Nos. 19-416 & 19-453

IN THE
# Supreme Court of the United States

NESTLÉ USA, INC.,
*Petitioner*,
v.

JOHN DOE I, ET AL.,
*Respondents*,

CARGILL, INC.,
*Petitioner*,
v.

JOHN DOE I, ET AL.,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are scholars of international law who believe that arguments about whether customary international law recognizes a norm of corporate liability rest on a fundamental misunderstanding. *Amici* have academic expertise and a strong interest in the proper application of international law by domestic courts.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties have consented to the filing of this brief.

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## INTRODUCTION

This Court has granted certiorari three times to resolve a circuit conflict that grew from a misunderstanding of how international law works. Under international law, whether corporations may be held liable for human rights violations turns not on whether customary international law recognizes a norm of corporate liability, but rather on whether the particular human rights norms at issue apply to corporations.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court recognized an implied cause of action for claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350. *Sosa* limited the ATS cause of action to international law norms that were definite and well-accepted. *See Sosa*, 542 U.S. at 732. In a footnote, *Sosa* distinguished norms that may require state action (like torture) from norms that do not (like genocide), stating that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20.

Although footnote 20 correctly identified the international law question as whether "a given norm" extends to "a private actor such as a corporation," *id.*, the Second Circuit later reframed the question as whether there is "a norm of corporate liability under customary international law," *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131 (2d Cir. 2010). Based largely on the jurisdictional limitations of international criminal tribunals, *id.* at 132-37, the panel majority in *Kiobel* held that "corporate liability for violations of customary international law has not achieved universal recognition or acceptance," *id.* at 149. Judge Leval disagreed with this reframing, pointing out that the customary international law of human

rights "prohibit[s] conduct universally agreed to be heinous and inhumane" but "leaves the manner of enforcement . . . almost entirely to individual nations." *Id.* at 152 (Leval, J., concurring in the judgment).

This Court granted certiorari in *Kiobel* to resolve the corporate-liability question. The first *amicus* brief filed by the United States explained that the Second Circuit's reading of *Sosa* footnote 20 "reflects a misunderstanding of international law[,] which establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state." Brief for the United States as Amicus Curiae 18, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491; filed Dec. 21, 2011) (First U.S. *Kiobel* Br.). As the brief noted, "[t]o the extent that [a] substantive norm is defined in part by the identity of the perpetrator, then the defendant must fall within that definition." *Id.* at 20. But the United States said it was not aware of any international law norm meeting the *Sosa* standard "that requires, or necessarily contemplates, a distinction between natural and juridical actors." *Id.*

After additional briefing and argument, this Court declined to address the corporate-liability question, affirming the decision below on the ground that the claims in that case did not "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

This Court granted certiorari on the corporate-liability question again in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). In an *amicus* brief, the new U.S. administration again noted that the Second Circuit had misconstrued *Sosa*, which "requires a claim under the ATS to be based on a well-established

international-law standard of *conduct*, not a well-established international-law standard of *liability*." Brief for the United States as Amicus Curiae 6, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499; filed June 27, 2017) (U.S. *Jesner* Br.). The brief observed that "[n]o principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations." *Id.* at 13. And the United States repeated its view in *Kiobel* that norms actionable under *Sosa* do not distinguish "between natural and juridical actors." *Id.*

Writing for a plurality of three in *Jesner*, Justice Kennedy accepted the Second Circuit's framing of the international law question as "whether there is an international-law norm imposing liability on corporations." 138 S. Ct. at 1399 (plurality). In dissent, Justice Sotomayor objected that this framing "fundamentally misconceives how international law works," because "international law determines what substantive conduct violates the law of nations" but "leaves the specific rules of how to enforce international-law norms and remedy their violation to states." *Id.* at 1419-20 (Sotomayor, J., dissenting). Justices Alito and Gorsuch did not join the plurality's discussion of corporate liability under international law. *See id.* at 1408-12 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1412-19 (Gorsuch, J., concurring in part and concurring in the judgment). In the end, even the plurality declined to resolve the international law question, concluding that there was "sufficient doubt on the point" to warrant deciding the case on other grounds. *Id.* at 1402 (plurality). Thus, *Jesner* held only "that foreign corporations may not be defendants in suits brought under the ATS." *Id.* at 1407 (opinion of the Court).

