Well, it was motivated by the  
16 Marbois incident and a similar incident to -- with  
17 regard to a Dutch ambassador in New York at the time of  
18 the Constitutional Convention. But if -- if the Court  
19 looked to the Bradford incident -- the incident about  
20 which Attorney General Bradford expressed his opinion in  
21 1795, which was an opinion that this Court found very  
22 important in terms of interpreting the Alien Tort  
23 Statute, the Bradford opinion had to do with an assault  
24 on the British colony in Sierra Leone. And so, it was  
25 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 statement -- the first  
17 sentence in your brief in the statement of the case is really  
18 striking: "This case was filed ... by twelve Nigerian  
19 plaintiffs 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 --

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

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

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

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

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

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

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

10 JUSTICE GINSBURG: That sounds --

11 JUSTICE KAGAN: Mr. Hoffman, could I --

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

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

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

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

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

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

10 JUSTICE BREYER: You went -- can I go back  
11 to -- are you finished with that answer? Because I want  
12 you to finish.

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

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

25 I'm sorry.

26 JUSTICE BREYER: I just want some

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

5 MR. HOFFMAN: Okay.

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

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

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Hoffman.

12 Mr. Kneedler.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

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

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

23 JUSTICE SOTOMAYOR: Mr. Kneedler, could you  
24 explain to me the -- the difference between respondeat  
25 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 where 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.



1 MR. KNEEDLER: I'm sorry.

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

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

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

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

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

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

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

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

16 JUSTICE SCALIA: Yes.

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

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

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

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

24 JUSTICE KAGAN: No, I'm not saying footnote  
25 20 --

1 MR. KNEEDLER: Right.

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

8 MR. KNEEDLER: Because the state  
9 actor aspect of it goes to the question of the conduct.  
10 Does the conduct itself violate the norm?

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

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

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

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: As a statement of  
23 your position.

24 MR. KNEEDLER: Yes.

25 CHIEF JUSTICE ROBERTS: But it doesn't work

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

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

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

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

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

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

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

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

22 (Laughter.)

23 JUSTICE BREYER: So, I -- I think this is  
24 unnecessarily complicated. They made a -- a categorical  
25 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 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

1 corporation would not be liable.

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

4 MS. SULLIVAN: The corporation would not be  
5 liable.

6 JUSTICE BREYER: What source have you for  
7 that proposition?

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

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

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

1 post-Nuremberg human rights offenses.

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

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

14 They failed --

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

25 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 --

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

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

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

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

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

20 I just want to go back and --

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

23 MS. SULLIVAN: Exactly. Exactly.

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

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

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

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

10 MS. SULLIVAN: Could absolutely.

11 JUSTICE SCALIA: Yes.

12 MS. SULLIVAN: Congress tomorrow,  
13 Justice Scalia --

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

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

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

24 MS. SULLIVAN: Yes, Your Honor.

25 JUSTICE KAGAN: Now, all of 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?



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

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

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

13 MS. SULLIVAN: -- international law apply.

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

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

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

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

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

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

1 JUSTICE KENNEDY: Can you tell me why --

2 MS. SULLIVAN: -- jurisdiction over

3 corporations.

4 JUSTICE KENNEDY: Can you tell me why you  
5 think they did that? I mean, for us, the -- respondeat  
6 superior is so simple. Why isn't it a big deal in  
7 international law?

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

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

22 MS. SULLIVAN: Yes, Justice Ginsburg. I.G.  
23 Farben was dissolved by the Control Council Law Number 9  
24 in 1945. It was a political act. It preceded any of  
25 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

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

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

8             JUSTICE KAGAN: Well, if that's --

9             MS. SULLIVAN: -- even as to individuals.

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

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

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

24            MS. SULLIVAN: Justice Kagan, you should  
25     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 be  
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.

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

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

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

24 That's because civil liability versus  
25 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 the -- 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 Ginsburg,  
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.

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

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

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

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

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

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

8 MS. SULLIVAN: You may --

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

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

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

24 JUSTICE BREYER: No, I see. Yes.

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

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

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

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

22 So, Your Honor, the question is not what  
23 should Federal courts do in the abstract; it's what  
24 should Federal courts do when there is exact statutory  
25 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?

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

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

21                   But also -- and this is --

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

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

1 to -- 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?

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

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

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

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

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

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

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

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

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

7 JUSTICE ALITO: Could I ask you this --

8 MS. SULLIVAN: -- human rights violations.

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

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

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

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

1 Tinto.

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

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

14 CHIEF JUSTICE ROBERTS: Please.

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

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Hoffman, you have 5 minutes remaining.

25 MR. HOFFMAN: Thank you.

1 REBUTTAL ARGUMENT OF PAUL HOFFMAN

2 ON BEHALF OF THE PETITIONERS

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

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

12 How do we deal with that incongruity?

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

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

1                   And 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

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

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

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

16 JUSTICE SCALIA: What's your position --

17 MR. HOFFMAN: Could -- could it --

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

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

25 JUSTICE SCALIA: I don't care about the



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

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

8 I think my -- my time is up.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 The case is submitted.

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

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