In the two cases under submission, plaintiffs have alleged that U.S. corporations aided and abetted child slavery abroad. Following circuit precedent, the Ninth Circuit adopted a "norm-by-norm" approach. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014). The court held that the prohibition against slavery was actionable under *Sosa* and applied to corporations. *Id.* at 1022-23. In a subsequent appeal, the court concluded that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." *Doe v. Nestle, S.A.*, 929 F.3d 623, 639 (9th Cir. 2019), *cert. granted*, Nos. 19-416 & 19-453 (U.S. July 2, 2020).

Before this Court, petitioners have framed the international law question as the Second Circuit did in *Kiobel*. *See* Nestlé Br. 39; Cargill Br. 41. Both petitioners rely exclusively on the jurisdictional limitations of international criminal tribunals. *See* Nestlé Br. 37-39; Cargill Br. 41-43.

The United States, reversing its positions in *Kiobel* and *Jesner*, now argues that this Court should extend *Jesner* to exclude even domestic corporations from the ATS cause of action. *See* U.S. *Nestlé* Br. 10-22. Although the United States notes that this Court need not address corporate liability under international law to decide these cases, *id.* at 11-12, the government appears now to agree with how that question was framed by the *Jesner* plurality and the Second Circuit in *Kiobel*, *see id.* at 11 (referring to the need for "a specific, universal, and obligatory norm of corporate liability") (quoting *Jesner*, 138 S. Ct. at 1401 (plurality)). *But see id.* (suggesting that the proper question is "whether an international-law norm extends to a particular category of actors"). The only evidence of

international law the United States offers on the question are limits on the jurisdiction of international criminal tribunals, *id.*, limits that—as discussed below—the United States previously told this Court were not relevant to the question of corporate liability under international law. *See* U.S. *Jesner* Br. 22-24; First U.S. *Kiobel* Br. 28-30. The United States provides no explanation for its changed views on international law.

## SUMMARY OF ARGUMENT

The Second Circuit's decision in *Kiobel* fundamentally misunderstood how international law works. Customary international law establishes human rights norms that prohibit certain conduct. Some of these norms apply to all actors, and some apply only to certain actors. Customary international law does not provide the means of enforcing those norms. Enforcement is instead left to states, which may act collectively through treaties or separately by providing liability under domestic law.

The Second Circuit confused limits on particular mechanisms for enforcing customary international law norms with limits on the applicability of the norms themselves. International criminal tribunals generally have been given jurisdiction only over natural persons because some nations do not hold corporations criminally liable. In concluding suppression conventions, like the Genocide Convention and the Torture Convention, nations have similarly limited their obligations to prosecute or extradite to natural persons. But limitations on particular enforcement mechanisms are not limitations on the underlying norms themselves. This is confirmed by the widespread practice of states providing both criminal and

civil liability for human rights violations, including corporate violations, in their domestic laws.

Customary international law therefore permits the United States to recognize a cause of action against domestic corporations under the ATS for violations of human rights norms as long as the norm at issue applies to corporations and the United States has jurisdiction to prescribe. There is no doubt that customary international law prohibits slavery and that this norm applies to juridical persons. The United States has jurisdiction to prescribe under customary international law based on the U.S. nationality of the defendants and on the character of slavery as a universal jurisdiction offense.

## ARGUMENT

### I. CUSTOMARY INTERNATIONAL LAW PROHIBITS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS BUT DOES NOT PROVIDE THE MEANS OF ENFORCING THOSE NORMS.

Modern international law takes two principal forms: (1) customary international law and (2) international agreements, also known as treaties or conventions. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102(1) (Am. Law Inst. 1987); Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (ICJ Statute).[2] "Customary international law results from a

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[2] International law also includes "general principles of law." ICJ Statute art. 38(1)(c). These general principles, drawn from domestic law, "may be invoked as supplementary rules of international law where appropriate." Restatement (Third) § 102(4). Examples include the principles of laches and *res judicata*. *See id.* § 102 cmt. l.

general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102(2); *see also North Sea Continental Shelf (Germ. v. Den., Germ. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20) (customary international law requires "a settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"). Rules of customary international law "have equal force for all members of the international community." *North Sea Continental Shelf*, 1969 I.C.J. at 38. By contrast, a treaty is "an international agreement concluded between States in written form and governed by international law." Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, T.S. No. 58, 8 I.L.M. 679. "Every treaty in force is binding upon the parties to it," *id.* art. 26, but "[a] treaty does not create either obligations or rights for a third State without its consent," *id.* art. 34; *see also* Restatement (Third) § 102(3) ("International agreements create law for the states parties thereto . . . .").

Much international law concerns the rights and obligations of states. *See* Restatement (Third), pt. II, intro. note ("The principal persons under international law are states."). But some rules of customary international law and some provisions of treaties

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Some provisions of the Restatement (Third) have been superseded by the Restatement (Fourth) of the Foreign Relations Law of the United States (Am. Law Inst. 2018), particularly with respect to treaties, jurisdiction, state immunity, and the enforcement of foreign judgments. In this brief, *amici* cite only those provisions of the Restatement (Third) that have *not* been superseded and remain the official position of the American Law Institute. Some *amici* worked on the Restatement (Fourth) as reporters or advisers. *Amici* submit this brief in their personal capacities, and the views expressed here should not be taken to represent the views of the American Law Institute.

apply to natural and to juridical persons. *See id.* ("In principle, . . . individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures."). As this Court noted in *Sosa*, international law when the ATS was passed in 1789 recognized certain "rules binding individuals for the benefit of other individuals," violations of which were considered "offenses against the law of nations." 542 U.S. at 715. These offenses included "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* (citing 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)). Some treaties at that time similarly created rights and obligations for persons other than states. *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202, 2219-20 (2015) (giving examples).

Customary international law today prohibits violations of certain fundamental human rights, creating both rights and obligations for persons other than States. *See* Restatement (Third) § 702 (listing recognized human rights norms). Some of these norms, like the norm prohibiting genocide, apply to all actors, regardless of state involvement. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (Genocide Convention) (defining "genocide" for purposes of the convention as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"). Others, like the norm prohibiting torture, sometimes apply only to those who act with state involvement.

*See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (Torture Convention) (defining "torture" for purposes of the convention as pain or suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").[3] None of these norms applies only to natural and not to juridical persons. *See* First U.S. *Kiobel* Br. 7 ("At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can."); U.S. *Jesner* Br. 13-14 (similar).[4]

Although customary international law establishes norms that apply to certain actors in certain contexts, customary international law does not provide the means for enforcing those norms against the actors to whom they apply. Instead, customary international law generally leaves questions of enforcement to the decisions of states. *See* U.S. *Jesner* Br. 17-18 (noting that "international law . . . establishes substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction" (citing *Nestle USA*,

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[3] Under international humanitarian law, the norm prohibiting torture may apply regardless of state involvement. *See Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgement ¶ 496 (Feb. 22, 2001); *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgement ¶ 148 (June 12, 2002) (agreeing with Trial Chamber).

[4] The current U.S. brief does not address this question. *See* U.S. *Nestlé* Br. 10-12.

766 F.3d at 1022)); First U.S. *Kiobel* Br. 18-19 (similar); *see also* Eileen Denza, *The Relationship Between International and National Law*, *in International Law* 423, 423 (Malcolm D. Evans ed., 2d ed. 2006) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level."); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself . . . does not require any particular reaction to violations of law."); Restatement (Third) § 111 cmt. h ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations."). This Court acknowledged the general relationship between customary international law and domestic law in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), noting that "the public law of nations can hardly dictate to a country . . . how to treat [a violation of international law] within its domestic borders." *Id.* at 423.[5]

International law does recognize certain rules of immunity. *See, e.g.*, *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 99, 134-35 (Feb. 3) (holding that states are immune from suit in the courts of other states for torts committed by armed forces during armed conflict). But doctrines of immunity do not affect the applicability of substantive law. To the contrary, the ICJ has made clear that "rules of State immunity are procedural in character" and "do not bear upon the question whether or not the conduct

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[5] *Amici* Professors of International Law agree that international law does not prohibit corporate liability for human rights violations. *See* Int'l Law Professors Amicus Br. 23 ("[I]t is not our position that international law completely bars corporate liability for international wrongs."). Their position is rather that *Sosa* requires an international consensus with respect to enforcement. *Id.* As explained above, that reading of *Sosa* is mistaken.

in respect of which the proceedings are brought was lawful or unlawful." *Id.* at 140. In any case, corporations do not enjoy immunity from suit under international law, much less benefit from a general norm of non-liability that even states do not enjoy.[6]

In sum, customary international law "does not contain general norms of liability or non-liability applicable to categories of actors." William S. Dodge, *Corporate Liability Under Customary International Law*, 43 Geo. J. Int'l L. 1045, 1046 (2012). Instead, customary international law establishes norms of conduct and leaves the enforcement of those norms to the decisions of states. As described below, states have acted both collectively and separately to enforce human rights norms. The resulting patchwork of enforcement mechanisms does not always extend as far as the norms themselves. But limitations on the enforcement mechanisms under treaties and domestic law must not be confused with limitations on the human rights norms themselves.

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[6] The United States has granted some immunity to state-owned corporations under the Foreign Sovereign Immunities Act of 1976 (FSIA). *See* 28 U.S.C. 1603(a) (defining "foreign state" to include state-owned corporations). But there is no general practice of states doing the same, *see* Xiaodong Yang, *State Immunity in International Law* 232-86 (2012) (discussing diverse approaches of states), and therefore no rule of customary international law extending immunity to such corporations.

Customary international law rules on state responsibility similarly do not apply to actors other than states. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, General Commentary (4)(d), 19 U.N. GAOR Suppl. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Y.B. Int'l L. Comm'n 26, 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (noting that articles do not apply to "non-State entities").

## II. LIMITATIONS ON ENFORCEMENT MECHANISMS ARE NOT LIMITATIONS ON THE APPLICABILITY OF HUMAN RIGHTS NORMS THEMSELVES.

Because the customary international law of human rights does not provide for its own enforcement, states have developed enforcement mechanisms, including international criminal tribunals, suppression conventions, and domestic laws imposing criminal and civil liability. *See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3, 63, 78 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("[T]he international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play."). Each of these enforcement mechanisms has limitations, but those limitations are not limitations on the customary international law norms of human rights themselves.

### A. Limits on the jurisdiction of international criminal tribunals are not limits on the norms themselves.

The Second Circuit in *Kiobel* relied heavily on limits circumscribing the jurisdiction of international criminal tribunals. *See Kiobel*, 621 F.3d at 132-37; *see also Jesner*, 138 S. Ct. at 1400-01 (plurality) (discussing jurisdictional limitations of international criminal tribunals). Petitioners' argument that customary international law does not recognize corporate liability rests entirely on such limitations. *See* Nestlé Br. 37-39; Cargill Br. 41-42.

But limits on jurisdiction are not the same as limits on substantive law. The fact that state-law tort suits between citizens of the same U.S. state may not be brought in federal court does not mean that state tort law is inapplicable to such citizens.

The same is true with respect to international tribunals. As the United States has twice explained to this Court, "each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to the reach of substantive international law." First U.S. *Kiobel* Br. 28; *see also* U.S. *Jesner* Br. 22-23 (similar). Although the United States now points to these limitations to support excluding all corporations from the ATS cause of action, U.S. *Nestlé* Br. 11, it provides no explanation of why its previous representations to this Court were incorrect.

**1.** *Nuremberg Tribunals*. After the Second World War, the Allied Powers established international tribunals to try war criminals. The London Charter established the tribunal at Nuremberg with jurisdiction "to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed" crimes against peace, war crimes, and crimes against humanity. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (London Charter). The limits on the jurisdiction of the Nuremberg Tribunal were not limits on the customary international law norms that the London Charter sought to enforce. That the Nuremberg Tribunal was given jurisdiction only over persons "acting in the interests of the European Axis countries" does not show that the prohibitions of

customary international law did not apply to other persons.[7] By the same token, that the Nuremberg Tribunal had jurisdiction primarily over natural persons does not show that the prohibitions of customary international law did not apply to juridical persons. In fact, the London Charter expressly provided that "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." *Id.* art. 9.

Additional trials for crimes against peace, war crimes, and crimes against humanity were conducted by the Allied Powers under Control Council Law No. 10. *See* Control Council Law No. 10, *in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee: Allied Control Authority, Germany—1945*, at 306 (1946). None of these prosecutions was brought against corporations directly, but the trials of corporate executives under Control Council Law No. 10 leave no doubt that corporations were considered to have violated customary international law. *See, e.g.*, *The Farben Case*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1132 (1952) ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law."); *id.* at 1140 (finding "beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben"); *see also Kiobel*, 621 F.3d at 179-80 (Leval,

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[7] In fact, the Allies established a separate tribunal to try violations of customary international law in the Far East. *See* Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589.

J., concurring in the judgment) (giving additional examples from the *Krupp* and *Flick* cases); Nuremberg Scholars Amicus Br. (discussing Nuremberg Tribunals at length). As these decisions show, limits on the jurisdiction of these tribunals were not limits on the applicability of customary international law.

**2.** *Yugoslav and Rwandan Tribunals*. In the wake of widespread violations of humanitarian law in the former Yugoslavia and Rwanda, the U.N. Security Council established international criminal tribunals with limited jurisdiction to prosecute these violations. *See* International Criminal Tribunal for the former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *adopting* Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993), *reprinted in* 32 I.L.M. 1192 (ICTY Statute); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (ICTR Statute). The jurisdiction of the ICTY was limited to grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. ICTY Statute arts. 2-5. It was also limited to violations committed in the territory of the former Yugoslavia since 1991. *Id.* art. 1. The jurisdiction of the ICTR was limited to genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. ICTR Statute arts. 2-4. It was also limited to violations committed in the territory of Rwanda and violations committed in the territory of neighboring states by Rwandan citizens during 1994. *Id.* art. 1. The jurisdiction of each tribunal was limited to "natural persons." ICTY Statute art. 6; ICTR Statute art. 5.

The limitations of these tribunals' jurisdiction to natural persons does not reject the applicability of customary international law to juridical persons, any more than the limitations of these tribunals' jurisdiction to certain offenses, places, and times reject the existence of other norms of customary international law or customary international law's applicability to other places and times. Indeed, during the trial of three individual defendants, the ICTR specifically found that a radio station, a newspaper, and a political party had been responsible for genocide. *See Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgement and Sentence ¶ 953 (Dec. 3, 2003). As with the Nuremberg Tribunals, limitations on the jurisdiction of the ICTY and the ICTR did not reflect limitations on substantive law.

**3.** *Rome Statute.* The same is true of limitations on the jurisdiction of the International Criminal Court (ICC). The Rome Statute established a permanent International Criminal Court with jurisdiction over genocide, crimes against humanity, and war crimes (and later the crime of aggression). Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (Rome Statute). The ICC is intended to "be complementary to national criminal jurisdictions." *Id.* art. 1. This means that a case will be considered inadmissible if a state is able and willing genuinely to carry out the investigation or prosecution. *Id.* art. 17. It is partly for this reason that the drafters of the Rome Statute limited the ICC's jurisdiction to natural persons. *See id.* art 25(1). As the United States explained in its first *Kiobel* brief, "[b]ecause many foreign states do not criminally prosecute corporations under their domestic law for any offense, extending the ICC's criminal jurisdiction to

include corporations would have rendered complementarity unworkable." First U.S. *Kiobel* Br. 29 (citation omitted); *see also* Brief of Ambassador David J. Scheffer as Amicus Curiae 5, 14-18, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499; filed June 26, 2017) (tracing exclusion of corporations from Rome Statute to principle of complementarity); Micaela Frulli, *Jurisdiction Ratione Personae*, *in* 1 *The Rome Statute of the International Criminal Court: A Commentary* 527, 532-33 (Antonio Cassese et al. eds., 2002) (same).

Limitations on the jurisdiction of the ICC do not reflect limits on the substantive norms of customary international law. That the ICC's jurisdiction is limited to only a few norms of customary international law, *see* Rome Statute art. 1, does not show that other norms do not exist.[8] That the ICC's jurisdiction is limited to crimes committed after the Statute's entry into force, *see id.* art. 11, does not show that crimes committed before that time do not violate customary international law. That the ICC's jurisdiction is limited to persons 18 years of age and older, *see id.* art. 26, does not mean that customary international law is inapplicable to persons under 18 years of age. By the same logic, that the ICC's jurisdiction is limited to natural persons, *id.* art. 25(1), does not mean that customary international law norms of human rights do not apply to juridical persons.

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[8] To make this point clear, Article 10 provides: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute art. 10.

### B. Obligations in suppression conventions to prosecute or extradite natural persons do not imply that the norms enforced are limited to natural persons.

Another mechanism that states collectively have adopted to enforce customary international law norms of human rights are suppression conventions, which typically require their parties to prohibit violations of such norms in their domestic laws and to prosecute or extradite those who violate them. *See* Restatement (Fourth) § 413 reporters' note 2 (listing suppression conventions). Because of the nature of the enforcement obligations they impose—to prosecute or to extradite—these conventions are often limited to natural persons. But limitations on the treaty obligations of states under these conventions are not limitations on the customary international law norms that they enforce.

The first modern suppression convention was the Genocide Convention. The International Court of Justice has held that genocide is prohibited by customary international law independently of the Convention. *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (noting that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"). In a later case, the International Court of Justice made clear that genocide could be committed by entities as well as by natural persons. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, 205 (Feb. 26) (referring to "the persons or entities that committed the acts of genocide at Srebrenica").

To enforce the customary international law norm against genocide, the parties to the Genocide Convention agreed to enact "the necessary legislation . . . to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III [conspiracy, incitement, attempt, and complicity]." Genocide Convention art. V. The parties further agreed "to grant extradition in accordance with their laws and treaties in force." *Id.* art. VII. Because the Genocide Convention obligates states to impose criminal punishment and to grant extradition, Article IV refers to natural persons. But Article IV simply reflects a limitation on the obligations imposed under the Convention—obligations to impose criminal punishment and to extradite—not on the norm against genocide itself.

A more recent suppression convention is the Torture Convention. The General Assembly Resolution adopting this Convention makes clear that torture violates customary international law independently of the Convention, the purpose of which was to "achiev[e] a more effective implementation of the *existing* prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment." G.A. Res. 39/46, pmbl., U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (emphasis added).

To enforce the customary international law norm against torture more effectively, the Torture Convention requires its parties to "ensure that all acts of torture are offences under its criminal law," Torture Convention art. 4(1), and to "make these offences punishable by appropriate penalties which take into account their grave nature," *id.* art. 4(2). The Torture Convention further requires its parties either to prosecute, *id.* art. 7, or to extradite, *id.* art. 8, any person

alleged to have committed torture who is present within any territory under its jurisdiction. The text describing some of these obligations refers to a person alleged to have committed torture with the word "him." *E.g.*, *id.* art. 7(1). To the extent references to natural persons limit the obligations of the Convention's parties to natural persons,[9] however, such references limit only the parties' treaty obligations. Such references do not, and could not, limit the scope of the customary international law norm prohibiting torture.[10]

### C. Nations are free to enforce international human rights norms by creating liability under domestic law.

States are free to go beyond their treaty obligations and create additional criminal, administrative, and civil enforcement mechanisms under domestic law. "At least until the twentieth century, domestic law

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[9] Other obligations under the Torture Convention contain no express reference to natural persons. Article 14(1), for example, provides: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." Torture Convention art. 14(1).

[10] Draft articles recently adopted by the International Law Commission, which may serve as the basis for a suppression convention on crimes against humanity, provide: "Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for [committing, attempting, and assisting crimes against humanity]." International Law Commission Draft Articles on Prevention and Punishment of Crimes Against Humanity art. 6(8), U.N. Doc. A/74/10, at 14 (2019); *see also id.* at 80-84, art. 6, Commentary (41)-(51) (discussing criminal liability of legal persons under national and international law).

and domestic courts were the primary means of implementing customary international law." U.S. *Jesner* Br. 24; *see also* First U.S. *Kiobel* Br. 31 (similar). The development of international criminal tribunals and suppression conventions during the twentieth century has not displaced the role of domestic law and domestic courts. *See Arrest Warrant*, 2002 I.C.J. at 78-79 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters.").

**1.** *Criminal Prohibitions*. A number of states have criminalized violations of fundamental human rights in ways that go beyond their treaty obligations. The Rome Statute does not require its parties to prohibit genocide, crimes against humanity, and war crimes in their domestic laws, but its system of complementarity encourages states to do so because a prosecution at the ICC is inadmissible if a state is able and willing to carry out the prosecution. *See* Rome Statute art. 17. A large number of states have adopted national complementarity legislation making genocide, crimes against humanity, and war crimes criminal offenses under their domestic laws. *See* Coalition for the International Criminal Court, *2013 Status of the Rome Statute Around the World* 9, *available at* http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf.

Some states have gone further than necessary to implement the Rome Statute's system of complementarity. In particular, as the United Kingdom and the Netherlands noted in their first *Kiobel* brief, "some countries, when incorporating the Rome Statute into their domestic law, imposed criminal liability on legal

persons for the group of crimes included in the Rome Statute." Brief of the United Kingdom et al. as Amici Curiae 20, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491; filed Feb. 3, 2012) (First U.K.-Netherlands *Kiobel* Br.); *see also* Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 871 (2009) (discussing examples). International law does not require states to extend criminal liability to corporations for violating customary international law norms of human rights, but it certainly permits them to do so.

**2.** *Civil Liability*. A number of states also provide civil liability for violations of fundamental human rights in ways that go beyond their treaty obligations. Suppression conventions typically require states to provide only criminal sanctions in their domestic laws,[11] but many states permit the victim of a crime to append a claim for civil compensation to a criminal proceeding in an action commonly known as an *action civile*. *See* Brief of the European Commission as Amicus Curiae 18 n.48, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491; filed June 12, 2012) ("Such proceedings are available in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, and Sweden."); Restatement (Fourth) § 407 reporters' note 5 (additionally listing Argentina, China, Ghana, and Russia); *see also Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring in part and concurring in the judgment) (noting that "the criminal courts of many nations combine civil and criminal proceedings").

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[11] Article 14 of the Torture Convention is an exception to this general practice. *See supra* note 9.

Earlier this year, the Supreme Court of Canada held that Canadian corporations may be held civilly liable in Canadian courts for violating fundamental human rights abroad. *See Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (Can.). Under the Canadian doctrine of adoption, "norms of customary international law . . . are fully integrated into, and form part of, Canadian domestic common law," subject to legislative override. *Id.* ¶ 94. The defendant's argument that corporations are immune from the application of customary international law, the court noted, "misconceives modern international law." *Id.* ¶ 105. The court concluded that corporations do not enjoy "a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law,' or indirect liability for their involvement in . . . 'complicity offenses.'" *Id.* ¶ 113.[12] The supreme court left it to the trial court on remand to decide whether such liability should take the form of new domestic torts based on customary international law or the direct application of customary international law. *Id.* ¶ 127; *see also* Foreign Lawyers Amicus Br. 16-20 (discussing *Nevsun*). International law generally does not require states to provide civil liability for violations of customary international law norms of human rights, but it certainly permits them to do so.

**3.** *U.S. Legislation*. The United States has a number of statutes providing criminal and civil liability for violations of customary international law, some of which go beyond its treaty obligations. To implement

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[12] The court phrased the question as whether it was "plain and obvious" that the plaintiffs' claims had no prospect for success because that is the Canadian standard for striking the pleadings. *Nevsun* ¶ 64.

the Genocide Convention and the Torture Convention, Congress has made genocide and torture criminal offenses. *See* 18 U.S.C. 1091 (criminalizing genocide); 18 U.S.C. 2340A (criminalizing torture). Congress has criminalized slavery, *see* 18 U.S.C. 1583-1584, as required by the Slavery Convention. Convention to Suppress the Slave Trade and Slavery art. 6, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253. But Congress also has criminalized violations of customary international law in the absence of a treaty obligation. *See* 18 U.S.C. 1651 (criminalizing piracy). Each of these federal criminal statutes applies to both natural and juridical persons. *See* 1 U.S.C. 1 (providing that the word "whoever" includes "corporations").

In some instances, Congress has provided civil liability for violations of customary international law. The Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, makes natural persons civilly liable for torture and extrajudicial killing under color of foreign law. In providing a civil remedy for extra-judicial killing, Congress went beyond the Torture Convention, which does not cover extrajudicial killing. Congress has also created a private right of action under the FSIA against state sponsors of terrorism and their officials "for personal injury or death caused by [an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking]." 28 U.S.C. 1605A(c). And Congress has provided a civil remedy for victims of slavery, *see* 18 U.S.C. 1595, which extends to anyone who violates the federal criminal prohibitions, including juridical persons as discussed above.

In short, just as other nations have gone beyond the scope of their treaty obligations to provide additional enforcement of customary international law norms against natural and juridical persons under domestic

law, so too the United States has gone beyond its treaty obligations to provide additional enforcement of customary international law norms against natural and juridical persons under its domestic law. In doing so, the United States is not bound to follow the patterns established by other nations. Nor are other nations bound to follow the patterns established by the United States. Apart from the obligations that states have adopted by treaty, international law leaves each state free to decide how to enforce customary international law norms within its own legal system.

## III. INTERNATIONAL LAW PERMITS A CAUSE OF ACTION AGAINST DOMESTIC CORPORATIONS.

The United States is free under international law to recognize a cause of action against domestic corporations for torts in violation of customary international law norms if the norms at issue apply to corporations and the United States has jurisdiction to prescribe under customary international law.

### A. The proper question is whether the particular norms at issue distinguish between natural and juridical persons.

Because customary international law leaves enforcement of human rights norms to the decisions of states, it simply makes no sense to ask whether there is a general "norm of corporate liability under customary international law." *Kiobel*, 621 F.3d at 131. The proper question is instead "whether international law extends the scope of liability for a violation of a *given norm* to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n.20 (emphasis added).

There is no doubt that customary international law prohibits slavery. *See, e.g.*, Universal Declaration of Human Rights art. 4, G.A. Res. 217 A (III), U.N. Doc. A/RES/3/217A (Dec. 10, 1948) ("No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."); International Covenant on Civil and Political Rights art. 8(1), Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (similar); *Barcelona Traction, Light & Power Co. (Belg. v. Sp.)*, 1970 I.C.J. 3, 32 (Feb. 5) (recognizing protection from slavery as an obligation *erga omnes*); *see also* David Weissbrodt et al., *Abolishing Slavery and its Contemporary Forms* 3, U.N. Doc. HR/PUB/02/4 (2002) (review for U.N. Commission on Human Rights) (finding that prohibition against slavery is "a well-established principle of international law").

There is also no doubt that the customary international law norm prohibiting slavery applies to juridical persons. *See* Yale Law Sch. Ctr. for Global Legal Challenges Amicus Br.; *see also* U.S. *Jesner* Br. 13 (noting that fundamental human rights norms "neither require nor necessarily contemplate a distinction between natural and juridical actors"); First U.S. *Kiobel* Br. 20 (similar). International law clearly permits application of the prohibition against slavery to petitioners' notwithstanding their status as corporations.

**B. Recognizing a cause of action against domestic corporations is consistent with customary international law limits on jurisdiction to prescribe.**

The United States also has jurisdiction to prescribe under customary international law. Slavery is an offense over which states may exercise universal jurisdiction even if no specific connection exists between

the state and the person or conduct being regulated. *See* Restatement (Fourth) § 413; *see also id.* § 402 cmt. j & reporters' note 10 (describing U.S. practice with respect to universal jurisdiction). With respect to domestic corporations, the United States also has jurisdiction to prescribe on the basis of nationality. *See id.* § 410; *see also* Brief of the United Kingdom et al. as Amici Curiae 14-15, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491; filed June 13, 2012) (Second U.K.-Netherlands *Kiobel* Br.) (stating that "the extraterritorial application of the ATS to acts committed by American individuals, corporations, and other U.S. entities in foreign sovereign territory, would be consistent with international law").

In 1789, the First Congress decided that aliens should be able to seek recovery in tort for violations of the law of nations. The "object[] of the statute's solicitude," *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 267 (2010), was at a minimum "to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants." *Jesner*, 138 S. Ct. at 1417 (Gorsuch, J., concurring in part and concurring in the judgment) (citing Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 509 (2011)). Some think that the ATS was intended to provide redress without regard to the nationality of the defendant. *See id.* at 1427 (Sotomayor, J., dissenting) ("The question for courts considering new ATS claims is, 'Who are today's pirates?'") (quoting *Kiobel*, 569 U.S. at 129 (Breyer, J., concurring in the judgment)). Under either understanding of the ATS's purpose, recognizing a cause of action against domestic corporations is proper.

## CONCLUSION

The court of appeals in this case asked the correct question under international law: whether the customary international law prohibition against slavery applies to corporations. Because the prohibition does, the United States is free to recognize a cause of action under the ATS against domestic corporations for violating that norm. The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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